ASPECTS OF PROPERTY:
THE IMPACT OF PRIVATE TAKINGS

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This dissertation is submitted to the University of Cambridge
for the degree of Doctor of Philosophy

September 2009

DECLARATIONS

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except where specifically indicated in the text.

This dissertation, including footnotes, does not exceed the permitted length of 80,000 words exclusive of footnotes, appendices and bibliography but subject to an overall word limit of 100,000 words exclusive of bibliography.

The thesis uses a modified form of the OSCOLA citation system (Oxford Standard for Citation of Legal Authorities).

(68,610 words, excluding footnotes and Bibliography)

PREFACE

My supervisor, Professor Kevin Gray, first introduced me to the fascinating boundary between the public and private in property law some years ago, when I was an undergraduate attending his studio session on quasi-public space. I owe Kevin my sincere gratitude, not only for sparking my interest in property, but also for his constant guidance, encouragement, and patience throughout my doctorate. He has been generous with his time and advice, and I have greatly enjoyed having the opportunity to discuss my research with a property lawyer of such breadth and depth of vision.

This thesis has also benefited from the help of a number of other people to whom I would like to express my thanks. I am grateful to my good friend, Director of Studies, and fellow Newnhamite, Dr Catherine Seville for suggesting long ago that I would enjoy the research involved in a PhD, and for providing counsel at strategic points throughout the process. Dr Pam Hirsch, my Graduate Tutor, also deserves thanks for her kindness and good humour over the past few years.

My thanks also go to my colleagues at St John's College, particularly Dr David Fox for his comments about Roman influences on the doctrine and structure of adverse possession, and Richard Nolan who has also shown a keen interest in my work. Additionally, I am indebted to Dr Solène Rowan, Dr Jessie Hohmann, Angus Johnston and Peter Turner for their friendship and support. I would also like to thank my colleagues at the Law Faculty, and the librarians at the Squire Law Library, who have been as helpful as ever. Thanks also to Norma Weir and Alison Hirst for their help throughout my time as a PhD student.

I am grateful for the financial support that I have received during my doctoral research. This thesis has been made possible by the generous funding of the Arts and Humanities Research Council. I also wish to record my gratitude for the assistance provided by the Law Faculty of the University of Cambridge which enabled me to undertake a research trip to America.

Special thanks are due to my mother, father, and stepfather for always encouraging me. They have been wonderful throughout my doctorate, in particular. I am grateful to them for enduring many a long technical conversation about my research with a very convincing semblance of interest. I am greatly appreciative of the constant support that they, and the rest of my family, have given me over the years. Thanks are also owed to my parents-in-law not only for their interest in my research, but also for being resigned to my need to colonize their dining-room table with books, articles and my laptop almost every time that we have visited them during my doctorate.

Above all though, I owe my greatest debt to my husband, Simon. Without his unfailing love, encouragement, and patience, I would not have been able to complete this thesis. His practical help in listening to my ideas and discussing my work has been invaluable. I feel very lucky to have benefited from his constant support which has been vital to my progress, particularly given the added (joyful) pressures of my becoming a mother part way through my doctorate. I am particularly grateful to him for taking over the daily care of our baby daughter, Esme, during the latter stages of my writing-up to give me more time to write, and for providing me with a wonderful example of Yorkshire grit in action.

I dedicate this thesis to Simon and Esme.

SUMMARY
ASPECTS OF PROPERTY: THE IMPACT OF PRIVATE TAKINGS

This dissertation examines the effect of private takings on concepts of property, primarily in England but with some reference to other common law jurisdictions. An introductory chapter briefly traces the constitutional protection of property rights in the context of the limitation under the Fifth Amendment to the United States Constitution, and Article 1 of the First Protocol to the European Convention on Human Rights, that property should only be taken where this is respectively for a 'public use' or in the 'public interest'. The second chapter examines a category of transfers that ostensibly breach this requirement – private takings. The chapter analyses why traditionally such takings have been viewed with suspicion, and argues that two forces have shaped these concerns: anxiety that private takings have an inherent potential for bias and abuse; and secondly, that they offend against deeper, often conflicting, notions of property in land. As a result, such takings are viewed as having a peculiar ability to render property rights excessively vulnerable.

The dissertation argues that, despite the often forceful rhetoric in this area, land law abounds with examples of private takings and that their impact should be reassessed. Drawing on the first two chapters, the body of the dissertation seeks to make sense of why the law has not merely tolerated but actively facilitated such takings. Three illustrative categories are discussed: the use of compulsory acquisition powers by private entities; adverse possession; and, the discharge of covenants and the creation of statutory rights of way. This dissertation contends that such private takings, whilst underlining property's paradoxical apparent solidity and fragile reality, also highlight one of property's greatest strengths: its elasticity. The relative importance of the values protected by property are as dynamic as the concept of property itself; private takings mirror a wider need for greater transparency when balancing competing property values.

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INTRODUCTION

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law ...

Article 1, First Protocol
European Convention on Human Rights ('ECHR')

[N]or shall private property be taken for public use, without just compensation.

Amendment V (1791)
Constitution of the United States of America

1 OVERVIEW

Some 200 years ago, Oliver Wendell Holmes noted that legal divisions 'however clear in their general outline' will be found on closer scrutiny to 'end in a penumbra or debatable land.'[1] This thesis explores the extent and implications of one such shadowy legal landscape: the boundary between the public and private in the context of constitutional property protection in England. Whilst legal grey areas may be valuable metaphorical grist to an academic's mill, the practical uncertainty engendered often has a deleterious effect. After all, constitutional protections (as with other legal rights) are only as strong as the enforcement extended to them. If the ambit of protection for property rights is unclear, or the motivations for defending these rights are misunderstood, then property itself becomes weaker because it becomes impossible to say clearly *what* is being protected and *why*. The dependence of substantive property rights upon enforcement is well known and encapsulated in Bentham's comment that property and law 'are born together, and die together…', such that '[b]efore laws were made there was no property; take away laws, and property ceases.'[2]

[1] OW Holmes, *The Common Law* (Lawbook Exchange Ltd, 2005), 127.
[2] J Bentham, *The Theory of Legislation* (Kegan Paul, Trench, Trubner & Co. Ltd., London 1931), 113.

One of the most controversial areas in constitutional property law today revolves around the breadth of the frequent prohibition on taking property from individuals, unless this is justified by some public interest or public use. Such protections reflect an inherent and systemic preference for voluntary transfers of property rights, whilst acknowledging that individual desires may need to be subordinated for the sake of others.[3] Much ink has been spilt over attempts to delineate a meaningful boundary between the acceptable *public* and the objectionable *private*. Courts and commentators have made valiant efforts to apportion varying degrees of acceptability to different categories of taking: radiating from the clearly *public* at the bull's-eye; through to the more ill-defined but still acceptable *public benefit*; and then out finally to those *private* takings which are said to be outside the boundary.

2 AIMS OF THE THESIS

Clearly, on a literal interpretation of both Article 1 of the First Protocol to the ECHR ('Article 1') and the Takings Clause of the Fifth Amendment to the American Constitution ('Takings Clause'), as set out at the beginning of this chapter, the division between public and private is significant. However, beyond this, very little attention has been paid to considering *why* this distinction might matter in the first place. The thesis argues that this is a fundamental and logically anterior question that should be considered before any meaningful sense can be made of wrangles over the constitutionality or otherwise of specific takings, and before a more coherent approach to takings can be considered.

In examining the *raison d'être* for the public-private divide, the thesis focuses not on *public* takings, but rather on the outlier category of private takings. The thesis concludes that private takings are not only misunderstood, but that also their potential impact on property doctrines and concepts has been overlooked. The public-private dichotomy is significant, if only to the extent that private takings present different hazards from public takings and a greater potential to affect the fragility of property.

[3] An analogous approach may be seen in the common law's preference for alienability, which is central to the notion of property as commodity and one of the hallmarks of a liberal conception of property.

To this end, the following chapters examine a range of responses made by legislatures and courts in relation to private takings. It is argued that these takings appear to provoke anxiety because of their potential for abuse, and their impact on deeper, unarticulated and often conflicting, notions of property. Despite this, the thesis argues that private takings continue to be ubiquitous in Anglo-American property regimes, due to their ability to promote economic development.

By its very nature, the ensuing study is thus broad in scope, and at times descriptive, rather than providing a narrowly focused exposition of doctrine. The thesis aims to give a 'bird's-eye' view of private takings to demonstrate their embedded nature in the English property regime. It is argued that this approach not only has considerable merit in providing the first assessment of their incidence and treatment in English law, but also provides a valuable springboard for future analytical research. Questions relating to the meaning of *property* or the validity of justifications given for particular property distributions are outside the scope of the thesis, as are questions relating to the extent to which constitutional property protection is warranted in the first place. In exploring the public-private divide in relation to takings, the thesis therefore has three aims: (i) to explore objections to private takings; (ii) to assess the attitude of legislators and courts to such transfers; and (iii) to comment on the impact that private takings have on property doctrines and concepts.

3 SIGNIFICANCE OF THE THESIS

The theoretical foundations underlying compulsory acquisition in this country have received little, if any, extended attention. As with so much of English law, the evolution of this area reveals an intense focus on attempting to fashion pragmatic rules and solutions, rather than formulating theories or considering core justifications. The focus of this work – private takings and the public-private boundary in the context of constitutional property protection in England – is specific to this thesis and has not been discussed in detail by previous authors. Significant attention is paid to considering *why* property theories may militate against equating private takings with public ones, and it is concluded that the public-private divide is meaningful to the extent that private takings have a particular impact on property concepts. The examination of different

categories of private takings embedded within the English property regime is also novel, as is the focus on using the conflicting arguments for private takings as a microcosm reflecting broader competing property values.

3.1 PREVIOUS ENGLISH APPROACHES

Few publications have attempted to consider in detail the implications of written constitutional property protection in England. The most comprehensive analysis to date is Allen's *Property and the Human Rights Act* published in 2005, which provides a wealth of information with a particular focus on the Strasbourg jurisprudence, particularly in relation to Article 1.[4] This work does not however address the issues raised by private takings, nor does it seek to discuss the interaction between domestic law and broader property theory. Other shorter articles by various authors do discuss the interplay of aspects of compulsory purchase and property law in England; however, as with Allen's work, none of these undertakes extensive detailed analysis of private takings or their impact on broader property concepts.[5] Much of the law in relation to this area has traditionally focused on whether property has been acquired, and if so, what rights there might be to compensation, and how this should be calculated. As noted previously, this thesis aims to fill this gap by integrating aspects of both constitutional property protection and property theory from a domestic, English, approach. Attention is therefore paid to understanding the underlying justifications for the use of such powers in the first place.

[4] T Allen, *Property and the Human Rights Act 1998* (Hart Publishing, Oxford, 2005).
[5] P Craig, 'Constitutions, Property and Regulation' [1991] Public Law 538. T Allen, 'The Human Rights Act (UK) and Property Law' in J McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999); T Allen, 'Controls Over the Use and Abuse of Eminent Domain in England: A Comparative View' in RP Malloy (ed) *Private Property, Community Development, and Eminent Domain* (Ashgate, Aldershot, 2008); R Clayton, 'New Directions in Compulsory Purchase' [2006] JPL 133; KJ Gray, 'Human Property Rights: the Politics of Expropriation' 16 Stellenbosch L Rev 398 (2005); J Howell, 'The Human Rights Act 1998: the "Horizontal Effect" on Land Law' in E Cooke (ed) *Modern Studies in Property Law* (Hart Publishing Oxford 2001).

3.2 PREVIOUS AMERICAN APPROACHES

By way of contrast, American jurisprudence contains an almost overwhelming abundance of commentary on the Takings Clause. However, as with English law in this area, very little attention has so far been paid to private takings or their wider potential significance. It is possible that a forthcoming American-focused article, 'Private Takings' by Abraham Bell, and a brief online response by Richard Epstein, will begin to ignite greater, and deserved, interest in this area.[6]

Bell's article emphasises the usefulness of private takings in overcoming holdout problems in the private sector, and argues that these takings may, in some circumstances, be preferable to public takings. On the assumption that private takings involve full compensation, preferably at the full subjective value of the property to the former owner, they should only occur where the taker values the property more highly than the former owner does. The compensation paid would, according to the article not only: (i) limit the number of private takings in the first place; but also, (ii) ensure that those that do take place are likely to be more economically efficient than their public counterparts, on the basis that there will be little or no call for politically-motivated overpayments of compensation.

Private takings are likely, in Bell's view, to be available only where: (i) the taker is the preferred party due to reasons of justice or efficiency; and (ii) marketplace transactions for the property are blocked due to strategic difficulties. Despite the acknowledged utility of private takings, the article warns that they should be viewed with caution due to the need to consider various factors, including transaction costs, when determining when or how private takings should occur. Failure to heed these issues might lead to efficient takings being blocked and inefficient takings occurring.

These arguments are compelling as far as they go, and usefully provide a preliminary discussion of some of the difficulties in this area. However, they do not sufficiently address the issue of assessing the impact of private takings where compensation is

[6] A Bell, 'Private Takings' 76 U Chi L Rev (forthcoming Spring 2009) available at http://ssrn.com/abstract=1274083. See also R Epstein http://legalworkshop.org/2009/03/19/not-so-private-takings-a-response-to-bell (both articles last accessed 15 August 2009).

limited, or non-existent. As this thesis notes, there are areas of English land law that could be categorised as private takings, such as adverse possession, where compensation is not paid.[7] It is also perfectly possible for statutes to allow for compensation that does not match the subjective value of the property to the former owner,[8] or even to provide for no compensation at all.[9] In these situations, it remains to be seen whether private takings would be just as acceptable as public takings, or whether deeper meta-principles of property theory would be offended. The thesis argues that greater attention needs to be paid to assessing the wider impact of private takings, and that the question of their utility is more contingent and shifting than is evident from Bell's article.

In the course of his article, Bell draws on his previous work with Parchomovsky in emphasising the existence of 'pliability rules' within legal systems.[10] As such, takings can be seen as a mixture of Calabresi and Melamed's property rule protection (allowing owners to refuse transactions), and liability rule protection (which allows others to seize rights on payment of compensation).[11] Takings, both public and private, involve the transformation of property rule protection, into liability rule protection, and then back to property rule protection again.[12] In this way, Bell argues that takings may be seen as occurring within a property system rather than without it, and therefore as less unsettling to the legal order than might be thought on first glance. In making these arguments, Bell has usefully drawn attention to the shifting nature of protection afforded to property in the takings sphere. However, this thesis argues that the issue of whether private takings should be viewed as being within or without a property system is more nuanced than is apparent from Bell's article. One of the core unanswered questions is still whether or not private takings *can* or *should* be equated with public

[7] The issue of compensation in relation to adversely possessed land was at stake in the *Pye* litigation discussed in detail in chapter 4 of this thesis.
[8] For example the compensation provisions of the Leasehold Reform Act 1967 (as amended), which formed the basis of the challenge in *James v United Kingdom*, Series A, No 98 (1986).
[9] It would be open to Parliament to enact legislation expressly obviating the need for compensation. If challenged in the courts, it would then become a question of whether compensation was required under the rule of law, and attempting to accommodate this with the concept of Parliamentary sovereignty.
[10] A Bell and G Parchomovsky, 'Pliability Rules' 101 Mich L Rev 1 (2002).
[11] G Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 Harv L Rev 1089 (1972).
[12] Bell, 'Private Takings' (fn 29), notes that takings are an exception to normal pliability rules which encompass an 'articulated expectation from the very outset'.

takings. The analysis which follows in the thesis is thus distinguishable from other works, including those of Allen and Bell.

4 RIPENESS OF THE THESIS

Additionally, the issues raised in this thesis are ripe for consideration on several grounds. First, the inherent importance of the public-private divide in relation to property law has been long disregarded in England due to the absence until relatively recently of any overarching written constitutional property protection. The enactment of the Human Rights Act 1998 ('HRA 1998'), and its incorporation of Article 1, means that it is no longer sufficient for property lawyers to ignore constitutional principles and their impact on domestic legal principles. The takings arena is an area of growing practical significance due to the interaction of constitutional norms and individual rights which produces 'dramatic and highly visible' judicial decisions.[13]

Secondly, the inattention paid to the ambit of private takings in England is unwarranted given the dynamic and increasing use of particularly broadly-worded compulsory acquisition powers by private parties. Recent potentially divisive projects which have made use of these powers include lands assembled for the 2012 London Olympics, Crossrail, and Pathfinder schemes. Given the scale and scope of private takings, it is particularly helpful to analyse the issues raised by such powers so that their impact can be assessed and suitable protections put in place, if necessary.

Thirdly, the discussion contained in this thesis serves as a step in redressing the limited analysis in English law of the underlying principles at play when property rights are reallocated. Other legal systems, such as South Africa, have been forced to grapple overtly with the challenges raised by competing claims produced by mass reorganisations of property rights. By way of contrast, the English social and legal order has been relatively stable thus leading to comparatively *ad hoc* challenges to property reallocations. Without widespread and significant social upheaval, there has been little

[13] H Dagan, 'Takings and Distributive Justice' 85 Va L Rev 741 (1999), 791.

call for English law to formulate or even articulate overarching legal principles governing the forcible transfer of property rights between individuals.

Given this background, varying English judicial and legislative approaches might be expected due to the highly fact-specific nature of takings. However, the divergent levels of protection which have ensued also appear to reflect a significant lack of clarity about *whether* and *why* property rights should be protected. A clear example of this in practice can be seen from the confusion arising in the *Pye* litigation which concerned adverse possession, both domestically and before the European Court of Human Rights ('ECtHR') and the Grand Chamber.[14] In the course of these proceedings, which are discussed in greater detail in chapter 4, judges at all levels vacillated between holding that the applicable adverse possession rules were or were not compliant with Article 1. Such uncertainty leaves individuals in doubt about the content of their property rights and unable to predict when these will, or should, give way to other interests. This confusion can breed resentment towards compulsory acquisition, and also reduces a sense of personal autonomy. Again, the increasing use of private takings in a post-HRA 1998 world means that the focus of this thesis on the ambit of constitutional property protection is timely.

5 DEFINITIONS

Before entering into the substance of the thesis it is first necessary to discuss and define certain terms which will be used throughout.

5.1 TAKINGS

The thesis uses the American term of a *taking* to refer to the compulsory transfer of possession of, or interests in, property. As such, the thesis encompasses a wider category of interferences with property than analogous traditional English terms such as *compulsory purchase* or *expropriation* might suggest. As André van der Walt notes, these common law terms suggest that the state is required to 'actually *acquire property*

[14] The *Pye* litigation is discussed in detail in chapter 4.

or *derive a benefit* from the expropriation or acquisition in some way, thereby excluding state actions that destroy or take away property without any benefit for the state.'[15] The thesis adopts, with minor modifications as highlighted in italics below, the definition of *taking* suggested by Jeremy Waldron. Thus, for the purposes of this dissertation, a taking includes any:

> Appropriation, [*extinction*] or occupation of a resource by a person other than the officially designated owner [*against the designated owner's wishes*], accompanied by the intention permanently[16] to deprive the official designated owner of the resource, whether that appropriation or occupation is morally justified or thought to be morally justified or not.[17]

This definition is used because it helpfully encapsulates not only ideas of neutrality as to the morality of the taking, but also stresses the importance of a commonsense, non-legalistic approach to defining the term. This latter factor is particularly important given the reliance placed upon Constitutional protections by members of the public. Ideally, concepts such as *property* and *takings* should be readily comprehensible to all members of society, including Ackerman's 'Ordinary Observer', due to their significance and the need for people to be able to understand and predict the ambit of the protections extended by constitutional provisions.[18]

Most constitutional property clauses, including Article 1 of the ECHR, distinguish between two different branches of takings. First, there are compensable physical takings that involve an involuntary change in possession or the extinguishment of land or interests in land; and secondly there are non-compensable regulatory takings where the use of land is burdened with so many regulations that the net effect is as if the land or

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[15] AJ van der Walt, *Constitutional Property Clauses: A Comparative Analysis* (Juta & Co, Ltd, Cape Town, 1999), 18.

[16] The issues raised by so-called 'temporary' takings are discussed in chapter 5 of the thesis.

[17] J Waldron, 'The Normative Resilience of Property' in J McLean (ed) *Property and the Constitution* (Hart Publishing Oxford, 1999), 172, fn 9.

[18] LS Underkuffler, *The Idea of Property: Its Meaning and Power* (OUP, Oxford, 2003), 11: 'there is the layman's view that property is 'things' – tangible things, such as land, chattels, and body parts, and intangible things, such as patents, copyrights, stocks and bonds. The idea that property is 'things' is, however, easily discredited by lawyers and philosophers for its awkwardness and incompleteness.' BA Ackerman, *Private Property and the Constitution* (Yale University Press, New Haven, 1977), 97-103 also refers to the allied notion of the 'Ordinary Observer' in noting that the layperson, even the educated layperson, generally understands property to be physical objects or 'things' and therefore contends that it is useful to consider whether an interest is sufficiently 'thing-like' to be property.

interest had been physically taken.[19] This dissertation focuses explicitly on physical takings, and does not include detailed discussion of the thorny issue of when land use regulations go 'too far'[20] and shade into confiscation,[21] or as Carol Rose has put it, the point at which a 'governmental action turns as if from Dr. Jekyll into Mr. Hyde.'[22]

5.2 PRIVATE TAKINGS

In the context of the thesis, a *private taking* is defined broadly and functionally as any situation where property is transferred from one individual or non-state party to another, rather than to the state or to an emanation of the state. As will be seen from later chapters of the thesis, this definition of private taking is wide enough to include circumstances where private companies or other corporate bodies 'take' property from others. It is acknowledged that the dividing line between state and non-state actors is unclear, and has been exacerbated by the greater use of public-private-partnerships, delegation of powers and privatization. The categories of taking discussed in the thesis all take place against a statutory framework to a greater or lesser degree, however, the focus is on the identity of the eventual beneficiary rather than the mechanism used to achieve the transfer.

5.3 TAKINGS OF LAND

The thesis is specifically interested in takings of land, rather than any other category of property. In referring to 'land' the thesis adopts the legal definition of this term as set out in the Law of Property Act 1925 ('LPA 1925'):

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[19] DL Callies, 'Takings: An Introduction and Overview' 24 Univ of Hawaii L Rev 441 (2002) provides a useful overview of the problems posed by takings.

[20] The US Supreme Court, like others, has struggled with pinning down the point at which regulation becomes expropriation. *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) (US Supreme Court) introduced the idea that when a regulation went 'too far' it would be a taking. See chapter 5 of the thesis for further discussion on this point.

[21] See also *Penn Central Transportation Co v City of New York* 438 US 104 (1978) (US Supreme Court); *Agins v City of Tiburon* 447 US 255 (1980) (US Supreme Court); *Nollan v California Coastal Commission* 483 US 825 (1987) (US Supreme Court); *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) (US Supreme Court) and *Lingle v Chevron USA Inc* 544 US 2005 (US Supreme Court).

[22] CM Rose, '"Takings" and the Practices of Property: Property as Wealth, Property as "Propriety"' in CM Rose (ed), *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press Inc, Boulder, 1994), 49.

> Land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over or derived from land.[23]

The decision to focus on takings of land rather than any other category of property is based on the fundamental historical, political and social importance of land. Milsom succinctly captured this idea in describing 'land as livelihood',[24] a notion which has been expanded upon by Baker's depiction of land as not only 'a place for man and beast' to live on, but also as 'a source of food and of all other commodities, including – if one has enough to let – money.' Unlike other forms of property, Baker continues, land 'outlives its inhabitants, is immune from destruction by man, and therefore provides a suitably firm base for institutions of government and wealth.'[25] Not only does this factor allow for the consideration of historical parallels in the thesis, but also allows for an appreciation of the broader social context of constitutionally protected property rights.

6 COMPARATIVE NOTES

Whereas the compulsory transfer of property rights has provoked fierce legal and academic discussion in America, the same cannot be said of England. As might be expected in a legal system which 'typically … fastens not on principles but on remedies'[26] English law has traditionally viewed the compulsory acquisition of property as a thicket of practical technicalities, rather than an area of fundamental legal significance.[27] Therefore, whilst the thesis centres primarily on English approaches to private takings and does not pretend to be a fully comparative work, some references

[23] LPA 1925, s. 205(1) (ix).
[24] SFC Milsom, *A Natural History of the Common Law: James S Carpentier Lectures* (Columbia University Press, New York, 2003); JH Baker, *An Introduction to English Legal History* (4th ed, Butterworths, 2002), 53.
[25] Baker, *An Introduction to English Legal History*, 223.
[26] *Davy v Spelthorne Borough Council* [1984] AC 262, 276, (Lord Wilberforce). *R v East Berkshire Health Authority*, *ex parte Walsh* [1985] QB 152, 162 (Lord Donaldson).
[27] M Taggart, *Private Property and Abuse of Rights in Victorian England* (OUP, Oxford, 2002), 103, refers to the contrast between countries who consider the taking of property for public purposes as 'an important aspect of constitutional law', and England, where the subject has the 'unglamorous name of "compulsory purchase" and is a highly practical subject, attended by little constitutional fanfare or theorizing.'

will be made to other legal systems that have paid greater attention to the underlying issues raised by constitutional property protection.

6.1 HAZARDS OF COMPARATIVE RESEARCH

The dangers of legal transplantation and comparative legal research at any level, particularly when considering public law issues, are well known. Montesquieu famously noted that the 'spirit of the laws' would be influenced by governmental, climatic, geographic, and social variations to such an extent that it would be 'very unlikely that the laws of one nation … [could] suit another.'[28] Whilst others, such as Kahn-Freund, have taken issue with Montesquieu's environmental focus, arguing instead that knowledge of the foreign law and its social and political context is more of a barrier to transplantation, they have also acknowledged the many difficulties presented by such research.[29]

Despite these caveats and the recognition that political, social and legal milieus differ greatly, the thesis will make some comparative comments. It is contended that courts the world over face many of the same fundamental problems when considering constitutional limitations on the taking of property. These include how best to balance the public and private, and how to ensure security whilst also facilitating economic and social development. The comparative references contained in this thesis are thus made in the spirit of exploring general and underlying property themes, rather than as an attempt to provide a normative solution to specific English problems.

[28] Montesquieu, *The Spirit of the Laws* (AM Cohler, BC Miller, HS Stone) (trs and eds) (CUP, Cambridge, 1989), bk 1, ch 3, 8.

[29] O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1, 27. *Cf.* A Watson, 'Legal Transplants and Law Reform' (1976) 92 LQR 79, 81, who argues that there is no need for the recipient legal system to have real knowledge of the social, economic, geographic and political context of the original rule. In turn, Watson's arguments have been criticized as being flawed in JWF Allison, *A Continental Distinction in the Common Law: A Historical and Comparative Perspective on English Public Law* (OUP, Oxford, 1996), 14.

6.2 AMERICAN JURISPRUDENCE

Whilst the thesis makes brief comparative references to several jurisdictions, American legal theory and jurisprudence figure most frequently. Despite the contextual nature of property rights, many universal and fundamental issues have arisen for discussion in America. As such, even a brief appreciation of American approaches to the difficulties presented by takings can provide valuable insights for those working in other jurisdictions. There are several compelling reasons, which explain why the balance of comparative references in the thesis is weighted more towards America than elsewhere.

6.2.1 Long-established protections

First, America possesses one of the most influential and well-established written property protection clauses in existence. Dating from 1791, the operative part of the Fifth Amendment to the United States' Constitution, or the Takings Clause as it has become known, declares '… nor shall private property be taken *for public use*, without just compensation.' The drafting of the clause is evidently ambiguous; the plain wording appears to refer to the circumstances in which compensation will be payable, rather than *when* the power might be exercised.[30] However, this distinction matters little given that courts have consistently interpreted this clause as a limitation on *when* property may be taken, rather than as a compensatory indicator. The long-standing property protection encapsulated in the Fifth Amendment thus contrasts valuably with the fledgling written protection existing in England under the ECHR. Not only does European jurisprudence in this area only stretch back some 50 years, but also domestic consideration of the impact of Article 1 is of even more recent existence following the enactment of the HRA 1998 in October 2000.

[30] TW Merrill, 'The Economics of Public Use' 72 Cornell L Rev 61 (1986), 71, argues that public use could mean that the government may only *condemn* if the use is public but it could 'also mean that when government condemns, it must *compensate* only if the taking is for a public use.' See also WB Stoebuck, 'A General Theory of Eminent Domain' 47 Wash L Rev 553 (1971), 591. J Rubenfield, 'Usings' 102 Yale LJ 1077 (1992), 1080, likewise maintains that the 'public use' limitation is not a threshold test, but merely clarifies that those takings where the State puts private property to State use should be compensated. This interpretation has been doubted by NA Sales, 'Classic Republicanism and the Fifth Amendment's "Public Use" Requirement' 49 Duke Law Journal 339 (1999), 344-345, fn 23.

6.2.2 Abundant case-law

Due to both the venerable nature of the Takings Clause, and the nature of American government, the country has produced an abundance of case law and commentary. Federal case law is supplemented by a wealth of State jurisprudence which frequently provides detailed consideration of the broader issues raised by takings. Additionally, since States are free to enact different and more stringent constitutional property protection than that afforded by the Fifth Amendment guarantee, there are numerous decisions and approaches available for analysis. In the course of the thesis, most attention will be paid to Federal jurisprudence revolving around the Fifth Amendment, but some reference will also be made to State decisions. The Federal bias in the thesis is due to the greater external weight placed on the terms of the US Constitution and Federal jurisprudence by overseas jurisdictions.

6.2.3 American Law and the ECHR

Thirdly, and following on from the previous point, American jurisprudence at a Federal level has had some effect on the development of European property protection. The ECtHR has acknowledged the value of having recourse to American decisions when discussing the scope of Article 1 protections, and has made explicit reference to American takings cases in its own judgments.[31]

7 STRUCTURE

As noted above, the aims of this thesis are threefold. First, to review possible objections to private takings and consider their potential merits; secondly, to scrutinize three different areas of English land law through the lens of private takings to assess the attitude of legislators and courts to such transfers; and thirdly, to comment on the impact that private takings have on broader property doctrines and concepts. The thesis

[31] For example, *James v United Kingdom* makes reference to *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) (US Supreme Court).

concludes that private takings are misunderstood and should be reconsidered, and that their impact on property has been overlooked. It is argued that the public-private dichotomy is significant, and that private takings theoretically have a greater potential than public takings to affect the fragility of property. Nonetheless, it is argued that the impact of private takings in practice underlines one of the central paradoxes of property: its ability to present an appearance of solid stability, whilst being an elastic and mercurial concept.

In assessing the significance of the public-private divide, the thesis takes the following structure. Chapters 1 and 2 frame the content of the thesis by identifying the doctrinal and philosophical context in which questions relating to public-private divide arise. Chapter 1 thus consists of an overview of background concepts including some of the various meanings attributed to the concept of *property*, and reference to the problems presented by entrenched constitutional property protection. The terms and extent of this protection in England and America are then set out and examined. The chapter concludes by noting that both jurisdictions subscribe to a number of competing visions of property, and that uncertainty about the basis of property protection and where to draw a public-private divide feeds through into conflicting interpretations of the scope of constitutional safeguards.

Chapter 2 builds on this discussion and considers examples of Anglo-American judicial rhetoric about private takings. Having noted that there is little overt comment in England, but an abundance in America, various theoretical and practical objections to private takings are then considered. These include: labour-desert theories; personal nexus with land; personhood; security; fear of tyranny; judicial scrutiny and control of private parties. It is argued that private takings may well engender specific concern in property regimes that value the personhood and security aspects of property. Additionally, there are potentially significant problems in scrutinizing private takings and controlling private parties, which are not present to the same degree in relation to public takings.

Having established the theoretical framework for the thesis, the second part of the dissertation focuses upon the reactions of courts and legislators to several instances of

private transfers. Chapters 3, 4 and 5 therefore contain a spectrum of sample private takings, albeit that these are rarely categorised as such by the courts. The takings discussed generally occur against a statutory framework or backdrop, but the eventual beneficiary is a private individual or entity. Chapter 3 thus focuses on historic and modern private powers of compulsory acquisition, chapter 4 concentrates on adverse possession, and chapter 5 addresses statutory rights of access and the discharge of restrictive freehold covenants. These categories have been chosen to be illustrative of various approaches taken towards different types of transaction, but it is acknowledged that many of the issues raised in the chapters overlap. Any taxonomy imposed needs to be tentative in order to take account of the varied nature of private takings.

The picture that emerges is complex and fluid. In some circumstances, notably those involving entrepreneurial activities, legislators appear both to accept and actively encourage the existence of private takings. This approach can be seen in chapter 3, which considers the use of private statutory powers of compulsory acquisition. Despite the rhetoric referred to in chapter 2, these types of private taking have been used frequently in England for centuries and appear to have been motivated by a pragmatic desire to encourage economic exploitation of land and interests in land. Provisions from modern compulsory purchase statutes are considered and distinctions are drawn between the reach of current statutory powers. The difficulties of controlling this type of private taking are also highlighted.

Chapter 4 moves further along the spectrum of private takings to consider an example of rules embedded within the property regime itself, which effect a private taking: adverse possession. The chapter considers the statutory backdrop to adverse possession and discusses recent litigation on the status of the doctrine as a taking or regulation. The complex and confusing nature of the law in this area is compounded by the dual use of identical property theories both to justify adverse possession and militate against private takings. Using the lens of private takings it becomes possible to make greater sense of the chaotic justifications employed in this area of the law, and to demonstrate that judicial attitudes towards adverse possession, and the changes introduced by the Land Registration Act 2002, are reflective of an underlying and unacknowledged uneasiness with private takings.

Chapter 5 considers statutorily authorised private takings of particular property rights, rather than full title. In this context the provisions of the Access to Neighbouring Land Act 1992 and analogous Australian legislation from New South Wales are considered. The chapter considers the problems posed by 'partial takings' and the interplay of exclusion and access. The provisions of the Law of Property Act 1925 dealing with the modification, and discharge of restrictive freehold covenants are also considered. The chapter argues that the relative creation and extinguishment of these rights may be viewed as takings of property, and that again judicial and legislative attitudes reveal a tacit sense of disquiet at private takings.

CHAPTER 1
PROPERTY AND CONSTITUTIONAL PROTECTION

> *"When* I *use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean – neither more nor less."*
> *'"The question is," said Alice, "whether you* can *make words mean so many different things."*
> *"The question is," said Humpty Dumpty, "which is to be master – that's all."*[1]

1 INTRODUCTION

Whereas the thesis focuses on the impact of private takings of land, this chapter touches upon various fundamental concepts and debates which provide valuable context for the thesis. The chapter thus describes some of the main definitions of *property*, before noting that opinions differ as to whether property *should* be constitutionally protected. Finally, the chapter examines the entrenchment of constitutional property protection in England and America.

2 PROPERTY AND THE SEARCH FOR MEANING

Property appears to be a portmanteau concept, where Humpty Dumpty-like, anyone can declare it to mean what they *want* it to mean. Over the centuries it has proven notoriously difficult to define this most contextual of terms.[2] However, rather than being a weakness, this flexibility only serves to increase the usefulness and importance of the concept to society generally. One of property's greatest strengths, and a *leitmotif* of this thesis, is its elasticity. As such it can act, in Laura Underkuffler's words, as the 'rallying cry of diverse and often conflicting contemporary legal claims and political

[1] L Carroll, *Through the Looking-Glass* (Penguin Books, London 2003), 186.
[2] FS Philbrick, 'Changing Conceptions of Property in Law' 86 U Pa L Rev 691 (1938), 696: 'the concept of property never has been, is not, and never can be of definite content.'

movements.[3] The call for property has been thus invoked by both those demanding and opposing land reform, and the payment of reparations.[4] The multi-faceted significance of property rights to people of all political and social castes is due to the way in which this concept reflects society's changing resolution of 'conflicting claims, visions, values and histories.'[5]

2.1 PROPERTY SYMBOLS

Whether unwittingly or not, the specific symbol used to represent property has a considerable impact on how society conceives of the concept and frames arguments concerning it. If, as Carol Rose suggests, property were to be represented not by land but by the equally valuable and vital symbol of water, it would be impossible to think of property rights in quite the same way. Instead of entailing the 'awesome Blackstonian power of exclusion',[6] symbolising property rights with water might be thought of 'literally and figuratively as more fluid and less fenced-in'. As such property would be viewed as being more concerned with 'qualities of flexibility, reasonableness and moderation, attentiveness to others, and cooperative solutions to common problems.'[7] Were water to replace land as a more accurate symbol of the growing realisation that property is a 'relative phenomenon, moulded by collective visions of the social good' it would mirror an 'inevitable threat to the viability of the common law model of property as raw, untrammelled, individually exercised exclusory power.'[8] This tension is alluded to in chapter 5 of the thesis.

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[3] Underkuffler, *The Idea of Property: Its Meaning and Power*, 11.

[4] AJ van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation' in J McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999), 118, observes in relation to the debates in South Africa surrounding both section 28 of the 1993 interim Constitution and section 25 of the final Constitution in 1996 that the: 'political debate never really allowed serious consideration of the possibility to exclude the property clause from the bill of rights … instead participants in the debate were forced to consider ways of both including a property clause … and prevent[ing] the complete insulation of property from government interference.' It seems that 'many people from formerly oppressed and disadvantaged groups' supported the 'inclusion of a property clause in the Constitution, regardless of the fact that the security they wanted for themselves would also provide security for beneficiaries of the apartheid system.'

[5] *ibid.*

[6] The importance of exclusion should not be underestimated, see chapter 5 of the thesis. This issue is examined in KJ Gray and SF Gray, 'Private Property and Public Propriety' in J McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999). See also KJ Gray, 'Property in Thin Air' [1991] CLJ 252.

[7] CM Rose, 'Property as the Keystone Right?' 71 Notre Dame L Rev 329, 351.

[8] Gray and Gray, 'Private Property and Public Propriety', 19.

2.2 PROPERTY AS A 'BUNDLE OF RIGHTS'

Property theorists in modern times, notably Grey, have likened property to a 'shadowy "bundle of rights"' supposedly in contrast to its allegedly historic significance as a 'central idea mirroring a clearly understood institution.'[9] This theory is based on both Hohfeld and Honoré's approaches to proprietary rights As such, property it is argued is 'no longer a coherent or crucial category in our conceptual scheme' but rather has 'disintegrated.'[10] Whilst seeming to be 'reassuringly three-dimensional' property appears on closer inspection to be 'rather like thin air' and as such 'dances away through our fingers and dissolves into a formless void' when attempts are made to grasp at it.[11]

The fragmentation of property and its allied ability to enable several people to enjoy the same resource at once is thus both a weakness and a strength. As Tay and Kamenka noted, property's ability to disintegrate has acted as a 'significant bulwark against political, governmental and religious power ... by fragmenting or helping to fragment and balance competing claims of King, baron, church and corporations, of state and citizens, of bureaucracies and those whom they administer.'[12] Whilst it is true that 'the bundle-of-rights conception of property is essentially devoid of content ... it is this feature ... that is its very attraction.'[13]

2.3 HISTORICAL 'PROPERTY'

The inherent ambiguity of the term 'property' is however nothing new. Perhaps

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[9] Property has been described as a 'bundle of rights' by, amongst others, GS Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (University of Chicago Press, Chicago,1997), 319-323, JE Cribbet, 'Concepts in Transition: The Search for a New Definition of Property' 1986 U Ill L Rev 1 (1986); JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 UCLA L Rev 711; JL Schroeder, 'Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property' 93 Mich L Rev 239 (1994).

[10] TC Grey, 'The Disintegration of Property' in JR Pennock and JW Chapman (eds) *Nomos XXII, Property* (New York University Press, 1980), 74.

[11] Gray, 'Property in Thin Air'.

[12] AE-S Tay and E Kamenka, 'Introduction: Some Theses on Property' 11 U NSW LJ 1 (1988), 5.

[13] C Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Distribution of Property Rights* (Hart Publishing, Oxford, 2002), 55.

surprisingly, it is far from clear that property in England was ever quite such a 'coherent or crucial category' as Grey would have us believe. The conception of property as a solid bulwark has gained such a hold as the liberal property paradigm,[14] that it is worthwhile reconsidering earlier property usage which demonstrates the shifting nature of the term. Before the seventeenth century, references to the word 'property' continued to echo its Latin origins where the word *proprietas* referred to the 'peculiar nature or quality of a thing.'[15] Property was not a 'shorthand referent'[16] to 'an object of legal rights, or possessions or wealth collectively.'[17]

It seems from Seipp's examination of the legal terms used in the Year Books from 1290 to roughly 1490, that English lawyers at this stage in describing rights in relation to land 'got along … without using any single term that had the scope, application, and explanatory power that later lawyers found in the words "property" and "ownership."'[18] Instead, the Year Books refer to 'right' and 'possession' in relation to land.[19] The absence of explicit property terminology in this context is intriguing given that the treatises known as Bracton and Britton, which would have been available to the Year Book lawyers at this time, used the Latin term *proprietas* and French *propreté* respectively in relation to land. Several explanations are given for the absence of explicit property language in relation to land in the Year Books during this period: the 'devisability' thesis; the 'good feudal lawyer' thesis; and, the 'interference' thesis**.**

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[14] This term is used loosely to denote property discourse following the traditions of John Locke and John Stuart Mill, which emphasises the importance of individual freedom, especially freedom from governmental control, and respect for the capacities of individuals.

[15] A well-known example of 'property' signifying an innate characteristic or attribute of a thing or person may still be found in the rite of Holy Communion contained within the *Book of Common Prayer*, first issued under Edward VI (1537-1553) in 1549 by Archbishop Cranmer (1489-1556). Both the 1549 and 1662 versions of the Prayer of Humble Access contain the phrase, 'we be not woorthie so much as to gather up the cromes under thy table: but thou art the same lorde whose propertie is alwayes to have mercie.' [Extract taken from a true facsimile of the 1549 Book of Common Prayer printed in 1896 and referred to in DN Griffiths, *The Bibliography of the Book of Common Prayer, 1549-1999* (British Library & Oak Knoll Press, London, 2002) as [1896/5].

[16] DJ Seipp, 'The Concept of Property in the Early Common Law'12 Law & Hist Rev 29 (1994), 33. This section will make frequent reference to the detailed and careful analysis of the use of property terminology in the Year Books carried out by Seipp.

[17] C Donahue Jr., 'The Future of the Concept of Property Predicted from Its Past' in JR Pennock and JW Chapman (eds) *Nomos XXII, Property* (1980), 31.

[18] Baker, *An Introduction to English Legal History*, 223, also comments that the 'word "owner" does not seem to have been much used by medieval lawyers: ownership is not an immutable legal idea any more than the French equivalent "property".'

[19] Seipp, 'The Concept of Property in the Early Common Law', 31-37.

2.3.1 Property and the 'devisability' thesis

The 'devisability' approach accounts for the restriction of 'property' terminology to chattels rather than land, due to the distinctions drawn in the rules for descent of an interest at the death of the holder.[20] Until the enactment of the Statute of Wills in 1540, land unlike chattels could not be devised in many areas of England.[21] Such an important distinction between 'heritable land and devisable chattels' may according to Seipp have led to the Year Book lawyers linking 'property' with the ability to devise an interest at death rather than 'the ability to alienate during life or the certitude that an interest would form part of the inheritance passing to the legally designated heir.'[22] Such an approach does not account however for the prevalence of the forerunner of the trust, the 'use', and the ability this provided for individuals to get land to intended beneficiaries. In addition, Seipp notes that the Year Book lawyers began to 'ascribe property to land' in the 1490s long after practical evasion became common and still some 50 years before the Statute of Wills made land devisable.

2.3.2 Property and the 'good feudal lawyer' thesis

The second explanation for the absence of 'property' terminology in the Year Books, that of the 'good feudal lawyer' also fails to fulfil its brief. The argument here is that as 'good feudal lawyers' the Year Book lawyers 'got it right' since under the feudal system only the king could be said to have any 'property' interest in land. Such a rationalisation whilst being 'anachronistic and overly formalistic' may well, it seems, have had some role to play in the conceptual split made by the Year Book lawyers as part of what Seipp terms the 'interference' thesis.

[20] The Year Books predominantly use the term 'property' when referring to chattels such as animals. For example, in distinguishing between wild and tame animals reference might be made in this context to the property (or characteristic) of a tame animal to return to its master.
[21] Statute of Wills, 32 Hen 8 ch 1 (1540).
[22] Seipp, 'The Concept of Property in the Early Common Law', 43.

2.3.3 Property and the 'interference' thesis

According to this explanation, the absence of modern property terminology and lack of reference to land may have been due to essential and obvious differences between moveables and immoveables. Since animals and domestic goods could wander far from their rightful possessors, Seipp argues that they required 'notional nametags – ascriptions of "property" to some person, who might be unknown in the county where the goods or animals were found.' The 'all-or-nothing' character of 'property' in the Year Book debates at this time was more appropriate in relation to goods or chattels, which were vulnerable to interference in a way that land was not.

Indeed, the paradigm liberal conception of property with its emphasis upon individual interests, seemingly espoused by writers such as Blackstone in his *Commentaries*, would have been unrecognisable in the feudal world. The 'interference' thesis stresses the fact that only a very few interferences with land would actually threaten the security or income of a tenant in possession. In a world where the advantage of landholding lay originally in the ability to raise an army rather than to exclude others, landholders would be accustomed to the idea that many people might work and benefit from a given piece of land. It would be accepted that people who did not possess the land as such, might still take some of the land's produce or simply pass across it in order to travel elsewhere. In this way, legally recognised rights of common or profit would co-exist with unwritten social norms based on broader notions of being a good neighbour.

2.4 PROPERTY AND 'SOLE AND DESPOTIC DOMINION'

In the 'practical arrangements of life in late medieval England, it appears that goods and animals, not land, came closest to what Blackstone would later call "that sole and despotic dominion."'[23] The application of 'property' to land, in addition to chattels, was thus a significant change given that it imported notions of 'absolute property in goods and animals into the context of land disputes.'[24] The scene was set for exclusion to

[23] Seipp, 'The Concept of Property in the Early Common Law', 40-46.
[24] *ibid.,* 47.

become the pre-eminent stick in the bundle of property rights in relation to land. The emphasis upon a landowner's right to exclude others from their property appears to have acted as a valuable bulwark of individual entitlements in the face of both the Tudor policies of fiscal feudalism, as well as the overweening demands of the Stuarts. The liberal conception of property as Blackstone's 'sole and despotic dominion' as such represented, according to Grey, a significant 'attack on feudalism' or that 'web of relations among persons' from which the 'rising bourgeoisie' were 'struggling to free themselves.'[25]

The clarity and solidity of this later liberal conception of property should be contrasted, according to Grey, with the modern bundle of rights view of property, which disappears into nothingness on closer inspection. However, one of the by-products of a consideration of the law relating to the compulsory acquisition of land, both in England and America, is that the classic liberal conception of property supposedly espoused by Blackstone's *Commentaries* appears to represent myth rather than reality in this context. This confusion arises due to the famous equation of the right of property with that 'sole and despotic dominion which one man claims and exercises … in total exclusion of the rights of any other individual in the universe.' Once property in land and moveables has been acquired by a person it 'remains in him, by the principles of universal law' until such time that he shows 'an intention to abandon it.'[26]

Property rights are, it seems initially on reading the *Commentaries*, held in such high regard by the law that it will be 'in vain' for it to be urged that the 'good of the individual ought to yield to that of the community' since the law will not tolerate 'the least violation' of privately-held property.[27] The common-law concept of property described here is 'essentially assertive, oppositional and exclusory. … [A] solid, reassuringly three-dimensional concept, resonating with its own unmistakable message

[25] Grey, 'The Disintegration of Property', 73-74.
[26] W Blackstone, *Book II, Commentaries on the Laws of England* (Printed at the Clarendon Press, Oxford, 1766), 2-9.
[27] W Blackstone, *Book I, Commentaries on the Laws of England* (Printed at the Clarendon Press, Oxford, 1765), 135.

for the world at large: property seemed to be absolute, unequivocal and quite possibly cosmic in its implications.'[28]

2.4.1 Blackstone and Compulsory Acquisition

Almost immediately though it becomes clear that Blackstone's legal world is not quite so clear-cut and protective of an individual's property rights against all-comers. Having pronounced that the public good is 'in nothing more essentially interested' than the protection of 'every individual's private rights' Blackstone briefly admits that this is not always true. In fact, the legislature frequently compels individuals to acquiesce in the transfer of their property rights 'not by absolutely stripping the subject of his property in an arbitrary manner' but rather by providing a 'full indemnification and equivalent' for the injury. According to Blackstone such a transaction is acceptable on the basis that that the legislature merely obliges 'the owner to alienate his possessions for a reasonable price' with the public being considered as though it were one individual 'treating with an individual for an exchange.'[29]

Compulsory purchase can be equated with free alienation in this way only to the extent that the individual receives compensation; the element of compulsion itself is not however justified by the payment of money, but rather by notions of the 'public good.'[30] At the time that Blackstone was writing his *Commentaries* the English had frequent and long experience of compulsory transfers of property between private individuals due to inclosure legislation, whereby individual rights in land were compulsorily extinguished so that the land could be reallocated to other individuals and more efficient farming methods applied. Here though, it seems that largely the 'expropriators and the expropriated were the same people.'[31] Chapter 3 of the thesis

[28] Gray and Gray, 'Private Property and Public Propriety', 12.
[29] Blackstone, *Book I, Commentaries on the Laws of England*, 135.
[30] K Davies, *Law of Compulsory Purchase and Compensation* (5th ed, Tolley Publishing Company Ltd, 1994), 4-5.
[31] *ibid.*, 6, notes that inclosures were first permitted only in relation to uncultivated land see e.g. Statute of Merton 1236, c 4; Statute of Westminster II 1285, c 46. These medieval statutes merely delineated in general terms the boundary, which marked off the extent of a manorial lord's rights from those of manorial tenants. Cultivated land was included in the inclosure movement in the seventeenth and eighteenth centuries; at this stage inclosure agreements were made between the various owners involved and registered in the Court of Chancery. Later, private local Acts were used in order to provide an element of compulsion. A public general Act, the Inclosure (Consolidation) Act 1801, enacted the bulk of detailed terms in a standard form providing that the standard provisions should apply to each individual

builds on this notion by exploring another example of private takings – private compulsory purchase powers – and demonstrates that England has a long history of non-consensual transfers of property rights. Rather than considering the justifications and implications of such a large exception to the idea of property as sole and despotic dominion, Blackstone embarks on a 'mass of descriptive doctrine' almost, Carol Rose contends, as if in relief that he has 'ducked the whole messy business.' Readers tend to overlook Blackstone's hesitancy about the foundations of existing distributions of property rights, and more significantly rely on the 'trope of exclusivity' thus giving an 'inappropriately individualistic patina to this most profoundly sociable of human institutions.'[32]

2.5 PROPERTY AND RIGHTS

Waldron argues that there is a tendency for discussions about property rights to fall unthinkingly into the trap of forgetting that the 'language of rights' tends to present 'each individual's claim peremptorily, as though it brooked no denial, no balancing, no compromise' rather than appreciating that individuals live in a 'social environment' where adjustments must be constantly made in order to reflect the expectations of other individuals. This is in other words, the debate as to whether property should be symbolized as land or water. Waldron emphasizes that whilst it is important to place property rights in their social context, this should not be at the expense of individual claims given that they are 'made by each man and woman in regard to leading a life on his or her own terms.' A 'readiness to balance claims of right against one another' therefore should not be 'the same as a willingness to submerge them in the overarching value of community' but instead recognises that if we rely on the 'absoluteness of rights, there is a danger that we may end up with no rights at all, or, at least, no rights embodying the idea of real concern for the individuals whose rights they are.'[33]

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private Act unless otherwise indicated. The Inclosure Act 1845 obviated the need for private Acts altogether by setting up a single statutory body of Inclosure Commissioners for England and Wales.

[32] CM Rose, 'Canons of Property Talk, or, Blackstone's Anxiety'108 Yale L J 601, 602 and 632.

[33] J Waldron, *Liberal Rights: Collected Papers 1981 -1991* (CUP, Cambridge 1993), 26-32.

This idea of property has continued to resonate, with Macpherson describing property as a 'right in the sense of an enforceable claim to some use or benefit of something', which will be enforced by 'society or the state, by custom or convention or law.'[34] However, this too is not a fully rounded description of property.[35] The conception of property as a 'claim' fails to acknowledge explicitly that property rights are intrinsically relative existing in relation to other people, not by reference to the thing itself.[36] As such property is far from being 'a monolithic notion of standard content and invariable intensity'; rather, property 'has come to be viewed as having an almost infinitely divisible and commensurable quality.'[37] The focus on identifying the various sticks or interests within the bundle of rights usefully highlights the importance of paying particular attention to the specific disputes, social context, relationships and values involved in determining the relative property interests of different parties.[38]

2.6 PROPERTY AND SOVEREIGNTY

Despite its potential disintegration, property continues to have a 'peculiar hold on the human imagination.'[39] Property remains 'ultimately an emotive phrase in search of a meaning.'[40] Much of its force may come from the seemingly ineluctable relationship between property and power. In this sense, property can be viewed as a state endorsed 'power-relation' created by the recognition of 'private claims to regulate the access of strangers to the benefits of particular resources.'[41] Assertions of property draw 'a circle around the activities of each private individual or organization' such that within the circle the owner is 'master' and others including the state have the burden of demonstrating that 'something the owner wishes to do should not be done.' This

[34] CB Macpherson, *Property, Mainstream and Critical Positions* (University of Toronto Press, Toronto, 1978), 3.
[35] Seipp, 'The Concept of Property in the Early Common Law', 51-52 who criticizes Macpherson's reading of property in the context of the Year Books as being insufficient in acknowledging that attribution of property brought with it not only many advantages but some disadvantages as well – to have 'the property of goods and animals meant, in many instances, to lose the beneficial use of them in circumstances of attaint, forfeiture, attachment, execution, heriot, mortuary, and the like.
[36] Gray and Gray, 'Private Property and Public Propriety', 12.
[37] *ibid*.
[38] WN Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' 23 Yale LJ 16 (1913), 26 Yale LJ 710 (1917); Grey, 'The Disintegration of Property'; AM Honoré, 'Ownership' in AG Guest (ed) *Oxford Essays in Jurisprudence* (OUP, Oxford, 1961).
[39] LS Underkuffler, 'On Property: An Essay'100 Yale LJ 127 (1990), 128.
[40] Gray, 'Property in Thin Air', 305.
[41] *ibid.*, 294.

conception of property, described by Reich, calls to mind Blackstone's 'despotic dominion' but the focus here is on the existence and effect of dominion rather than the freedom to act in a despotic manner within the 'zone within which the majority has to yield to the owner. [Where] [w]him, caprice, irrationality and "antisocial" activities' are given 'the protection of law.'[42]

The connection between property and power, or sovereignty, has been explored to great effect in Morris Cohen's seminal article on this subject. From the regime where 'land is the principal source of obtaining a livelihood'[43] and 'he who has the legal right over the land receives homage and service from those wish to live on it', to the more obscure relationships within an economy, Cohen describes the 'character of property as sovereign power compelling service and obedience.'[44] Due to the monopolistic control that aggregation of property may produce where 'a few' can 'compel others to work under degrading and brutalizing conditions' it is argued by Cohen that 'we can no longer maintain Montesquieu's view that private property is sacrosanct and that the general government must in no way interfere with or retrench its domain.'[45] Instead, attention should be paid to determining the 'precise lines along which private enterprise must be given free scope' and where instead it 'must be restricted in the interests of the common good.'[46]

2.7 NON-PROPERTY

Regardless of attempts to determine what property is, and what ownership of property entails, there remains no single concept of ownership. Instead our efforts to understand this institution might be better rewarded by considering the interaction between the 'spectrum of ownership interests' and the 'different types of rules to be found in property institutions, as well as indicating the space left for non-ownership items.'[47]

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[42] CA Reich, 'The New Property' 3 Yale L J 733 (1964), 771.
[43] See the comments of Milsom and Baker referred to in the Introduction to this thesis (n. 24-25). Baker noted that '[c]ontrol of land could not, indeed, be readily divorced from power and jurisdiction, from "lordship".'
[44] MR Cohen, 'Property and Sovereignty'13 Cornell LQ 8 (1927).
[45] The control of monopolistic property rights is discussed in chapter 2 of this thesis in relation to the use of compulsory acquisition powers by private entities.
[46] Cohen, 'Property and Sovereignty', 12.
[47] J Harris, 'Is Property a Human Right?' in J McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford, 1999), 67.

This idea of looking to those resources which cannot be 'propertised' by being coupled with 'excludability', or the ability to regulate access by strangers, may get us 'much closer to the core of "property" than does the conventional legal emphasis upon the assignability or enforceability of benefits.'[48] The significance of non-property, as Harris contends, is based on the fundamental coupling in property institutions of the 'twinned, and mutually irreducible, notions of trespassory rules and the ownership spectrum.'[49] Resources may be resistant to trespass claims for physical, legal and/or moral reasons but it is this last category that his most interesting since here the courts recognises 'some serial ranking of legally protected values and interests: claims of "property" may sometimes be overridden by the need to attain or further more highly rated social goals.'[50]

Despite the fluid and often-contentious nature of property, it continues to exert an impressive degree of legal, political, and social influence. The effects and significance of differing definitions of property can be seen in each of these spheres by considering the types of property rights that a particular society deems to be 'worthy' of constitutional protection. As such, the legal definition of property and the extent to which it is protected 'raise immediately the most fundamental problems of political philosophy and social life – the relationship between the individual and his social environment, between the citizen and the State and – in modern society – between the personal and the commercial.'[51] Whilst it is impossible to define this most contextual of terms, the thesis argues that private takings act as a useful barometer and provide valuable opportunities to observe the changing ambit of property protection.

3 ENTRENCHMENT OF PROPERTY RIGHTS

No matter how property rights are conceived, decisions as to whether or not to protect property, and if so how this should be achieved, are often highly contentious. In

[48] Gray, 'Property in Thin Air', 268-294.
[49] Harris, 'Is Property a Human Right?', 67-68.
[50] Gray, 'Property in Thin Air', 281.
[51] AE-S Tay, 'Property and Law in the Society of Mass Production, Mass Consumption and Mass Allocation' in *A Revolution in our Age: The Transformation of Law, Justice and Morals* (Canberra Seminars in the History of Ideas, 1975), 19.

deciding not to refer to protection of property in the Canadian Charter of Rights and Freedoms in 1982 (despite the earlier inclusion of such a right, albeit 'feeble and underemployed', in the Canadian Bill of Rights in 1960), various reasons were given. Namely that: the property concept was too open-ended and imprecise; that a clause might allow landowners to oppose almost any land-use or planning regulation; or might confound land reform policies in relation to aboriginal people; that there were sufficient existing sources of property protection; and that there was too much controversy about whether property should be ranked with 'classic' personal and civil liberties.[52] Calls for property rights to receive explicit written constitutional protection frequently arise at, or in the wake of, times of great social change. The potential social turmoil and need for speedy resolution can compound some of the many problems identified by the Canadians, which face those drafting property clauses.

3.1 VALUES SECURED BY PROPERTY PROTECTION

First, property rights have an 'uneasy place' in the constitutional order given that the 'allure of property' is often argued to be its potential to enhance 'wealth, both personal and social' whereas constitutions are 'concerned classically and fundamentally with *political* ordering.'[53] The inclusion of property among constitutionally protected rights 'seems less central to the political core of constitutional government than the rights most critical to self-governance – primarily voting, speech, and assembly.'[54] Of course, it is equally possible to view property instead as the 'linchpin, the pivot, the central right on which all the others turn, the "guardian of every other right."'[55] The idea that property has an important role to play in securing core political freedoms has arisen both after the American Revolution[56] as well as in the aftermath of the Second World War for example. Many countries supported the inclusion of protection for property

[52] The Canadian example is the subject of detailed discussion in van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation', 110-111.
[53] Rose, 'Property as the Keystone Right?', 329-330.
[54] *ibid*.
[55] *ibid*., 333. For an historical account of property rights being viewed as integral to the protection of other constitutional rights, see JW Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (2nd ed, Bicentennial Essays on the Bill of Rights, OUP, Oxford, 1998).
[56] See for a detailed examination Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*.

rights in the draft ECHR,[57] and viewed this document as a potentially valuable 'obstacle to any political ideology with aspirations to dictatorship' since it prevented expropriation of property being used as 'one of the first steps' by 'totalitarian governments to weaken their political opponents.'[58]

3.2 STRUCTURAL PROBLEMS WITH ENTRENCHMENT

Secondly, constitutional clauses are problematic at a structural level because they are blunt instruments with which to deal with the many dimensions of property. There are no satisfactory definitions of property or possessions since extant law can supply 'neither a perfectly complete nor a perfectly reliable definition of constitutionally protected property.'[59] In attempting to define what property is, and what it is not, fundamental questions are at stake namely, 'what are we trying to accomplish with a property *regime*?' Only then is it possible to 'begin to understand what we include in property and why, and what we leave out and why.'[60] Unfortunately, it seems that these questions are often left unanswered by the courts to which such questions of interpretation normally fall.[61]

Often the court can 'try to avoid making direct judgments of its own' regarding the 'nature or quality of the interest or injury, or the political values at stake in deciding whether such an interest ought to be legally protected' by determining whether '*someone else* had *already* concluded – for whatever reasons, and prompted by

[57] The Norwegian delegate, M. Sundt, gave this as the reason for including the proposal to include protection for property in the draft Convention. The British government opposed the suggestion in the belief that such a clause (especially if it provided for compulsory compensation) would be a barrier to domestic nationalisation proposals. FM McCarthy, 'Deprivation without compensation: the exceptional circumstances of *Jahn* v *Germany*'(2007) EHRLR 295, 303, fn 3. See also T Allen, *Property and the Human Rights Act 1998*, 19-20 and the comment at fn 64 by the Irish representative that he believed: 'that it is a fundamental right necessary for the full development of the human being that he should have the right to own property.'

[58] McCarthy, 'Deprivation without compensation: the exceptional circumstances of *Jahn* v *Germany*', 295-296.

[59] F Michelman, 'Property as a Constitutional Right'38 Wash & Lee L Rev 1097 (1981), 1103.

[60] CM Rose, '"Takings" and the Practices of Property: Property as Wealth, Property as "Propriety"', 49-50.

[61] A well-known domestic example of the difficulty of defining property is the circular definition of property given by Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL), 1247-1248 where he observed that: '[b]efore a right or interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'

whatever values – that it should so count, or should enjoy some relevant kind and degree of legal protection.'[62] Whilst this approach has some advantages in that it allows for an element of discretion and responsiveness that might otherwise be lacking, the most appropriate arena for society to introduce changes based on developing moral knowledge may be the political process rather than courts, given the greater opportunities for civic involvement. However, it is possible to argue that the courts are more than capable of supplying content to the non-specific term *property* and can do so in such a way that 'helps resolve the apparent conflict between popular government and property rights, if they understand property as itself an essential ingredient of "the opportunity to participate … in the political processes by which values are … identified and accommodated."'[63]

3.3 PROTECTION OF EXISTING PROPERTY RIGHTS

Thirdly, property clauses generally protect existing entitlements rather than making moral judgments about the rights or wrongs of distributions.[64] Nor can they protect the vast range of property which falls outside property regimes and which yet may be vitally important, or those categories of property which lose their 'propertiness' as time goes on, for example intellectual property subject to sunset clauses.[65] Despite these issues, the generalised nature of constitutional rights does have its advantages. Sweeping protections of property are broad enough generally in themselves to encompass and accommodate developing 'moral knowledge' which periodically 'requires us to introduce discontinuities' into the types of property claims that society, and we as members of society, recognise.[66] Tideman gives as an example of this the

[62] Michelman, 'Property as a Constitutional Right', 1100.
[63] *ibid.*, 1109.
[64] As such there is a 'kind of cruel logic' according to Rose, 'Property as the Keystone Right?', 343, which means that once 'monopolistic interests have captured a favored place, the only practical routes to the diffusion of economic power may be quite unsettling to a regime of property rights.' See the discussion relating to the drafting of new South African constitutions in van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation', 111, where some were concerned that the 'constitutional entrenchment of property rights would "insulate" existing landholdings against land reform efforts, and so institutionalise or entrench existing imbalances and injustices in the distribution of property.'
[65] Gray, 'Property in Thin Air', 296. See also 256, where attention is drawn to the fact that 'contrary to popular perception, the vast majority of the world's human and economic resources still stand *outside* the threshold of property and therefore remain unregulated by any proprietary regime.' As such, analysing what *prevents* something from being categorised as *property* may perhaps be the nub of the matter.
[66] TN Tideman, 'Takings, Moral Evolution, and Justice' 88 Columbia L Rev 1714 (1988), 1720. In these circumstances, the rectification of property rights based on changing social mores demonstrates a greater

changing attitudes to slavery leading to the recognition that the law should not allow one human being to own another.[67]

Additionally, there are objections not only to how property may be protected, but also to the potentially deleterious effects of constitutional entrenchment. Greg Alexander attributes much of this hostility to two core concerns: first, that protecting property rights in such a manner 'shrinks the scope of democratic deliberation' since they become 'beyond change, modification, or ending through ordinary political processes'; and secondly, that such protection has a fundamentally anti-redistributive effect.'[68] Jennifer Nedelsky's treatment of this area amplifies these core concerns by referring to five objections to the inclusion of a property clause in a bill of rights: (i) that property will be insulated in a regulation-free private enclave; (ii) that the tendency of property to create and support power inequalities will be reinforced; (iii) the entrenchment of property will upset and invert constitutional hierarchies of rights; (iv) litigation about constitutional property will result in wasted resources; (v) important issues will be removed from the public sphere and converted into technical legal debate.[69]

4 COMMON LAW PROPERTY PROTECTION IN ENGLAND

Given the problems with constitutional property protection, it seems unsurprising that the requirement that property should only be taken where this is in the 'public interest' is a relatively recent phenomenon in England. Whilst it is only with the incorporation of Article 1 into domestic law via the HRA 1998 that written protection for property rights has been secured, the common law contains several examples of limitations on the seizure of property.

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concern with equality than Bentham's much vaunted security. Tideman argues that where holders of discredited property accept a cost burden they are encouraged to assess the cost of such 'moral accidents' and investors are put on notice, before investing in property, that they should consider whether society will later find their property claim to be 'morally unfounded'.

[67] Slavery in the United States was officially abolished by the enactment of the Thirteenth Amendment to the Constitution in 1865, which declared that: 'Neither slavery nor involuntary servitude … shall exist within the United States, or any place subject to their jurisdiction. …' In Britain, the slave trade was abolished in 1807 by the Act for the Abolition of the Slave Trade (47 Geo III, Sess 1, c 36) and slavery itself was abolished in 1833 by the Act for the Abolition of Slavery (3 & 4 Will IV, c 73).

[68] GS Alexander, *The Global Debate Over Constitutional Property: Lessons for American Takings Jurisprudence* (University of Chicago Press, Chicago, 2006), 30-34.

[69] van der Walt, 'The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation', 114.

4.1 PROPERTY AND PREROGATIVE POWERS

In England, the power to seize property was traditionally a prerogative power of the monarch – perhaps due to feudal ideas of residual property remaining in the crown. In considering the history of constitutional protection of property in England during the Middle Ages one of the first problems is translating modern notions to a fundamentally different world that knew citizens 'only as privileged residents of a city and that knew the state, in the modern sense, not at all.'[70] In this instance, the past truly is a foreign country where 'they do things differently there.'[71] Even so, there were 'some intimations' of an early notion that property 'ought to receive some legal protection against the king' as shown by clauses contained in Magna Carta such as those stating that no freeman should be disseised of his freeholds, liberties or free customs…except by the law of the land (chapter 29). Similarly the idea of payment for items requisitioned by the King's household was set out (chapters 19 and 21).[72]

One of the crown's prerogatives under the common law also included the power to enter private property in order to erect defences against a public enemy or the sea.[73] The remaining limits on the power to take property in time of war were discussed by the House of Lords in the *De Keyser's* case[74] where it was held that where statute and prerogative overlapped the terms of the statute should apply. Again in the *Burmah Oil* case,[75] which involved the destruction of Burmah Oil's installations during the Second World War in the face of the advancing Japanese army, the House of Lords held that there was a general rule that seizure or destruction of property within the realm under prerogative powers, even in a grave national emergency, could only take place on the footing that compensation was payable. The judgments in the case referred to the notion of broader public needs, perhaps influenced by the civilian works of Grotius and Pufendorf, which their Lordships cited. Lord Reid observed that 'the property of

[70] Donahue Jr., 'The Future of the Concept of Property Predicted from Its Past', 38.
[71] LP Hartley *The Go-Between* (Penguin Books, London, 1997), 5.
[72] Donahue Jr., 'The Future of the Concept of Property Predicted from Its Past', fn 94 refers to one of the justifications for the deposition of Richard II in 1399 being that whilst he was king no man's property was safe. Additionally, during the reign of Henry VIII statutes take private property for public work and Donahue queries whether these are 'more important for their recognition of the eminent domain power of the state or for their provision for compensation to the owner whose property is taken.'
[73] *Case of the Isle of Ely* 10 Co Rep 141 (1572) and *AG v Tomline* 12 Ch D 214 (1879).
[74] [1920] AC 508 (HL).
[75] [1965] AC 75 (HL Sc).

subjects belongs to the state under the right of eminent domain' and as such the state or its representatives 'can use the property of subjects, and even destroy or alienate it, not only in case of direct need … but also for the sake of public advantage.'[76]

Viscount Radcliffe similarly noted that '[i]f the civilian writers are consulted … [t]he sovereign power in a state has the power of eminent domain over the property of subjects, but may exercise its power only for public welfare or advantage or in case of necessity.' In these circumstances, and following Pufendorf, the exercise of such power required 'compensation to the person dispossessed' as '"manifest equity", since it is not fair that one citizen should be required against his will to make a disproportionate sacrifice to the common wealth.'[77]

4.2 EARLY COMPULSORY ACQUISITION STATUTES

Property rights in England were more generally taken under the auspices of statutory rather than prerogative powers. Such statutes might be of general effect, public or private. Early examples of such statutes exist from the time of Henry VIII and include a statute enacted by Parliament to authorise the City of Gloucester to renew conduits conveying water to the city and to dig for springs nearby so that water could be brought into the city for the 'commonwelth utilitie and relief.'[78] The Statute is one of the earliest Acts of its kind and is 'noteworthy for its carefully drawn clauses providing for compensation in case of injury to private owners.'[79] In 1544 the City of London was granted power by Parliament to enter on and appropriate private property after discovering springs at Hampstead that were to supply the city with water; compensation was to be determined by appraisers appointed by the Chancellor.[80]

Robert Callis' *Reading upon the Statute of Sewers* in 1622 referred to a statute aimed at preventing the flooding of lands by the sea or by running streams, and provided specifically for the repair of sea-walls and the removal of obstructions to water

[76] *ibid.*, 108.
[77] *ibid.*, 128, (Viscount Radcliffe).
[78] 33 Hen VIII c 35. WD McNulty, 'The Power of 'Compulsory Purchase' under the Law of England' 21 Yale L J 639 (1912), 643.
[79] FA Mann, 'Outlines of a History of Expropriation' (1959) 75 LQR 189, 194.
[80] 35 Hen VIII c 10. McNulty, 'The Power of "Compulsory Purchase" under the Law of England', 644.

courses.[81] In his reading, Callis cites two instances where a new drain was built by commissioners over private land without an inquest or jury. The first took place in 1601, and the second in 1615. In discussing the fact that 'by the making and erecting of these new defenses the inheritances of private persons are thereby prejudiced whereon they be built' he states that 'things that concern the commonwealth are of greater account in the law than the interest of private persons.' Even so, he observed that such powers should be exercised carefully such that 'where any man's particular interest and inheritance is prejudiced for the commonwealth's cause, that that part of the country be ordered to recompense the same which have good thereby.'[82]

4.3 LANDS CLAUSES CONSOLIDATION ACTS

Despite the long history of the use of compulsory acquisition in England, it was only in the mid-1840s, in response to the volume of private bill legislations coming before Parliament, that a series of Consolidation Acts were enacted. These statutes were generally aimed at: improving the language usually used in private bills; shortening legislation to allow for speedier consideration by Parliament and making it easier to identify a bill's main purpose;[83] ensuring a greater degree of uniformity between clauses from analogous bills thus allowing for greater ease of comprehension, and that judicial decisions against an undertaking could be applied against similar undertakings; ensuring that all the clauses which were meant to be in a bill were in it; and enabling landowners who might be affected by a proposed bill to know what their rights would be without having to wait to see the exact terms of the bill.[84] These Acts focused mainly therefore on sweeping together 'usual' clauses rather than promulgating broad statutory powers in themselves. In relation to property rights, the most important statute was the

[81] 23 Hen VIII c 5.
[82] JL Sackman and others, *Nichols' the Law of Eminent Domain* (Rev. 3rd ed, M Bender, New York 1964-today) §1-76, §1.21[4].
[83] Note the comments by Lord Selborne LC in *Directors Metropolitan District Railway Company v Sharpe* [1880] 5 AC 425 (HL), 430: 'it is of the greatest importance … to remember the principles of the scheme of legislation contained in [the Consolidation Acts]. They were passed … so that, when any particular undertaking afterwards came to be authorized, the special Act might be introduced in a short form … containing only such clauses as were suggested by the circumstances of the particular case.'
[84] FA Sharman, 'The History of the Lands Clauses Consolidation Act 1845 - I' [1986] Statute L Rev 13, 17-18. See also FA Sharman, 'The History of the Lands Clauses Consolidation Act 1845 - II' [1986] Statute L Rev 78, 83.

Lands Clauses Consolidation Act 1845[85] ('the 1845 Act') which for the first time in British legal history introduced a statutory procedure for compulsory purchase.

4.4 MODERN COMPULSORY PURCHASE POWERS

Today, compulsory purchase may occur in two different ways. First, there may be a public general Act – authorising the use of compulsory purchase powers to take land for a particular purpose.[86] After this a Compulsory Purchase Order ('CPO') will be made which specifies the land required and which can be confirmed only by the relevant government minister. The making and confirmation of the CPO will normally be governed by the terms of the Acquisition of Land Act 1981. In the event that there are objections to the CPO that are not withdrawn, a public inquiry will be held. The second main method of compulsory purchase involves the use of powers included in the Transport and Works Act 1992. Under this process, the Secretary of State for Transport can make a works order, and any entity that has the power to promote a Bill in Parliament such as an individual, company or statutory body may also request that such an order should be made. A hearing or public inquiry will then be held in order to determine the merits of the request.

Traditionally, before the incorporation of Article 1, it could be argued that the lawyer in England had 'no material interest … as to the source and extent of this power [of compulsory acquisition], for the absolutism of Parliament covers both the power of Eminent Domain, and the obligation to compensate.'[87] As Dicey observed 'Parliament … habitually interferes, for the public advantage, with private rights' to such an extent that interferences with property rights were 'so much a matter of course as hardly to excite remark, and few persons reflect what a sign this interference is of the supremacy

[85] 8 Vict c 18. The Preamble to the 1845 Act stated that it was: 'expedient to comprise in One general Act, sundry Provisions usually introduced into Acts of Parliament relative to the Acquisition of Lands required for Undertakings or Works of a public Nature, and to the Compensation to be made for the same, and that as well for the Purpose of avoiding the Necessity of repeating such Provisions in each of the several Acts relating to such Undertakings as for ensuring greater Uniformity in the Provisions themselves.'

[86] Examples include the Town and Country Planning Act 1990, s. 226 (as amended by section 99 of the Planning and Compulsory Purchase Act 2004); Regional Development Agencies Act 1998, s. 20; and the Leasehold Reform, Housing and Urban Development Act 1993, s. 162(1).

[87] McNulty, 'The Power of "Compulsory Purchase" under the Law of England', 640.

of Parliament.'[88] As such the 'question is never asked in England whether or not the property taken is for a public use, or if compensation is provided.'[89] This view is clearly exaggerated given that the courts have proved resistant to arguments that Parliament did not intend to provide compensation without being provided with explicit proof.[90]

Nevertheless, there is little doubt that the effect of Parliamentary sovereignty in this area has been to focus attention on practicalities rather than theoretical justifications for takings. There appear to be surprisingly few references to the notion that there should be an element of public interest involved, or what this might entail, before compulsory acquisition should take place.[91] One such comment is that famously made by Lord Denning in the *Prest case* where he stated that, in his opinion, Parliament only grants a compulsory acquisition power 'or should only grant it, when it is necessary in the public interest.' In cases of doubt where the 'scales are evenly balanced' the 'decision … should come down against compulsory acquisition.' He added that in his opinion it was 'a principle of our constitutional law' that a citizen should not be deprived of his land 'against his will, unless it is expressly authorised by Parliament and the public interest decisively so demands.'[92]

5 'PUBLIC INTEREST' AND ARTICLE 1

The introduction of Article 1 may initially appear to have ushered in significant changes to the legal landscape in relation to the protection of property rights in England. [93] In

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[88] AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, Macmillan, London, 1961), 1.

[89] McNulty, 'The Power of "Compulsory Purchase" under the Law of England', 643.

[90] *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 (PC), 359, (Lord Warrington): 'a statute should not be held to take away private rights of property without compensation unless the intention to dos so is expressed in clear and unambiguous terms.' *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508 (HL), 592, (Lord Reid): 'I entirely accept the principle [espoused in *Colonial Sugar*]. It flows from the fact that Parliament seldom intends to do that and therefore before attributing such an intention to Parliament we should be sure that that was really intended … if there is reasonable doubt, the subject should be given the benefit of the doubt.'

[91] *Tomkins v Commissioner for the New Towns* (1989) P & CR 57 (CA) (Bingham LJ): '[w]hen land is compulsorily purchased the coercive power of the state is used to deprive a citizen of his property against his will … [this] is justified by the public intention to develop the land in the wider interests of the community of which the citizen is part.'

[92] [1983] 17 EGLR (CA), 18.

[93] The scope and impact of Article 1 on English law is considered in Allen, *Property and the Human Rights Act 1998*, see also Allen, 'The Human Rights Act (UK) and Property Law'.

fact, the breadth of the provision and the deference accorded to State decisions is such that it could be argued that little extra protection of significance has been provided.

Whilst the HRA 1998 does not give English courts the right to strike down non-Convention compliant legislation, they are required to consider the terms of the Convention when considering statutes. In addition, the courts have regard to government policy in this area as set out in the most recent government circular entitled *Compulsory Purchase and the Crichel Down Rules*.[94] The guidance provided 'indicates the factors to which a confirming Minister 'may have regard in deciding whether or not to confirm an order.'[95] Most importantly, the guidance states that regard should be had to the provisions of Article 1, such that a CPO 'should only be made where there is a compelling case in the public interest' such that the purposes for which the CPO is to be made 'sufficiently justify interfering with the human rights of those with an interest in the land affected.'[96] The domestic courts are generally deferential to 'reasonable'[97] governmental decisions in this area, particularly given the complex social and economic matrix frequently involved in planning decisions.[98]

5.1 STRUCTURE OF ARTICLE 1

This concern with balancing individual interests with those of the wider community clearly echoes the Strasbourg jurisprudence on Article 1. The ECtHR has repeatedly explained that the article comprises three distinct, but not unconnected, rules.[99] The first rule, which is of a general nature, states the principle of peaceful enjoyment of existing

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[94] ODPM Circular 06/2004, *Compulsory Purchase and the Crichel Down Rules* (2004) ('Crichel Down Circular').

[95] The policy set out in the Crichel Down Circular, and previous incarnations, have been referred to in several court cases. *Tesco Stores Ltd v Secretary of State for the Environment* (2000) 80 P & CR 427 (QBD), 429 (Sullivan J): 'I am satisfied that the … policy as set out in Circular 14 of 94 that a Compulsory Purchase Order should not be made unless there is a "compelling case in the public interest", fairly reflects … [the] necessary element of balance.'

[96] Crichel Down Circular, [16]-[17].

[97] In the sense that the exercise of decision-making remains within the 'four corners' of the relevant statutory discretion. Only if the decision is 'so unreasonable that no reasonable authority could ever have come to it' can the courts then interfere according to Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA).

[98] This issue is discussed below in chapter 2 of the thesis.

[99] *Sporrong and Lönnroth v Sweden* Series A No 52 (1983), 5 EHRR 35, [61]. See also *Holy Monasteries v Greece* Series A, No 301-A, (1995) 20 EHRR 1; *Carbonara and Ventura v Italy* (App 24638/94), Judgment of 30 May 2000; *Allard v Sweden* (App 35179/97), (2004) 39 EHRR 321.

property interests.[100] The second rule allows for the deprivation of possessions subject to certain conditions, most notably where such a deprivation is 'in the public interest'.[101] The third rule recognises the right of States to control the use of property, in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose.[102] It seems that the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment and are to be construed in the light of the overarching general principle enunciated in the first rule.[103]

5.2 POSSESSIONS AND ARTICLE 1

As with all entrenched property rights, the breadth of the protection afforded to individuals depends on how the associated legal system defines 'property'. Both the Commission and ECtHR have defined 'possessions' in broad terms with an autonomous meaning which is 'certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights" and thus as "possessions", for the purposes of this provision.'[104] More recently the Grand Chamber concluded that the terms of Article 1 were wide enough to have imposed a *positive* obligation on Turkey, which meant that the state should have taken practical

[100] The ECtHR's first judgment to consider Article 1 concerned Belgian laws on illegitimacy. In *Marckx v Belgium* Series A, No 31, the Court stated at [50] that the Article 'applies only to a person's existing possessions and gives no guarantee of a right to acquire possessions.'

[101] 'Deprivation' appears to require the extinction of the owner's legal rights. The Court will 'look behind the appearances and investigate the realities of the situation complained of' in order to determine whether a *'de facto* expropriation' has taken place according to *Sporrong and Lönnroth v Sweden.* One of the rare examples of the Court finding a *de facto* deprivation is the case of *Papamichalopoulos and others v Greece* Series A, No 260-B, which involved the Greek Navy benefiting from land which was used as a naval base and holiday resort for officers whilst leaving the applicants as the lawful possessors of the land.

[102] 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

[103] *Jahn and others v Germany* (Apps 46720/99, 72203/01 and 72552/01), Judgment of the Grand Chamber of 30 June 2005, [49].

[104] *Gasus Dosier-und Fördertechnik GmbH v Netherlands* Series A, No 306-B, (1995) 20 EHRR 403 [53]. For further discussion, see T Allen, 'The Autonomous Meaning of "Possessions" under the European Convention on Human Rights', in E Cooke (ed) *Modern Studies in Property Law: Volume II* (Hart Publishing, Oxford, 2003).

steps to avoid the destruction of property owned by individuals living in unsafe conditions on a rubbish tip.[105]

5.3 FAIR BALANCE AND COMPENSATION

In determining whether or not a deprivation of property falls foul of Article 1, the Court must assess whether three conditions have been met: (i) that the measure is in accordance with conditions provided for by national law;[106] (ii) that the general principles of international law have been respected; and (iii) that the deprivation must be in the public interest. This third element requires a balancing of the public interest against individual rights and the ECtHR will look to see that the means employed are proportionate to the aim sought. Apparently, the Court will not find the requisite balance where a person has had to bear 'an individual and excessive burden' and often this determination will be influenced by whether or not compensation is provided.

Failure to pay 'an amount reasonably related to … [the property's] value' will 'normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances.' Even so, Article 1 does not guarantee full compensation since there may be 'legitimate objectives of "public interest"' that call for 'less than reimbursement of the full market value.'[107] The ECtHR has recently noted that 'there is a direct link between the importance or compelling nature of the public interest pursued and the compensation which should be provided' in order to comply with the guarantees under Article 1. As such, a 'sliding scale should be applied in this respect, balancing the scope and degree of importance of the public interest against the nature and amount of compensation provided to the persons concerned.'[108]

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[105] *Öneryildiz v Turkey* (App 48939/99), Judgment of the Grand Chamber of 30 November 2004, (2005) 41 EHRR 325.

[106] *James v United Kingdom*, [67] noted that 'The Court has consistently held that the terms "law" or "lawful" in the Convention "[do] not merely refer back to domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law.'

[107] *Holy Monasteries v Greece*, [71]. See also *James v United Kingdom*.

[108] *Urbárska obec Trenèianske Biskupice v Slovakia* (2009) 48 EHRR 49, [126].

5.4 PUBLIC INTEREST

However, the 'public interest' requirement does not act as a high threshold. It is perfectly acceptable for a deprivation of property to be in the public interest even if the community at large gains no direct benefit from the deprivation.[109] The ECtHR is also highly sensitive to the need, as it sees it, to provide States with a wide area of discretion such that the Court 'finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies'[110] should be 'a wide one' and will therefore 'respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation.'[111] As such there is 'there is almost a presumption' in property cases 'that a national measure is in the public interest.'[112]

It is perhaps more telling to ask when a deprivation will *not* be held to be in the 'public interest' given the great deference paid by the ECtHR to legislative decisions. One possible exception, which might logically be thought to be on the outer edges of acceptability, is the direct forcible transfer of property interests from one individual or entity to another, or private takings. As will be discussed elsewhere in this dissertation, such takings are frequently condemned for a variety of reasons. Strasbourg has considered instances of such takings, and whilst admitting that 'a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest"' concluded that 'depending upon the circumstances' such a transfer may 'constitute a legitimate means for promoting the public interest.'[113] These issues are discussed further in chapter 2 of the thesis.

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[109] *Allard v Sweden*, [52] where the court accepted that maintaining a functioning system of co-ownership could further the public interest although in the particular instance the law went beyond what was necessary to secure this object.

[110] Recent examples include the Bug River restitution cases, which involve compensation claims from applicants affected by the redrawing of Poland's eastern border after WWII. Some 80,000 people were affected and the Court faced 167 applications relating to the same set of circumstances. The Grand Chamber in *Broniowski v Poland* (App 31443/96), Judgment of the Grand Chamber of 22 June 2004, (2005) 40 EHRR 495, [116] referred to the notion of 'public interest' as being 'necessarily extensive' especially in the face of 'such fundamental changes' as 'the transition from a totalitarian regime to democratic form of government' and the ensuing 'reform of the State's political, legal and economic structure'.

[111] *James v United Kingdom*, [46].

[112] C Ovey and R White *Jacobs and White, The European Convention on Human Rights* (4th ed, OUP, Oxford 2006), 362.

[113] *James v United Kingdom*, [40].

It these circumstances the 'public interest' fetter acts as no real limitation at all given that it will nearly always be possible to find some type of broader general public benefit accruing from even suspect private takings. The difficulties of defining 'public interest' such that it provides some protection for property rights whilst also remaining workable have also vexed American courts for centuries.

6 'PUBLIC USE' IN AMERICA: THE FIFTH AMENDMENT

As noted in the Introduction to this thesis, the scope of the Takings Clause contained in the Fifth Amendment is not immediately obvious. Over time however, it has been accepted that the clause acts as a limitation on taking rather than going to the matter of compensation.[114] The public use limitation has a fragmented history. Before the enactment of the Fifth Amendment in 1791, six of the first 13 State Constitutions including Delaware, Massachusetts, New Hampshire, Pennsylvania, Vermont and Virginia contained 'public use' limitations on takings.[115] The first case to consider an exercise of the US Federal government's power of eminent domain was the case of *Kohl v United States* in 1875.[116] The case involved the federal government's use of eminent domain to build federal courts and post offices.

Whilst the time lag between the enactment of the Fifth Amendment in 1791 and the *Kohl* case in 1875 appears considerable, this may be because there was little need for government to take privately owned land until the growing industrialisation of the 19th century. Before then, there was likely to have been large amounts of unclaimed land, and governmental activities would have been limited.[117] It was not until the adoption of the Fourteenth Amendment in 1868 (some 77 years after the passage of the Fifth

[114] See WM Treanor, 'The Original Understanding of the Takings Clause and the Political Process' 95 Colum L Rev 782 (1995), 785, fn 15, that the absence of compensation meshes with the prevailing republican ideology at the time of the Founding Fathers, which required that individual interests, including property rights, should be subordinate to the public good. See also NH Cogan (ed), *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* (OUP, Oxford, 1997), 372-374.
[115] See Sales, 'Classic Republicanism and the Fifth Amendment's "Public Use" Requirement', 367-369 and fn 137. Sales also notes at 360-361 that, other than Vermont and Massachusetts' State constitutions, no States required compensation to be paid by the State when seizing property.
[116] 91 US 367 (1876) (US Supreme Court).
[117] Anon, 'The Public Use Limitation on Eminent Domain: An Advance Requiem'58 Yale L J 559, 600.

Amendment itself) that the limitations of the Takings Clause and certain other protections found in the Bill of Rights could be relied on against the States.[118] Even after the passage of the Fourteenth Amendment, it was not until 1896 that the Takings Clause was applied judicially to the States under the Fourteenth Amendment in the case of *Missouri Pacific Railway v Nebraska*.[119]

7 THE BATTLE BETWEEN 'PUBLIC USE' AND 'PUBLIC BENEFIT'

American takings case law is split by a continuing tension between two differing interpretations of the meaning of 'public use.'[120] The 'actual-use' theory interprets public use narrowly, allowing property to be taken where the government, or the public, will *use* or occupy the property.[121] The more expansive 'public benefit' reading of the clause equates public use with broader notions of public benefit.[122] The courts in America have repeatedly noted that there is no satisfactory 'single clear-cut rule' to

[118] The Supreme Court has incorporated all of the procedural protections of the Bill of Rights against the States, i.e. the Fourth, Fifth, Sixth and Eighth Amendments, except the Sixth Amendment right to indictment by a grand jury, the Seventh Amendment right to civil jury trial, and the Eighth Amendment protection against excessive bail. The Supreme Court has not applied to the States the Second Amendment right to bear arms and the Third Amendment right not to have soldiers quartered in one's home.

[119] 164 US 403 (1896) (US Supreme Court), 417, (Justice Gray): 'The taking by a State of the private property of one person ... for the private use of another, is not due process of law.' Similarly, *Fallbrook Irrigation Dist v Bradley* 164 US 112 (1896) (US Supreme Court), followed a year later in *Chicago, Burlington & Quincy Railroad Co v Chicago* 166 US 226 (1897) (US Supreme Court).

[120] Sales, 'Classic Republicanism and the Fifth Amendment's "Public Use" Requirement', 355, notes that this tension is exacerbated by the ambivalent stance Republican theory exhibited towards private property. Private property was necessary for participation in civic affairs since those who held such property were deemed to be independent enough of the influence of others to recognise the public good, but property was also subject to the demands of that public good.

[121] *Healy Lumber Co v Morris* 74 P 681 (1903) (Supreme Court of Washington), 504, (Justice Dunbar): 'this is the announcement of a dangerous doctrine, tending to encroach upon private rights … and to render such rights as uncertain and varying as are the interest of different localities and opinions of different judges.' *Georgia Dept of Transport v Jasper County* 355 SC 631 (2003) (Supreme Court of South Carolina), 638: 'We take a restrictive view of the power of eminent domain because it is in derogation of the right to acquire, possess and defend property. It is well-settled that the power of eminent domain cannot be used to accomplish a project simply because it will benefit the public … The public use implies possession, occupation, and enjoyment of the land by the public at large or by public agencies.' *Ottofaro v City of Hampton* 265 Va 26 (2003) (Supreme Court of Virginia), 31, (Justice Leroy R Hassell Sr): 'We have stated that "the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies."'

[122] *Fallbrook Irrigation Dist v Bradley*; *Rindge Co v Los Angeles* 262 US 700 (1923) (US Supreme Court); *Vitucci v New York School Construction Authority* 289 AD 2d 479 (2001), 481: 'If a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain.'

assist in deciding whether property is to be taken for a public use or not.[123] Moreover, even if it were possible to devise such a test the courts have warned that it would 'probably not be prudent'[124] to do so due to society's changing nature and needs.[125] Whilst it might well be unwise to essay a precise rule, it is a tempting prospect given the state of chaos that reigns in this area.[126]

The State courts have taken divergent views on which interpretation of public use to follow at different periods of history, and the particular circumstances of the State itself. State constitutions are free to enact stronger protections for property rights than those contained in the Fifth Amendment. Many State constitutions contain greater limitations on the State's power to take private property. Some insist that the compensation be paid in money and in advance of the taking, others that compensation is owed when property is 'damaged' as well as taken. Stoebuck notes that twenty-six of the fifty American States have provisions in their State constitutions allowing for compensation for 'damaged' property as well as 'takings.'[127] The inspiration for these clauses apparently comes from an 1870 amendment to the Illinois constitution intended to liberalise the circumstances in which compensation for loss of certain property rights, particularly street access, would be paid. [128]

[123] *Dayton Gold & Silver Mining Co v Seawell* 11 Nev 394 (1876), 400-401: 'The authorities are so diverse and conflicting, that no matter which road the court may take it will be sustained, and opposed, by about an equal number of the decided cases. In this dilemma, the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it.'

[124] *Prince George's County v Collington Crossroads Inc*, 275 Md 171, 339 A2d 278, 284.

[125] *New York City Housing Authority v Muller* (Court of Appeals New York), 1 NE 2d 153, 155: 'Over many years and in a multitude of cases the courts have vainly attempted to define comprehensively the concept of a public use… to formulate anything ultimate, even though it were possible would, in an inevitably changing world, be unwise if not futile.'

[126] *Hairston v Danville & Western Railway* 208 US 598 (1908) (US Supreme Court), 606, (Justice Moody): 'when we come to inquire what are public uses for which the right of compulsory taking may be employed … we find no agreement, either in reasoning or conclusion.'

[127] Stoebuck, 'A General Theory of Eminent Domain', 555, fn 8 notes that the States possessing such provisions are spread geographically across America, and a few proscribe the use of offsetting benefits in calculating compensation.

[128] See the discussion relating to the Illinois 1870 constitution in *Chicago v Taylor* 125 US 161 (1888) (US Supreme Court), 165.

7.1 EXPANSIVE PUBLIC USE TEST

The broad interpretation of public use as public benefit appears to accord best with an original understanding of the Takings Clause itself.[129] Whilst one might expect early American law with its republican concern with the pursuit of 'society's common good,'[130] to have forbidden takings of private property that did not amount to use by the public, but allowed sectors of society or certain individuals to benefit, this was not the case. This apparent paradox has been explained by Sales arguing that republican society appears to have believed that the public shared the 'same core interests' and that therefore a 'benefit to one' could be thought of as a 'benefit to all.' Thus, the routine authorisation of takings around the first half of the nineteenth century benefiting a 'discrete segment' of the public at the expense of their neighbours can be seen as still compatible with republican ideals.[131] In the Supreme Court's most recent case on this point, *Kelo v New London*, Justice Thomas' dissent also looked to an originalist reading of the Takings Clause and came to the opposite conclusion. He argued, contrary to the last fifty years' worth of Supreme Court public use cases, that the court should return to 'the original meaning' of the clause; he concluded that the government only has the power to take property if it actually uses or gives the public a legal right to use the property.[132]

7.2 THE MILL ACTS

The difficulties in drawing a meaningful boundary between the public and private in the context of constitutional property protection quickly became apparent in relation to the

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[129] BF Melton Jr, 'Eminent Domain, "Public Use," and the Conundrum of Original Intent' 36 Nat Resources J 59 (1996), 85.

[130] Sales, 'Classic Republicanism and the Fifth Amendment's "Public Use" Requirement', 350, fn 55, observes that the etymology of the word 'republic' suggests that the aim of a republican government is to advance the res publica, or common good, and the reference to Pennsylvania's 1776 constitution (Art V) describing the object of political action as being 'instituted for the common benefit, protection and security of the people, nation or community; and not for the particular emolument or advantage of any single man, family, or sett of men [sic], who are a part only of that community.'

[131] *ibid*., 342-343. See also the seminal work by MJ Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, Cambridge, 1977), 31-53, in the chapter headed 'The Transformation in the Conception of Property.' Likewise, Melton Jr, 'Eminent Domain, "Public Use," and the Conundrum of Original Intent'.

[132] 545 US 469 (2005) (US Supreme Court). Justice Stevens, for the majority, read some of the same history differently.

public benefit approach, especially in the context of the Mill Acts. These pieces of legislation effectively allowed riparian landowners to construct dams, and potentially flood neighbouring land, or construct structures on their riparian neighbour's banks, in order to create sufficient reserves of water to power mills. The first Mill Act was enacted by Virginia in 1667 and ten colonies followed suit in adopting such legislation.[133] The Mill Acts initially satisfied the actual use rather than public benefit test; they performed a common-carrier function and were open to 'use' by the public with millers being under an obligation to grind the grain of all citizens.[134] In later years however the Acts benefited industries with no such duties to the public. At this stage the operation of such mills had to be justified by recourse to a different approach to the public use limitation. In the event that all members of the public could be seen to share a core set of republican beliefs, takings advancing the interests of one citizen, rather than the public at large, could be regarded as satisfying the public use clause by equating 'use' with 'benefit.'

Such an approach was not far-fetched. The preambles to the Mill Acts frequently referred, as did Maryland's Mill Act to a hope that the legislation would lead to the 'Increase of our Trade and Navigation [and] the Peopling of this Province.' However, some courts began to have misgivings about holding that takings of land by private companies, for totally private uses, under the Mill Acts were constitutional. These reservations became particularly acute because it became steadily harder, as Epstein notes, once the public benefit dissipated to know which types of takings would be for private uses.[135] Some States went so far as to repeal their Mill Acts on the grounds that they interfered overly with private interests. The Supreme Court attempted to avoid the question of how the Mill Acts could be reconciled with the Takings Clause by unconvincingly treating the Acts as regulations rather than takings. The obvious

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[133] *Head v Amoskeag Manufacturing Co* 113 US 9 (1885) (US Supreme Court). Sales, 'Classic Republicanism and the Fifth Amendment's "Public Use" Requirement', 369, fn 149 – Connecticut, Delaware, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia.

[134] An exception was Maryland's 1719 Mill Act, which permitted riparian landowners to build privately-operated iron mills.

[135] P Nichols, 'The Meaning of Public Use in the Law of Eminent Domain' 20 BUL Rev 615 (1940), 619; RA Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, Cambridge, 1985), 172, fn 25, refers to the case of *Miller v Troost* 14 Minn 365 (1869), 369: 'To say the least, such a law goes to the extreme limit of legislative power, and had not similar laws, in States having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one.'

difficulty with an expansive reading of the public use doctrine is that it becomes impossible to place meaningful limits on the exercise of the power.[136] Every action of government and business could be said to produce some wider public benefit and therefore act as justification for the taking of property rights, with the consequence that the 'property of the citizen would never be safe from invasion.'[137]

The expansive treatment accorded to companies under the Mill Acts led to a reaction and a move towards interpreting the public use doctrine narrowly, as has happened again more recently in the wake of broad interpretations of the constitutionality of modern regeneration schemes.[138] At its strictest, the actual use theory required all members of the public to have equal access to the property taken,[139] as in Senator Tracy's concurrence in the case of *Bloodgood v Mohawk & Hudson Rail-Road Co*.[140] in 1837 where he equated public use with 'public possession and occupation.'[141] The difficulties inherent in the test are clear – what proportion of the public must be admitted to the property for the taking to satisfy the public use clause? Does it matter if the 'public' constitutes only a section of society? Or, if those who are admitted need to pay before they are admitted?[142]

Additionally, the narrow test was of little help in reducing the likelihood of 'frivolous' takings of private property; were 'public occupation and enjoyment' of the land to be the applicable test, this would still allow takings for the purpose of building hotels and theatres. As Chief Justice Hawley judge noted in 1876 in the *Dayton Gold* case, taking

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[136] Anon, 'The Public Use Limitation on Eminent Domain: An Advance Requiem', 601: 'where the desire was strong to … increase industrial development, the courts found … the natural law concept of 'public good' to be of wondrous elasticity.' *ibid.*, at fn 14 see the reference to *Potlatch Lumber Co v Peterson* 12 Idaho 769 (1906), 785: 'it is enough if the taking tends to enlarge resources, increase the industrial energies and promote the productive power of any considerable part of the inhabitants of a section of the State, or leads to the growth of towns and the creation of new channels for the employment of private capital and labor, as such results indirectly contribute to the general prosperity of the whole community.'

[137] *Chesapeake Stone Co v Moreland* 104 SW 762 (Ky 1907), 765.

[138] Notably following *Kelo v New London*, discussed below.

[139] Sales, 'Classic Republicanism and the Fifth Amendment's "Public Use" Requirement', 346.

[140] 18 Wend 9 (NY 1837) where Senator Tracy disagreed with the majority on the first point in the case as to whether a legislature could delegate their eminent domain power to a railroad company, believing that 'public use' meant possession by a government agency. See also *In re Albany St* 11 Wend 149 (1834) (NY Sup Ct) where authorising the appropriation of private property for public use was held to 'impliedly' declare that 'for any other use, private property shall not be taken from one and applied to the private use of another.'

[141] *Bloodgood v Mohawk & Hudson Rail-Road Co*, 60.

[142] Anon, 'The Public Use Limitation on Eminent Domain: An Advance Requiem', 603-604.

land to build such amenities could be equated to taking land for railroads, an acknowledged public purpose, since 'the public have the same right, upon payment of a fixed compensation' to 'seek rest and refreshment' at such places 'as they have to travel upon a railroad.'[143] The issue of where to draw the public-private boundary remains a live issue in State jurisprudence today, and examples of the judicial rhetoric employed are discussed further in chapter 2 of the thesis.

8 THE US SUPREME COURT AND 'PUBLIC USE'

The Supreme Court's decisions over the past fifty years have arguably whittled away the barriers to the exercise of eminent domain powers by the government,[144] reducing the doctrine of public use to little more than a nominal requirement at best, and a 'dead letter'[145] at worst. However, there is perhaps still some way to go before according the public use doctrine 'permanent interment in the digests,' as confidently asserted in the 1950s.[146] The Supreme Court has been remarkably consistent over the past fifty years in applying a broad and expansive interpretation of the public use doctrine.[147] The seminal case is that of *Berman*.[148] This involved condemning a flourishing department store because it happened to be situated in an area of Washington D.C. condemned by a redevelopment agency in order to eliminate blight. Justice Douglas noted that in considering a slum clearance project the court was dealing with 'what has traditionally been known as the police power' and famously observed that: 'If those who govern the

[143] *Dayton Gold and Silver Mining Co v Seawell*, 410.
[144] *Berman v Parker* 348 US 26 (1954) (US Supreme Court); *Hawaii Housing Authority v Midkiff*; *Kelo v New London*.
[145] Merrill, 'The Economics of Public Use'.
[146] Anon, 'The Public Use Limitation on Eminent Domain: An Advance Requiem'. Whilst the most recent federal Supreme Court decision in this area (*Kelo*) interpreted the public use test broadly, the court was closely split on the result with four of the justices dissenting strongly from the majority opinion.
[147] *Mt Vernon-Woodberry Cotton Duck Co v Alabama Interstate Power Co* 240 US 30 (1916) (US Supreme Court), 32, where Justice Holmes rejected the use by the public test: 'The inadequacy of the use by the general public as a universal test is established.' See most recently the case of *Kelo v New London* and Justice Stevens' opinion for the majority.
[148] *Berman v Parker*, 28. The District of Columbia Redevelopment Act 1945, s. 2 made a legislative decision that: 'it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating all such injurious conditions by employing all means necessary and appropriate for the purpose.'

District of Columbia decide that the Nation's capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.'[149]

The decision in *Berman* was followed by the Supreme Court with a further expansive interpretation of the public use limitation in the case of *Midkiff v Hawaii Housing Authority*, which was itself cited in the ECtHR case of *James v UK*. The case of *Midkiff* involved an attempt to mitigate an historical land oligopoly existing on Hawaii, which had led to some 72 private landowners owning 47% of the State's land.[150] The legislature's response to the oligopoly was to introduce a land condemnation scheme, the Land Reform Act 1967, transferring title from lessors to lessees. The appellants challenged the Act and asked for a declaration that it was unconstitutional. Justice O'Connor confirmed that the Supreme Court had 'long ago rejected any literal requirement' that property should be 'put into use for the general public.'[151] The Land Reform Act's attempts to attack 'certain perceived evils of concentrated property ownership' in Hawaii were a legitimate public purpose according the Supreme Court.[152]

Justice O'Connor's equation of public use with public purpose in *Midkiff* caused her great difficulties in the latest Supreme Court decision, *Kelo v City of New London*, to consider the meaning of the public use limitation. The case involved the condemnation of lands adjacent to a new pharmaceutical development in the economically depressed Connecticut city of New London, in the hope that the development would act as a catalyst for wider economic benefits. The majority of the Supreme Court, building on *Berman* and *Midkiff*, held that a taking for economic development was a sufficiently public purpose to be constitutionally sound.[153] Justice Stevens for the majority noted that the Court had held the concept of 'public welfare' as being 'broad and inclusive' in *Berman* and *Midkiff*. In addition, the majority stressed the 'great respect' owed to State legislatures and courts in discerning local needs. Justice Stevens noted that there was nothing to stop States from placing further restrictions on the exercise of their eminent

[149] *ibid.*, 33.
[150] *ibid*., 232. On the most densely occupied island of Oahu some 22 landowners owned 72.5 per cent. of fee simple titles.
[151] *ibid*., 244.
[152] *ibid*., 245.
[153] The impact of the *Kelo* decision is discussed in detail in RP Malloy (ed), *Private Property, Community Development, and Eminent Domain* (Law, Property and Society, Ashgate, Aldershot, 2008).

domain powers. The case was closely split with Justice O'Connor and Justice Thomas both writing forceful dissents.[154]

9 CONCLUSION

The contextual nature of property is 'too variegated to permit the identification of a monolithic conception'.[155] The decision whether to entrench property rights, however these are defined, is thus a particularly complex matter. Both American law and English law, influenced as it now is by Article 1, have battled over how best to draft and interpret constitutional limitations on the exercise of powers of expropriation. In considering the scope and ambit of the 'public interest' and 'public use' limitations it is clear that these phrases are often so widely interpreted as to be little more than an illusory fetter on the taking of property rights. In considering whether or not there are any real outer-bounds to these restrictions it appears that even highly suspect categories of takings, private takings, are accepted (if not fully approved of) by the courts.

Analysis of the public interest and public use clauses, and particularly private takings, allows for a more transparent appreciation of the relative significance of various property uses, and the values allegedly served by protecting one property interest over and above another. The next chapter examines the rhetoric against private takings in greater detail and analyses why they have traditionally been viewed with greater suspicion than public takings. The thesis argues that concerns have been shaped by two forces: anxiety that private takings have an inherent potential for bias and abuse; and secondly, that they offend against deeper, often conflicting, notions of property in land. As a result, such takings are viewed as having a peculiar ability to render property rights excessively vulnerable.

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[154] Justice Stevens delivered the opinion of the Court, in which Kennedy, Souter, Ginsburg and Breyer JJ joined. Justice Kennedy also filed a concurring opinion. Justice O'Connor filed a dissenting opinion in which Rehnquist CJ, Scalia, and Thomas JJ joined. Justice Thomas also filed a dissenting opinion. The case is discussed in chapter 2 of the thesis.

[155] C Rotherham, 'Property and Unjust Enrichment: A Misunderstood Relationship' in A Hudson, *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, London, 2004), 200.

CHAPTER 2
OBJECTIONS TO PRIVATE TAKINGS

> *She [Susette Kelo] is living in this house ... and she does not want to move. She said I'll move if it's being taken for a public use, but by God, you're just giving it to some other private individual because that individual is going to pay more taxes.*[1]

1 INTRODUCTION

Few people are pleased to hear that their property will be compulsorily acquired. Whilst this is understandable in a property regime that values voluntary transfers, the reactions of dispossessed owners appear to differ according to the identity of the beneficiary involved in the taking. Where property is taken by the State for its own use, or the provision of infrastructure, the former owner is likely to accept this, albeit grudgingly. However, in the event that property is compulsorily reallocated between individuals, the deprived owner's response often appears to be very different, even if the taking occurred against a backdrop of some alleged wider benefit. Here, the primary reaction is more usually one of disbelief or outrage. A typical response of this kind may be found in the epigraph to this chapter, where Justice Scalia explicitly stated that Susette Kelo *would* have moved from her house for a public benefit, but was resistant to, and irate about, the planned transfer to another individual.

2 THE SQUEAK OF THE LEMON PIPS

It may be tempting to dismiss these complaints about beneficiary-identity in private takings as merely the result of sour grapes. First, human nature is such that it is almost to be expected that an ousted owner might feel particularly aggrieved at suffering the

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[1] Justice Scalia, transcript of the oral hearing in *Kelo v New London* 545 US 469 (2005) (US Supreme Court), at http://supremecourtus.gov/oral_arguments/argument_transcripts/04-108.pdf, 51 (last accessed 15 August 2009).

loss of their property whilst seeing other individuals benefiting. Secondly, it seems only natural that owners who have enjoyed a privileged position for many years, and find themselves facing dispossession due to social reform policies for example, should try to raise vociferous and possibly tactical legal challenges to redistributions, as in *Hawaii Housing Authority v Midkiff* and *James v United Kingdom*.[2] In these circumstances, society at large may choose to discount beneficiary-identity objections as being not only unworthy of serious consideration, but also particularly groundless in the face of offers of compensation or wider concerns of justice demanding changes in ownership. It could be argued that such complaints are merely 'the squeak of the pips when the lemon is squeezed' or the 'sound of the eggs breaking as a better omelette is concocted'[3] – something unfortunate, but necessary.

However, perhaps surprisingly, both the public and the courts have been historically reluctant to dismiss the disruption caused by compulsory private takings as simply the necessary 'squeak' of the metaphorical lemon pips. Such takings have been frequently denounced as anathema, and their noxious nature assumed to be self-evident. This chapter takes a different approach. Rather than automatically dismissing such takings as being obviously beyond the pale, this chapter gives a few illustrative examples of the type of rhetoric arising in relation to English and American private cases, before assessing whether these attitudes are based on any meaningful objections to such takings. The focus here is particularly on identifying concerns based on broadly-conceived notions of property that may have an underlying, and often unarticulated, influence in this area. Later chapters examine specific categories of private takings in an attempt to discern the extent to which such objections are borne out in practice, and if so, what their impact may be more generally for property.

3 THE RHETORIC OF PRIVATE TAKINGS

It seems that private takings rarely receive as much meaningful comment as they merit, from either a theoretical or practical perspective. Those explicit references that do exist

[2] *James v United Kingdom* involved the trustees of the Grosvenor estate contesting the terms of the Leasehold Reform Act 1967, which allowed for leasehold enfranchisement.
[3] J Waldron, 'The Normative Resilience of Property' in J McLean (ed) *Property and the Constitution*, 170-171.

focus predominantly on delimiting the scope of public interest fetters, a question that is the other side of the problem of private takings. As noted previously, this dissertation contends that in order to appreciate the full significance of constitutional property clauses it is necessary to ask whether, and if so why, it might matter that property should only be taken where there is some public use or benefit, rather than a merely private benefit.[4]

3.1 ENGLISH RHETORIC ON PRIVATE TAKINGS

There are few explicit references or objections to private takings as such in English cases. This may be due to the idiosyncratic development and recognition of various property rights in England, and the absence until relatively recently of any express constitutional protection for such rights. One of the clearest references in English law concerning private compulsory transfers of property rights, before the incorporation of the ECHR into domestic law via the HRA 1998, is *In re Henderson's Conveyance*.[5] This case involved an application under s. 84 of the Law of Property Act 1925 ('LPA 1925') to modify the terms of a restrictive covenant. The operation of this legal mechanism is discussed further in chapter 5 of the thesis. In the course of his opinion in the case, Farwell J stated that:

> Speaking for myself, I do not view this section of the Act as designed to enable a person to expropriate the private rights of another purely for his own profit. I am not suggesting that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation … [but] I do not think the section was designed with a view to benefiting one private individual at the expense of another private individual.[6]

Even here, where the court expressly referred to the expropriation of private rights for the benefit of another private party, there was only lukewarm condemnation for the practice. The words used by Farwell J emphasise the tentative and personal nature of

[4] This chapter, as with the dissertation as a whole, has an English focus. However, concerns relating to the scope of public use clauses can also be seen in other jurisdictions with similar constitutional property clauses. See, for example, the references in van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, 149 to German expropriation cases including *Dürkheimer Gondelbahn Case* BVerfGE 56, 249 and *Boxberg Case* BVerfGE 74, 264.
[5] [1940] Ch 835 (Ch D).
[6] *ibid*., 846.

his decision, with a deliberate distancing from being seen to lay down principles of general application. There is no real discussion of why Farwell J was reluctant to allow the expropriation of private rights by private individuals. Nor, unsurprisingly given the rules of Parliamentary sovereignty, was there any discussion about whether it *would* have been acceptable to the court had s. 84 LPA 1925 authorised such an expropriation.[7]

3.2 ECHR RHETORIC ON PRIVATE TAKINGS

Overt discussion of private takings has also arisen in the context of interpreting the public interest limitation in Article 1. In *James v United Kingdom* the trustees of the Duke of Westminster's Grosvenor estate challenged the leasehold enfranchisement provisions of the Leasehold Reform Act 1967 on the grounds that they were private takings, rather than being in the public interest. Under the terms of the 1967 Act, those tenants occupying houses held on long leases of 21 years or over, or renewed for periods totalling over 21 years, had a statutory right (subject to various conditions) to purchase compulsorily the property's freehold. From 1979 to 1983, tenants of 80 properties applied for enfranchisement and paid compensation in respect of properties in Belgravia held by the Grosvenor estate as freeholder. Whilst compensation was paid, the applicants alleged that financial losses ranging from £1 million to nearly £1.5 million had been sustained as a result of having to sell the freeholds on statutory terms, rather than in the open-market.

In discussing the public interest challenge to the 1967 Act, the European Court of Human Rights ('ECtHR') stated that it agreed 'with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest".'[8] However, the court gave no reason for why 'pure' private benefit cases should be condemned, other than allowing an inference to be drawn that the court's view was based on a literal textual application of the phrase 'public interest' in Article 1. It could be argued that the absence of any discussion is telling in itself; perhaps the court believed that no explanation for its judgment was

[7] Examples of explicit legislative permission for private takings, such as those contained in private Acts of Parliament, are discussed in chapter 3 of the thesis.
[8] *James v United Kingdom*, [39].

necessary since it was already patent. This almost throwaway acceptance and dismissal of the problems raised by private takings is unhelpful. The court therefore agreed in *James* that private takings fall outside the permissible ambit of the public interest clause, but without explaining how to draw any meaningful distinction between the public and private.

As noted in the previous chapter, European jurisprudence in this area appears to accept that almost any nominally private taking will be capable of producing at least some attenuated concomitant public benefit and thereby satisfy the requirements of Article 1.[9] In *James* itself, the court accepted that private takings transfers could constitute a 'legitimate means for promoting the public interest' but that this would depend upon undefined and indefinable 'circumstances'. In addition the court stated that there appeared to be 'no common principle [which] can be identified in the constitutions, legislation and case law of the Contracting States which would warrant the notion of public interest as outlawing compulsory transfer between private parties.'[10] In support of this, the ECtHR made a cursory reference to the US Supreme Court decision in *Hawaii Housing Authority v Midkiff*, without however attempting to understand the complex and contradictory Fifth Amendment case-law background.

In fact, it is by no means clear that there is 'no common principle', which would justify the notion of public interest as 'outlawing' private takings. It seems more likely that the court failed to identify any 'common principles' due to a lack of meaningful discussion about private takings in domestic and Article 1 case law, rather than the non-existence of such principles *per se*. Had the ECtHR examined some of the American case-law in this area in greater depth it might well have discovered certain underlying property principles affecting the desirability or otherwise of private takings.

[9] *ibid*., [45]: 'the Court comes to the … conclusion … [that] a taking of property effected in pursuance of legitimate social, economic or other policies may be in "in the public interest", even if the community at large has no direct use or enjoyment of the property taken.'
[10] *ibid*., [40].

3.3 AMERICAN FEDERAL RHETORIC ON PRIVATE TAKINGS

Traditionally, unlike their English and European counterparts, American courts have been more willing to discuss, and frequently, condemn private takings.[11] This approach at a Federal level appears to be a natural result of the overt constitutional protection afforded to property rights under the Fifth Amendment, and the reference to the 'public use' limitation in the Takings Clause of that Amendment.[12] Several 19th century American cases contain arguments about private takings. One of the more well-known of these cases is *Wilkinson v Leland*. Here, Justice Story emphasised that the court knew of 'no case, in which a legislative act to transfer property of A to B without his consent, has ever been held a constitutional exercise of legislative power.' Instead, he asserted that such attempts had been 'constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.'[13] The case, which involved a probate dispute, arose in Rhode Island. At the time, this State had no written constitution, but relied instead on remnants of a charter granted previously by Charles II. Under the terms of the charter, the Rhode Island general assembly possessed power 'in the most ample manner' to make laws as long as they were 'not contrary and repugnant unto … the laws &c. of England, considering the nature and constitution of the place and people there.'

Justice Story held that despite the broad legislative discretion held by the Rhode Island general assembly it would 'not lightly be presumed that the great principles of Magna Charta were to be disregarded.' This is an interesting justification given the lack of discussion in English cases of any common law authority on this point. It may be possible to view this judicial appeal to broad-brush principles, and references to 'Magna

[11] This attitude has been demonstrated over the years at both a Federal and State level. Some State courts have been more outspoken than others, depending upon the precise terms of their individual constitutional property clauses.

[12] *Thompson v Consolidated Gas Utilities Co* 300 US 55 (1937) (US Supreme Court), 80: 'one person's property may not be taken for the benefit of another private person, without a justifying public purpose, even though compensation be paid.' *Hawaii Housing Authority v Midkiff*, 245, (Justice O'Connor): 'A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and thus would be void.'

[13] 27 US 627 (1829) (US Supreme Court), 658.

Charta', as a convenient refuge when seeking to find some authority for a decision. However, it seems that Justice Story did have a deeper point to make here, since he stressed that 'government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body without any restraint.' Therefore, allowing the Rhode Island general assembly the power to rearrange private property rights as in *Wilkinson v Leland* appears for Justice Story to have been tantamount to condoning the type of supposed tyranny existing under King John before Magna Carta. Instead, he re-asserted his opinion that the 'fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred.'[14]

3.4 KELO AND PRIVATE TAKINGS

Private takings have continued to be discussed at Federal level in American takings jurisprudence. The *Kelo* case is the most recent Supreme Court decision to consider private takings.[15] The majority in the case acknowledged that 'it has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation.'[16] Following previous expansive readings of the public use test in *Berman v Parker* and *Hawaii Housing Authority v Midkiff* the majority found that there was sufficient public benefit to be gained from the takings involved in *Kelo* to satisfy the public use requirement. In responding to concerns that cities would be able to transfer property between citizens in order to put land to more productive use, the majority stated that 'such an unusual exercise of government power would certainly raise a suspicion that a private purpose was afoot … [and could] be confronted if and when they arise.'[17]

In his concurrence, Justice Kennedy observed that courts applying rational-basis review in public use cases 'should strike down a taking that … is intended to favor a particular private party, with only incidental or pretextual public benefits.'[18] In some

[14] *ibid*., 656-657.
[15] *Kelo v City of New London*.
[16] *ibid*., 477, (Justice Stevens).
[17] *Kelo v City of New London*, 486-487, (Justice Stevens).
[18] *ibid*., 490.

circumstances, Justice Kennedy noted that a stricter level of scrutiny might be required due to an acute risk of 'undetected impermissible favoritism of private parties.'[19] The situations in which such a presumption might arise were not detailed however. Whilst confirming that any 'plausible accusation of impermissible favoritism to private parties' should be treated as a 'serious' objection, Justice Kennedy did not enter into an analysis of why this might matter so much.[20] It seems that his disquiet centred around the possible subversion of the public use clause, but without explaining whether and why there might be any additional reason for concern.

The dissenters in *Kelo* agreed with the majority that a 'purely private taking could not withstand the scrutiny of the public use requirement' and described this as a 'bedrock principle'.[21] However, they argued that a broad interpretation of the public use clause left 'all private property … now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded.'[22] The minority in *Kelo* identified three categories of takings which they argued complied with the public use clause: (i) transferral of private property to public ownership for use as a hospital, road and so on; (ii) private takings where the beneficiary makes the property available for the public's use such as a railway or utility; and (iii) in certain exigencies the public use can be served by private ownership serving some broader public benefit as in *Berman* and *Midkiff*.[23] One of the primary concerns of the dissenters appeared to be the lack of security for property rights once the public use clause was read so broadly as to allow the 'specter of condemnation to hang over all property.'[24] Justice Thomas' dissent also raised the concern that interpreting the public use clause broadly so as to allow private takings producing incidental public benefits would guarantee that 'these losses will fall disproportionately on poor communities.' The reasons given for this anxiety were that such communities were less likely to put their lands to the 'highest and best social use' and would also be 'the least politically powerful.'[25] The opinions in *Kelo*, particularly from the dissenting members of the court, provide some indication of potential underlying objections to private takings.

[19] *ibid*., 493.
[20] *ibid*., 491.
[21] *ibid.*, 500, (Justice O'Connor).
[22] *ibid*., 494.
[23] *ibid*., 497-498.
[24] *ibid.*, 503.
[25] *ibid*., 521.

3.5 AMERICAN STATE RHETORIC ON PRIVATE TAKINGS

Concerns raised at Federal level about private takings have also at times been echoed in State decisions.[26] Whilst such decisions have to be taken in the context of their particular governing constitutional provisions, they can also provide some useful analysis of 'acceptable' public takings. In *Wayne County v Hathcock*[27] the Michigan Supreme Court overturned its previous polarising decision of *Poletown Council v City of Detroit*.[28] The *Poletown* case was a cause célèbre; Justice Ryan in his dissent in the case predicted that the 'reverberating clang of its economic, sociological, political, and jurisprudential impact is likely to be heard and felt for generations.'[29] Detroit responded to a threat by General Motors (GM) to remove its Cadillac manufacturing operations from the city, with a loss of some 6,000 jobs, by acceding to the company's demand that Detroit should supply land for a new plant by condemning 465 acres.

Despite noting that the condemnation destroyed a 'tightly-knit residential enclave of first- and second-generation' Polish Americans,[30] the majority of the court held that a public use was involved. The benefit accruing to Detroit due to the taking, in retaining the GM plant and the jobs at stake, was a 'clear and significant' benefit since it accomplished the 'essential public purposes of alleviating unemployment and revitalizing the economic base of the community.'[31] Justice Fitzgerald dissenting in *Poletown* protested that the decision that the 'prospect of increased employment, tax revenue, and general economic stimulation' made the taking sufficiently 'public' meant that there was 'virtually no limit to the use of condemnation.'[32]

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[26] See for example, at State level, Justice Wood's comments in *Buckingham v Smith* (1840), 10 Ohio 288 (Supreme Court of Ohio), 297, that the State should only take property where this was: 'wanted for *public* use, or demanded by the *public welfare*.' The court knew of 'no instances in which it has, or can be taken, even by a state authority, for the mere purpose of raising a revenue by resale … and the exercise of such a power would be utterly destructive of individual right, and break down all the distinctions between *meum* and *tuum,* and annihilate them forever, at the pleasure of the state.'
[27] 471 Mich 445 (2004) (Supreme Court of Michigan).
[28] 410 Mich 616 (1981) (Supreme Court of Michigan).
[29] *ibid*., 645.
[30] *ibid*., 657-658.
[31] *ibid*., 634.
[32] *ibid*., 644.

The Michigan Supreme Court took the unusual step of overruling *Poletown* in the *Hathcock* decision by relying on an originalist approach to the Michigan Constitution. This approach depended on an examination of a sophisticated understanding of 'public use' at the time of the Constitution's ratification in 1963. According to this view, condemnations were for a public use in three circumstances: firstly where private land was transferred to a private entity due to 'public necessity of the extreme sort otherwise impracticable;' secondly, where the private entity to whom property is transferred remains accountable to the public in its use of the property; and thirdly, where the property itself is selected on the basis of facts of 'independent public significance.' Regardless of the Michigan Supreme Court's trenchant rebuttal of the idea that their State's eminent domain powers could be exercised on the basis that use of that property might contribute to the economy's health, other State courts remain divided on whether takings leading to predicted economic benefits are unconstitutional,[33] or permitted.[34]

Ohio has taken a similarly restrictive view of the Federal decision in *Kelo*, and as such both Michigan and Ohio provide a useful opportunity to examine whether there are underlying objections to private takings, as allowed for by a broad interpretation of the public use clause.[35] The case of *Norwood v Horney*,[36] a decision of the Ohio Supreme Court, echoes some of the concerns raised in Justice Ryan's dissent in the Michigan case of *Poletown* and the decision in *Hathcock*. Again, the case of *Norwood* involved the constitutionality of a municipality taking an individual's property by eminent domain and transferring the property to a private entity for redevelopment. Justice Maureen O'Connor noted near the outset that such cases:

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[33] *JC Penney Corp v Carousel Center Co* 306 F Supp 2d 274 (2004); *Daniels v The Area Plan Commission of Allen County* 306 F3d 445 (2002) (7th Cir); *SW Ill Development Authority v National City Environmental LLC 768* N E 2d 1 (Supreme Court of Illinois), 240, quoting Justice Kuehn in dissent in the appellate court: 'If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of a private capitalist's ability to develop land cannot justify a surrender of ownership to eminent domain.'

[34] *City of Duluth v State* 390 NW 2d 757 (Minn 1986), 763: 'The revitalization of deteriorating urban areas and the alleviation of unemployment are certainly public goals.' *Las Vegas Downtown v Pappas* 119 Nev Adv Op No 51, 39255 (2003) (Supreme Court of Nevada); *City of Jamestown v Leevers Supermarkets* 552 N W 2d 365, 372-3 (ND 1996); *Vitucci v New York School Construction Authority*, 481: 'If a municipality determines that a new business may create jobs, provide infrastructure, and stimulate the local economy, those are legitimate public purposes which justify the use of the power of eminent domain.'

[35] Ohio's General Assembly unanimously enacted 2005 Am Sub SB No 167 to create a task force to study the use and application of eminent domain in Ohio and imposed a temporary moratorium on any takings which might allow for the compulsory transfer of private property between individuals where that property was not within a blighted area.

[36] *Norwood v Horney* 110 Ohio St 3d 353 (2006) (Supreme Court of Ohio).

> Often represent more than a battle over a plot of cold sod in a farmland pasture … For the individual … the appropriation is not simply the seizure of a house. It is the taking of a home – the place where ancestors toiled, where families were raised, where memories were made.[37]

In addition, the Ohio Supreme Court noted that early Ohio cases viewed property rights in Lockean terms as 'an *original* and *fundamental* right, existing anterior to the formation of government itself' such that 'Government is the necessary burden imposed on man as the only means of securing the protection of his rights.'[38] As such the Court found that 'the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces.'[39] Despite these trenchant views, Justice Maureen O'Connor acknowledged that the 'concept of public use has been malleable and elusive' but refused to hold that economic development by itself was a sufficient public use to satisfy a taking.[40]

4 PROPERTY PRINCIPLES AND PRIVATE TAKINGS

An analysis of private takings is necessarily intertwined with, and shaped by, at least two other significant facets of property theory: (i) the balance drawn between the public and the individual; and (ii) justifications given for particular distributions of property. Whilst both of these issues are also raised by 'public' takings, it seems that private takings cause greater anxiety precisely because they force a very stark reconsideration of often unspoken notions about how property rights are obtained, and allocations justified.

The compulsory transfer of property between individuals, even where compensation is paid, therefore brings the former owner face-to-face with the realisation that not only does *their* property right no longer receive State-backing, but more invidiously, another individual has been deemed by the State to be more 'deserving' of the property right at stake. The emotional reactions experienced by owners in such circumstances are not

[37] *ibid*., 355.
[38] *ibid*., 362, quoting Chief Justice Bartley in *Bank of Toledo v Toledo* (1853) 1 Ohio St 622, 632.
[39] *ibid*., 363.
[40] *ibid*., 365-378.

wholly explicable in and of themselves from a purely logical point of view. Whether property benefits the State or another private party, the legal mechanism is the same. In both cases, the original owner's rights are 'downgraded' from property protection to liability protection; then the new owner, whether the State or an individual, benefits from the reinstatement of property protection. To this extent, it should make no real difference to the ousted owner *who* precisely gains 'their' property since the process and resulting loss are the same in both scenarios. However, this approach overlooks the seeming practical importance of beneficiary-identity, and appears to ignore the wider relational dimensions of property.

4.1 External and Internal Aspects of Property

For centuries, property has been valued not only for economic reasons, but also as a means of placing individuals within a wider societal context. The relational aspects of property are therefore both external and internal. To the outside world, property holdings provide a deal of information, which third parties assess and use when relating to owners. Property provides valuable geographic intelligence, for example, enabling others to identify the village, town or even country that other people hail from. Additionally, property allows people to allocate others within elaborate social hierarchies, and thereby categorize them whether for good or ill. Depending upon the type of social policies holding sway at any one time, property may reveal a great deal about the boundaries between the individual and the State, and their relative rights and responsibilities.

To the individual, property may provide a useful barometer of social standing and relative sovereignty.[41] In addition, rather than viewing property as a means of connecting to other people and society, holdings may be valued for their potential to act as a bulwark against unwanted interference and incursions. From an internal perspective, property is often intimately connected with a person's sense of self and identity. Private takings, as with any compulsory acquisition of property, affect both

[41] Rose, '"Takings" and the Practices of Property' in *Property & Persuasion: Essays on the History Theory, and Rhetoric of Ownership*, 58-60.

the external and internal dimensions of the owner's relations with other people.[42] However, it seems that compulsory transfers between individuals may be particularly repugnant to ousted owners due to a perceived heightened impact on the internal relational aspects of property. Where the State benefits from property, it may be easier for the ousted owner to dismiss this as 'nothing personal'. However, where another individual benefits directly from the taking it seems that this strikes more deeply at the former owner's psyche and sense of self-worth.

In reviewing some of the rhetoric relating to private takings cited above, it seems that there may be several possible reasons for the particular disquiet caused by private takings. These objections appear to centre on references to Lockean notions, the importance of personal links to property, lack of security, dangers of possible tyranny, and problems with judicial review of private takings. As such, these concerns span both the question of how to draw an appropriate balance between society and the individual, as well as justifications given for property allocations. The remainder of this chapter will therefore analyse and assess the relative strength of these various potential objections to private takings.

4.2 LOCKE AND PRIVATE TAKINGS

Locke's influence over English and particularly American constitutional law has been much debated, with varying opinions about the extent to which Lockean notions actually affected legal, as opposed to political, debates.[43] There is little doubt though that 'a peculiar form of property … as individual absolute dominion' formed one of the 'central tropes' of public discussion during the eighteenth-century and was 'crucial to debates in public law, political argument, political economy, and moral philosophy.'[44] It

[42] See Hohfeld's analysis of property rights as the interaction between rights, privileges, powers and immunities between people, rather than between people and things, in Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' .

[43] There are occasional references to Locke in English cases e.g. *Earl Fitzwilliam's Wentworth Estates v Minister of Town and Country Planning* 2 KB 284 [1951] (CA), 312, where the court criticised the fact that the rights of parties against the Central Land Board did not depend on established standing laws, but rather 'the views of expediency which a government department may entertain.' Examples of discussion relating to Locke's influence on the Takings Clause see e.g. JM Gaba, 'John Locke and the Meaning of the Takings Clause' 72 Mo L Rev 525 (2007). DA Schultz, 'The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence'13 W New Eng L Rev 155 (1991).

[44] RW Gordon, 'Paradoxical Property' in J Brewer and S Staves (eds) *Early Modern Conceptions of Property* (Routledge, London, 1995), 95.

may be possible to view private takings transfers as odious on the grounds that they offend against Lockean-influenced notions of desert and the social contract. Whilst Locke's *First Treatise* focused on refuting the arguments of those such as Sir Robert Filmer who supported government by absolutist monarchy,[45] it is Locke's *Second Treatise* which is of more direct interest in relation to private takings.

4.2.1 Labour and private takings

In the *Second Treatise* Locke advanced his arguments on property and government. Both Locke and his opponents' arguments were firmly rooted in religious justifications, but their interpretations of the derivation of property rights differed significantly. Filmer argued that people held property at the grace of the monarch, with the king deriving his dominion over resources by direct descent from Adam, who had himself been given responsibility and power over creation by God. Locke's approach instead rested on the idea that property rights were gained not by decree of an absolute monarch, but rather were an entitlement conferred by God on all for their common good. Property rights could therefore be appropriated initially by the 'Industrious and Rational' mixing their labour with items removed from the common state. Locke's spoliation and sufficiency provisos provided some notional, if debatable, outer limits to the amount of property which could be appropriated.[46]

The notion that mixing labour with an object produces initial property rights in the thing can be attacked on several grounds. Nozick, for example, argued that Locke's assertion does not explain why, even if industry does increase the value of the appropriated thing, an individual is given exclusive ownership of the object rather than a proportionate share in its increased value.[47] It may well be claimed that rewarding effort with full ownership acts as a valuable incentive for people to work hard and also to innovate. However, the possible benefit of this approach may be less clear in relation to land where guaranteed use of land coupled with the right to any resultant harvest might well

[45] R Filmer, *Patriarcha and Other Writings* (JP Sommerville ed., CUP, Cambridge, 1991).
[46] For further discussion on Locke's views, see for example M Kramer, *John Locke and the Origins of Private Property* (CUP, Cambridge, 1997); J Waldron, *The Right to Private Property* (Clarendon Press, Oxford, 1988); S Buckle, *Natural Law and the Theory of Property: Grotius to Hume* (Clarendon Press, Oxford, 1991).
[47] R Nozick, *Anarchy, State, and Utopia* (Blackwell, Oxford, 1974), 174-182.

act as a sufficient incentive. Despite the problems with Locke's labour theory, his 'remarkably influential, if somewhat incoherent justification for private property' continues to influence property law and private takings today.[48]

Paradoxically, whilst Locke's social compact theories have been used as ammunition *against* private takings the same cannot be said for Lockean-influenced labour theories. Here, adaptations of Locke's theory have acted as a partial and positive justification *for* certain categories of private takings, including adverse possession.[49] Under both the registered and unregistered systems in England, it is vital that the squatter demonstrates 'possession' of the land at stake in order to have any chance of successfully acquiring title. Possession requires a demonstration on the part of the squatter of not only an intention to possess, but also factual possession of the land. The requirements of adverse possession are discussed in chapter 4 of this thesis, but for present purposes it is enough to note that the labouring on land can act as powerful support for a squatter's claim. Locke himself might not recognise or agree with the arguments made for favouring those who use things for a long period of time; however, elements of his labour theory have been used as support for the reallocation of property rights between the paper owner and squatters.[50]

It is worth noting that there are clearly problems with Lockean-influenced labour theories as a justification for adverse possession. First, such theories are logically inconsistent in recognising only recent labour rather than that previously expended by the paper owner. Secondly, and more fundamentally, they ignore the fact that Locke's work focused on the initial allocation of property rights; any subsequent labour did not justify reallocation of property but was rather an attempt to steal the property.[51] Additionally, this type of approach may lead to the economic exploitation of land taking precedence over other uses of land involving less obvious labour, or even no labour at all, but which may be of greater overall social value, such as leaving land fallow or as

[48] Gaba, 'John Locke and the Meaning of the Takings Clause', 532.
[49] As will be discussed in chapter 4, which focuses particularly on adverse possession, the legal and theoretical landscape in this area is highly complex and has changed significantly in England due to the introduction of the Land Registration Act 2002.
[50] MJ Radin, 'Time, Possession and Alienation' 64 Wash U LQ 739 (1986), 739, notes that Locke's theory of just acquisition is strictly concerned only with the moment at which entitlements first come into being. However, at 750 she argues that Lockean theory may 'color' the theory of adverse possession by 'lending some sympathy to "squatters"'.
[51] Gaba, 'John Locke and the Meaning of the Takings Clause', 537, fn 45.

wild lands.[52] The labour theory thus undermines the paper owner's 'vital discretion over the priority to be accorded to the various forms of value inherent in a particular asset.'[53] The owner of land is by definition, as Gray and Gray note, normally 'entitled to prioritise the relevant values which the land holds for him … to devote his interest in the land toward the objective of use, sale, endowment or recreational or cultural enjoyment.'[54]

4.2.2 The social compact and private takings

Traditionally, Locke's social compact theory has been referred to most frequently in discussions relating to private takings, particularly in attempts to resist such takings. The social compact is an attempt to ground the legitimacy of government in some 'hypothetical general agreement among humans to be subject to government.'[55] According to this theory, people with absolute dominion over their property were paradoxically prepared to relinquish full control over rights in their own person and possessions in order that they might better secure protection for those rights. The motivations for entering into the social compact have been described as both communitarian and individualistic.[56] In return for uniting together with others for the 'mutual preservation of their lives, liberties and estates' individuals were able to secure the 'great and chief end' of preserving their own property.[57] Thus, Locke argues that joining together in civil society provides some respite from the type of life described by Hobbes as 'solitary, poor, nasty, brutish, and short.'[58]

Locke distinguishes between two elements of the social compact: the creation of a civil society which comes into being through agreement; and government which is

[52] JG Sprankling, 'An Environmental Critique of Adverse Possession'79 Cornell L Rev 816 (1994) 816-827, argues that the labour focus of adverse possession for instance perpetuates a 'pre-development nineteenth century ideology' encouraging economic exploitation which is 'fundamentally antagonistic to the twentieth century concern for preservation.'
[53] KJ Gray and SF Gray, *Elements of Land Law* (5th ed, OUP, Oxford, 2009), [1.5.39].
[54] *ibid*.
[55] Gaba, 'John Locke and the Meaning of the Takings Clause', 544.
[56] EC Gardner, 'John Locke: Justice and the Social Compact' 9 Journal of Law & Religion 347 (1991), 358.
[57] J Locke, *Two Treatises of Government* (P Laslett ed., CUP, Cambridge, 1988) 359, [134].
[58] T Hobbes, *Leviathan* (JCA Gaskin ed, OUP, Oxford, 1998), ch. 13, 84, [9]. Hobbes' comments were made in the context of a discussion about the state people exist in where security other than that which their individual strength and invention may provide.

established by the community forming a 'common ruling authority' and entrusting political power to this government.[59] According to Locke's view, no government should be able to take away property rights from individuals since the 'preservation of property' is the 'end of government, and that for which men enter into society'. In the event that property may be taken from them by the State, people 'must be suppos'd to lose that by entering into Society, which was the end for which they entered into it, too gross an absurdity for any Man to own.'[60]

Locke's views have been used to support the argument that any reallocation of property rights, even if compensation is provided, fatally undermines the social compact.[61] Most famously, in the American case of *Calder v Bull*, Justice Chase explicitly argued that private takings offended against ideas of a social contract:

> An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority … [A] law that takes property from A and gives it to B: it is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.[62]

Similarly, the slightly earlier American case of *Vanhorne's Lessee v Dorrance* contains vehement support for the social compact. Justice Patterson expressed grave concern at the effect that private takings might have on the supposed foundations of government:

> [T]he right of acquiring and possessing property, and having it protected, is one of the natural, inherent, and unalienable rights of man. … [The security of property] was one of the objects that induced them to unite in society. No man would become a member of a community, in which he could not enjoy the fruits of his honest labour and industry. The preservation of property then is a primary object of the social compact.[63]

Justice Patterson's opinion does consider, at a later stage, the status of private takings where compensation is at least provided. He expressed grave concerns about the need for such takings since it was of 'primary importance' that vested land 'should be secured, and the proprietor protected in the enjoyment of it' on the grounds that the

[59] Gardner, 'John Locke: Justice and the Social Compact', 359.
[60] Locke, *Two Treatises of Government* 360, [138].
[61] ER Claeys, 'Public Use Limitations and Natural Property Rights' Mich St L Rev 877 (2004), 892.
[62] 3 US 386 (1798) (US Supreme Court) [emphasis in the original removed].
[63] 2 Dall 304 (CC Pa. 1795), 310.

constitution 'encircles and renders it an holy thing.'[64] However, he admitted that it might be theoretically possible to 'divest one individual of his landed estate merely for the purpose of vesting it in another' so long as full indemnification was provided where the sum due would be ascertained by either the parties, commissioners or a jury. Even in these circumstances, Justice Patterson argued that it would require a 'singular' and 'untoward … state of things' before the legislature should be presumed to exercise 'so unnecessary, dangerous, and enormous a power'.[65]

4.2.3 Assessing the influence of Locke's theories on private takings

In assessing whether Locke's ideas may provide a meaningful basis for criticising private takings it is important to make several distinctions. Firstly, perhaps unsurprisingly given the relevant constitutional history, there seems to be little or no reference to the idea of a social compact in English cases. Those references that there are to the 'social compact' in English cases appear mainly in relation to treason cases and arise in relation to the question of whether allegiance may be owed to the government in question.[66] At other times, references to Locke have been used almost as a rhetorical flourish.[67]

Additionally, whilst it is true that early American private takings cases make explicit reference to Locke's ideas, this practice tends to fall into abeyance.[68] Later American allusions to Locke are generally more muted and subtle in their use. This may be due to the growing influence of the Fifth Amendment, which provided explicit constitutional protection for property rights. There is clearly some overlap in cases that refer expressly

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[64] *ibid*., 311.
[65] *ibid*., 312.
[66] See e.g. the *Trial of John Horne Tooke* in 1794 (25 St Tr 1) for compassing the death of King George III which refers to both John Locke and the social compact.
[67] See e.g. Denning LJ's dissent in *Earl Fitzwilliam's Wentworth Estates v Minister of Town and Country Planning*, 312. Although for an example where more compelling use is made of Lockean notions, see Viscount Radcliffe's reference to Locke in relation to the prerogative in *Burmah Oil Co v Lord Advocate*, 135-136. These issues are referred to in chapter 1 of the thesis.
[68] See though Justice Harlan's comments in *Chicago, Burlington & Quincy Railroad Co v Chicago*, 236: 'The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down by jurists as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen."'

to Lockean ideas despite the intervening enactment of the Fifth Amendment in 1789, and examples include both *Vanhorne's Lessee v Dorrance* (1795) and *Calder v Bull* (1798). Despite this overlap, it seems that Locke's influence in American property law may have been more political than legal in nature. Schultz, for example, argues that the later treatment of property in American law indicates that the Founders 'often followed one view about property in political discourse, but acted differently when it came to treating property institutionally.'[69] Subsequent references to Locke and his theories appear in cases where courts have cited contractarian philosophers and commentators,[70] and made reference to Lockean ideas of a 'state of nature' and a 'social contract'.[71]

Even if the premise of the social compact approach can be accepted, the theory does not explain of itself *why* private takings are viewed with such suspicion. After all, it could be argued that whether the State or another individual benefits from the taking in question the action of taking still undermines the supposed agreement made by individuals when agreeing to enter civil society. There is also no explanation of why compulsory property transfers should challenge the social compact if alternative property, whether real or monetary, is offered. Here, individuals would retain the property rights that they entered into civil society to protect, but just in a different form. In addition, as noted elsewhere in this dissertation, early American law abounds with examples of private takings, such as those under the Mill Acts, despite the strong and frequent political references by the Founders to Locke's theories.[72]

Nevertheless, it is possible that there are elements of Locke's theories, echoed and modified in later works by other commentators, which may provide a more reasonable explanation for the concern with which private takings are viewed. For example, Locke's broad conception of property as 'life, liberty and estate' encompasses not merely economic worth but also 'the development of the human personality … the exercise of independent thought and creative powers.'[73] It could be argued therefore

[69] Schultz, 'The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence', 186.
[70] One such example includes the work of Richard Epstein who has focused on a modified Lockean approach to the Takings Clause in order to reassert the role that private property may play as a barrier to governmental power. See Epstein, *Takings: Private Property and the Power of Eminent Domain*, 7-18.
[71] AL Allen, 'Social Contract Theory in American Case Law' 51 Fla L Rev 1 (1999), 7-11.
[72] See pages 57-60 of the thesis for discussion of the Mill Acts.
[73] Underkuffler, *The Idea of Property: Its Meaning and Power*, 138.

that property is thus to be protected because it is associated with not only the political liberties of individuals, but because of its central importance to individual self-expression, identity, and personality.[74]

4.3 PERSONAL NEXUS WITH LAND

As noted above by Justice Maureen O'Connor in the Ohio Supreme Court case of *Norwood v Horney*, takings of land can have not only financial but holistic and emotional connotations.[75] Unlike compulsory purchase rules, which generally view financial damages as an adequate recompense for the loss of land,[76] there continue to be other examples in English law where the personal connection with particular plots of land receives some non-constitutional property-rule protection. Merely two instances will be referred to here: specific performance of contracts relating to land; and the Crichel Down rules.[77]

4.3.1 Specific performance

The remedy of specific performance, as is well-known, is purely equitable and limited to cases where the common law remedy of damages is inadequate. However, land is 'always treated as being of unique value' such that the remedy of specific performance is almost always 'available to the purchaser as a matter of course.'[78] The remedy remains discretionary despite the presumption that it will be granted in relation to land contracts, and may be refused on the grounds that there has been: mistake; delay causing injustice; or where the vendor would be required to undertake uncertain litigation in order to secure some requisite consent or to obtain vacant possession.

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[74] Schultz, 'The Locke Republican Debate and the Paradox of Property Rights in Early American Jurisprudence', 163.
[75] *Norwood v Horney*, 355.
[76] Allen, 'Controls over the Use and Abuse of Eminent Domain in England' in RP Malloy, *Private Property, Community Development, and Eminent Domain*, 84.
[77] Another clear example might include the differing levels of protection afforded to residential leasehold premises rather than commercial premises, especially under the Rent Acts.
[78] C Harpum, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (7th ed, Sweet & Maxwell, 2008), 690.

There are signs that the traditional view that each plot of land is unique may be coming under increased pressure in other jurisdictions. The Canadian Supreme Court, for example, has suggested in an *obiter dictum* that whilst the 'common law regarded every piece of real estate to be unique … this is no longer the case. Residential, business and industrial properties are all mass produced … If a deal falls through for one property, another is frequently, though not always, readily available.' As such, it was viewed as 'no longer appropriate … to maintain a distinction in the approach to specific performance as between realty and personalty.'[79] The Canadian approach has been criticised by Chambers on the grounds that it leads to inequality, uncertainty and unintended consequences for the creation of property interests.[80] Even on large-scale real estate developments it is hard to see how one plot of land may be viewed as identical to another. Whilst distinctions between plots may be slight, there will be *some* differences whether of the actual topography, the views that will be seen from the land, neighbours, access to services and so on. There appears to be no indication as yet that English law will follow the Canadian example in this area.

4.3.2 The Crichel Down Rules

The Crichel Down Rules are non-statutory arrangements under which 'surplus Government land acquired by, or under a threat of, compulsion' should be offered back at market-value to 'former owners, their successors, or to sitting tenants.'[81] The notion of offering back land may been influenced by clauses in the Lands Clauses Consolidation Act 1845, which required 'superfluous lands' to be sold within the period specified in the Act, or within ten years of completing the works.[82] Crichel Down itself concerned some 725 acres of land acquired in 1938 and used as a bombing range during the war. In 1949 the land was transferred by the Air Ministry to the Ministry of Agriculture. The former owner, Lt. Comdr. Marten had apparently been thwarted in his attempts to re-acquire the land, despite having been promised that the land would be offered back to him if it were to be sold. Following backbench Parliamentary pressure

[79] *Semelhago v Paramadevan* (1996) 136 DLR (4th) 1 (Canadian Supreme Court), 9-10, (Sopinka J).
[80] R Chambers, 'The Importance of Specific Performance' in S Degeling and J Edelman (eds) *Equity in Commercial Law* (Lawbook Co, Sydney, 2005).
[81] Crichel Down Circular, 108, [1].
[82] G Eve Chartered Surveyors, *The Operation of the Crichel Down Rules* (2000), [3.2]. Accessible at http://www.communities.gov.uk/documents/planningandbuilding/pdf/158478.pdf (last accessed 15 August 2009).

in 1953, the then Minister for Agriculture, Sir Thomas Dugdale, appointed Sir Andrew Clark QC to hold a public inquiry into the Crichel Down affair.[83] As a result of the inquiry and widespread criticism, Dugdale resigned on the grounds of ministerial responsibility.[84]

It appears that the motivation behind the Rules, that land should be offered back to former owners, despite payment of market-value at the time of acquisition, is based on notions of equity.[85] The Rules state that former owners should be 'given a first opportunity' to repurchase the land previously owned by them, provided that the character of the land has 'not materially changed since acquisition.' All Government Departments, executive agencies and non-departmental public bodies ('NDPBs') such as NHS Trusts are subject to the Rules. Local authorities and other statutory bodies with powers of compulsory purchase, or who hold land which has been compulsorily purchased, are 'recommended to follow the Rules.'[86] It appears that most organisations dealing with the Rules 'claimed not to know on what moral, ethical, financial or legal principles the Rules are based on', but there remains a strong sense in landowners that the Rules 'represent a tacit acceptance of an "emotional tie" between the owner and ... [their] land.'[87] There are exceptions and time limits to the obligation to offer back land, notably non-agricultural land, which becomes surplus and available for disposal more than 25 years after the date of acquisition.[88] Seemingly, whilst the Rules recognise that former owners may have a personal interest in the land its scope is time-limited.

4.4 PERSONHOOD AND PRIVATE TAKINGS

Margaret Radin's Hegelian-influenced views of the importance of property to a sense of selfhood provide a useful theoretical approach when examining the issue of private takings and personal links with land.[89] Hegel's *Elements of the Philosophy of Right* identified the 'human good with the self-actualization of the human spirit', the essence

[83] *Report of the Public Inquiry into the Disposal of Land at Crichel Down* (Cmd 9176/1954).
[84] C Turpin and A Tomkins, *British Government and the Constitution* (6th ed, CUP, Cambridge, 2007), 573-574.
[85] Eve Chartered Surveyors, *The Operation of the Crichel Down Rules*, [3.3].
[86] Crichel Down Circular, at Annex, 117, [3]-[4].
[87] R Gibbard, 'The Crichel Down Rules', in E Cooke (ed) *Modern Studies in Property Law: Volume II* (Hart Publishing, Oxford, 2003), 336-337.
[88] Eve Chartered Surveyors, *The Operation of the Crichel Down Rules*, [14].
[89] MJ Radin, 'Property and Personhood' 34 Stan L Rev 957 (1982).

of which he termed 'freedom'. As such, freedom involved humans as 'an abstract unit of free will … [taking on a] concrete existence'[90] by actively relating to 'something other than oneself in such a way that this other becomes integrated into one's projects, completing and fulfilling them' so that they belong to 'one's own action rather than standing against it'.[91]

Radin builds on Hegel's work by exploring the relationship between property and personhood from an intuitive viewpoint; she notes the deep connection that individuals feel towards certain personal objects that they possess such as a 'wedding ring, a portrait, an heirloom, or a house.' Such possessions are 'bound up with personhood' because, according to Radin, 'they are part of the way we constitute ourselves as continuing personal entities in the world.'[92] By way of contrast, certain more fungible property such as money is not bound up with a sense of personhood because this type of property is 'perfectly replaceable with other goods of equal market value.'[93] The subjective nature of the personhood perspective makes it necessary to 'think of a continuum that ranges from a thing indispensable to someone's being to a thing wholly interchangeable with money.'

Whilst many relationships between people and things will fall in the middle of such a spectrum, it is 'generally understood' that a person's home will be 'towards the personal end of the continuum.'[94] According to Radin's argument, property tied up with personhood claims should be protected by property rule protection enabling the owner to exclude others from that property.[95] As she notes, entitlements are strategically valuable from an economic perspective because they enable individuals to satisfy their own property preferences.[96] From a non-economic perspective, Radin contends that these entitlements contribute to a 'stable context of things in my environment, against

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[90] *ibid.*, 972.
[91] GWF Hegel, *Elements of the Philosophy of Right* (ed AW Wood, trans HB Nisbet, CUP 1991), xi-xii.
[92] Radin, 'Property and Personhood', 959.
[93] *ibid*., 960.
[94] *ibid*., 987.
[95] *ibid.*
[96] Gray and Gray, *Elements of Land Law*, [1.5.39], refer to the 'vital discretion over the priority to be accorded to the various forms of value inherent in a particular asset' including an owner's: 'use-value'; 'exploitation value'; 'non-survival- value'; 'exchange value'; 'endowment value'; and 'non-commodity value' wrapped up in property.

which I can constitute myself as a person and live my life.'[97] If then, these entitlements are interfered with not only can this disrupt the economic function of entitlements by ignoring the individual's priorities, but from a non-economic perspective, 'such divestments can also almost literally be a "rip-off" of the person.'[98]

4.4.1 The home and private takings

The *home* is a particularly emotionally-laden concept, with an almost unique place in the human mind, such that it has 'long been regarded as deserving of special protection in the law.'[99] There are long-standing and consistent English references to the peculiar significance of the home as a place of refuge from an overweening State, with the home acting as 'fortress and … castle.'[100] The significance of the home applies in this conception to all social classes and affords both the weak and the mighty the same dignity and sense of social equality within this most private sphere, such that even the 'poorest man may in his cottage bid defiance to all the forces of the Crown.'[101] Both American and European law recognise that levels of privacy within the home receive greater protection than they might elsewhere.[102]

The home is often viewed as a 'site of safety, a place of refuge and peacefulness … a valued territorial setting.'[103] Whilst there is some temptation to equate the home or other forms of property with territory, this should be resisted since 'territoriality is not the same thing as property.' As Rose notes, the 'distinctive hallmark of property, as opposed to territoriality, is the *absence* of challenge from others' such that 'others routinely recognize and respect one's claims' relieving us of 'the debilitating expense

[97] Radin, 'Property and Personhood', 1155.
[98] *ibid*.
[99] Gray, 'Human Property Rights: the Politics of Expropriation', 406.
[100] *Semayne's Case* 5 Co Rep 91a, 77 Eng Rep 194 (1604), 195.
[101] William Pitt, the Elder, Earl of Chatham in a speech in the House of Lords (1763) as recorded in Brougham's *Statesmen in the Time of George III* (First Series) (1839), 41-42 and quoted by Lord Millett in *London Borough of Harrow v Qazi* [2004] 1 AC 983 (HL), 1015.
[102] See Article 8(1) of the ECHR which states that 'Everyone has the right to respect for … his home'. It seems that Strasbourg jurisprudence has viewed this as a right to be free from surveillance and arbitrary interference from the authorities, rather than a protected property right which would fall to be considered under Article 1 of the ECHR instead.
[103] L Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford, 2007), 135.

and effort of constant vigilance.'[104] The fundamental importance of possessing land or having a place to call one's own is something that resonates throughout the history of English land law. In addition the personal nexus with land developed through the concept of seisin has 'undoubtedly left an indelible mark on the way in which the common lawyer thinks of all property and particularly of land.'[105]

4.4.2 Disproportionate impact of takings involving the home

Even those who *do* own property or their own home are not affected equally by takings, whether private takings or State takings. It seems that the consequential burdens of condemnations tend not to fall equally on all members of society.[106] Certain individuals may find that their links with property count for less for whatever reason. The exercise of compulsory acquisition powers, particularly those related to economic development, affects the elderly, minorities, and the economically disadvantaged doubly. First, there is the pragmatic likelihood that property owned by such groups will provide an 'easier' target due to their relative lack of political and economic power, and the fact that they are unlikely to put their property to its 'best' economic use.[107] As will be discussed later in this chapter there have also been unfortunate instances of private takings being used in a biased manner against particular sections of society. Secondly, where property is taken for whatever reason, it seems that the personal effect of such takings may be more profound for some groups than for others.

For instance, takings that necessarily uproot people's support networks can have a disproportionate impact on women, in particular. Many women have multiple roles as employee, mother and potential family provider leading to severe geographic and time constraints on their lives. Disruption to one aspect of life can have severe consequences

[104] CM Rose 'Property and Expropriation: Themes and Variations in American Law' 2000 Utah L Rev 1 (2000), 3.
[105] KJ Gray, 'Property in Common Law Systems' in GE van Maanen and AJ van der Walt (eds) *Property Law on the Threshold of the 21st Century* (Maklu, 1996), 251.
[106] Justice O'Connor warned in *Kelo v City of New London*, 505, that the result of the decision 'will not be random … the government now has license to transfer property from those with fewer resources to those with more.'
[107] *ibid.*, Justice Thomas' dissent warned that allowing takings for economic benefit would ensure that losses 'fall disproportionately on poor communities.' Not only would such communities be 'systematically less likely' to put their property to the perceived 'highest and best social use' but these communities were 'also the least politically powerful.'.

on other roles and aspects. Research carried out by Gilbert in this area produced many clear examples of women seeking to make employment, child care and housing decisions in concert in order to 'strategize' in response to their time and space constraints.[108] Not only does the removal of a home or link with an area cause upheaval in women's plans and strategies for combining their multiple roles, but it can also lead to a loss of employment opportunities.

For immigrants and other city dwellers who need the security of a supportive neighbourhood, it seems that eviction 'on short notice created nothing less than a life crisis.'[109] Most women, of whatever race, 'rely heavily on personal contacts to link them to jobs, child care, and housing, and more broadly for economic and emotional support.' Removing people from their community has a much broader impact and can even put women in particularly vulnerable positions where they have no personal contacts who can perform a 'screening function' by giving them information about 'employers, landlords, and child-care providers.' They may also be disadvantaged by having fewer people in their new area who can vouch for them to new employers.[110]

4.4.3 Economic development takings and the impact on personhood

Arguably, any taking affects the sense of self and personhood of vulnerable individuals, and as such, private takings are no worse than those involving direct State benefits. There is some merit to this argument, but private takings (particularly of homes) present uncompromising judgments between the types of property use that are deemed worthy of support, and those that are not. This approach may also be particularly undermining to a sense of self in not recognising the deep personal and emotional investment often made in a home, or the choices made about particular property uses. Individuals who believe in leaving land fallow for environmental reasons, or who choose to deal with their property in a particular non-harmful manner, may well ask why their choices

[108] MR Gilbert 'Identity, Difference, and the Geographies of Working Poor Women's Survival Strategies' in KB Miranne and AH Young (eds) *Gendering the City: Women, Boundaries, and Visions of Urban Life* (Rowman & Littlefield Publishers, Inc. Lanham, 2000), 71.
[109] BJ Frieden and LB Sagalyn, *Downtown, Inc., How America Rebuilds Cities* (The MIT Press, Cambridge, 1989), 33.
[110] *ibid*., 73.

should not be respected by society. This is an issue that will be discussed in chapter 4 of this thesis in relation to adverse possession.

Those who are already struggling to make full economic use of their property may question why economic use should be the main, if not sole, criterion for determining whether or not their property use will be supported. In addition, reducing property use to its economic worth leads to a very narrow, non-holistic, view of what it means to be a property owner. Gone is the image of property as the fullest bundle of sticks, allowing the owner free rein over the use of their property so long as this does not impinge upon or harm others. In its place is an image of property as an economic unit, which must be utilised to a particular unknowable capacity, in order to afford any protection for more personal interests. Where property is not being 'used' to this required level, such personal links will not receive sufficient recognition in themselves to protect the status quo of the property allocation.

One of the difficulties with takings, particularly for economic development purposes, is that their use and scope are difficult to predict. Individuals may feel especially helpless given that it is often impossible to foresee when or even whether the State may want their property, let alone another wealthier, or more determined private party. There is always the possibility that someone else may find a 'better' use for property. Justice O'Connor's dissent in *Kelo* described this situation by asking 'who among us can say she already makes the most productive or attractive possible use of her property? … Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.'[111]

4.4.4 Assessing the influence of personhood on private takings

Despite frequent legal references to the central role of the home to human identity and security, Radin notes that if the personhood perspective were to be expressed in law, it might be expected to act as an implied limitation on takings. In these circumstances, special, personal, categories of property such as the family home would be expected to

[111] *Kelo v City of New London*, 503.

receive property rule protection rather than liability rule protection.[112] In fact, the personhood perspective has not emerged to protect family homes from being taken, and nor has stricter judicial scrutiny for such takings occurred.[113] The American approach has been succinctly summed up by Justice Plager who observed that a 'man's home may be his castle, but that does not keep the government from taking it.'[114]

A similar situation also exists in England. For example, the House of Lords' decision in *London Borough of Harrow v Qazi* revealed a potentially ambiguous approach to the idea of *home*, albeit not strictly in a takings case, before firmly finding that the *home* did not have or deserve additional legal protection. Lord Bingham referred to the fact that Article 8(1) ECHR protected the home because 'few things are more central to the enjoyment of human life than having somewhere to live' and referred to previous domestic definitions of home as the place where a person lives 'and to which he returns and *which forms the centre of his existence*'.[115] Yet, their lordships were all reluctant to accept that the termination of the tenancy in *Qazi* 'in a manner consistent with its contractual and proprietary incidents' could constitute a 'lack of respect for the home.' This was because the 'home was always subject to those contractual and proprietary incidents' and the 'contrary view' would be to 'treat a "home" as something ethereal, floating in the air, unconnected to bricks and mortar and land.'[116] In Fox's view it is 'noteworthy' that the House of Lords 'dismissed the proposition that home could bear value in law, other than as a physical structure or capital asset, with language evoking images of a vaporous, insubstantial (non-) entity.'[117]

Despite the House of Lords' approach it seems that property, particularly land and the home, represents for many far more than mere bricks and mortar. Property and the home can symbolize 'things that money itself can't buy – place, position, relationship, roots, community, solidarity, status … and security too …'[118] English law recognises

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[112] Calabresi and Melamed 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral'.
[113] Radin 'Property and Personhood', 1006. See also J Fee, 'Eminent Domain and the Sanctity of Home' 81 Notre Dame L Rev 783 (2006) who argues that current eminent domain law in America does not adequately protect the home, and calls for higher levels of compensation when homes are taken.
[114] *Hendler v United States* 952 F 2d 1364 (1991), 1371.
[115] *London Borough of Harrow v Qazi*, [8] [emphasis added].
[116] *ibid*., [145] (Lord Scott).
[117] Fox, *Conceptualising Home: Theories, Laws and Policies*, 247.
[118] Michelman 'Property as a Constitutional Right', 1112.

this to an extent by providing for 'home loss payments' (amongst other financial recompense) under s. 29 Land Compensation Act 1973. In the event that a person is displaced from a dwelling due to the compulsory acquisition of their interest in the property they will be given extra monetary compensation. Under s. 30 of the same Act, the home loss payment is calculated at 10 per cent. of the market value of the relevant interest in the dwelling, subject to a maximum of £47,000 and a minimum of £4,700.[119] Whilst it is good to see some official recognition of the importance of a home or dwelling to individuals, these provisions will still prove to be insufficient for those who want their home to be protected by property-protection rather than liability-protection. As Laura Underkuffler notes, concepts of property can become closely intertwined with a sense of control such that with this 'visceral power of property comes similarly visceral outrage when property needs and claims – so obvious to those who assert them – are not honoured.'[120]

There is, it must be acknowledged, a vitally important flip-side to the significance of the home and the ability of owners to exclude others, including the government, from this most private of spheres: the concomitant exclusion and subordination of the homeless.[121] As Schnably observes, the 'social image of the home as a refuge gives strong support to the idea of property as a right to exclude' but this may 'ironically, bolster strategies aimed at rendering homeless people invisible or pushing them into harmful disciplinary regimes.'[122]

4.5 SECURITY AND PRIVATE TAKINGS

One of the most serious potential objections to private takings has already been glimpsed in relation to concerns about their effect on personhood; it is the impact that private takings may have on the security of property rights generally. Property rights are

[119] Home Loss Payments (Prescribed Amounts) (England) Regulations 2008, SI 2008/1598.
[120] Underkuffler, *The Idea of Property: Its Meaning and Power*, 3.
[121] See J Waldron 'Homelessness and the Issue of Freedom' 39 UCLA L Rev 295 (1991). This significant area also crosses over into debates about privatisation of public spaces, see for example Gray and Gray 'Private Property and Public Propriety'.
[122] SJ Schnably, 'Rights of Access and the Right to Exclude: the Case of Homelessness' in GE van Maanen and A van der Walt (eds) *Property Law on the Threshold of the 21st Century* (Maklu, 1996), 554. See also the exploration of property from the perspective of those on its margins in A van der Walt, *Property in the Margins*.

strongly bound up with security values and regularity in daily social encounters.[123] Property rights though depend on the State to guarantee entitlements, otherwise chaos and anarchy might quickly return with 'might as right' becoming the prevailing property allocation and enforcement method. The American courts have drawn attention to the need for property protection to support and stabilise the property usage claims relied upon in daily life. In addition, people's reliance on these claims must not be 'arbitrarily undermined.'[124] In Justice Ryan's famous dissent in the *Poletown* case he warned that 'economic development takings "seriously jeopardiz[e] the security of all private property ownership."' This view was echoed by Justice O'Connor in *Kelo* when she warned that the majority decision would lead to 'the specter of condemnation' hanging over all property.[125]

4.5.1 Bentham and security of property

In a world where property rights are arbitrarily at risk it is possible that 'the game which property lawyers play would disintegrate into some sort of lottery – the juristic equivalent of a game of musical chairs – in which claims to desired resources would be constantly liable to be swept aside by random, unilateral and unappealable fiat.'[126] Not only is a lack of security personally upsetting, but it may have more far-reaching consequences for society at large. Whilst Jeremy Bentham asserted that there 'is no such thing as natural property, and that it is entirely the work of law' comprised of nothing but 'the expectation of deriving certain advantages from a thing which we are said to possess', he agreed with Locke on the importance of security of property rights.[127]

For Bentham, security consisted of 'receiving no check, no shock, no derangement to the expectation founded on the laws' and the legislator 'owes the greatest respect to this expectation which he has himself produced.'[128] Bentham categorised the evils that

[123] Michelman 'Property as a Constitutional Right', 1102.
[124] *Board of Regents of State Colleges v Roth* 408 US 564 (1972) (US Supreme Court).
[125] At 503. Large-scale property reallocations may well lead to a sense that all property rights are 'up for grabs', but the low-key private takings considered in chapters 4 and 5 of this thesis are arguably just as detrimental to the security of property.
[126] Gray and Gray, *Elements of Land Law*, [1.5.33].
[127] Locke, *Two Treatises of Government*, 359, [134].
[128] Bentham, *The Theory of Legislation*, 111-113.

result from violations of property under four different heads: the evil of non-possession; the pain of losing; the fear of losing; and the deadening of industry. The fear of losing and pain of losing are most obviously intertwined with security of property. As he explained, when people lose faith in the security of property the 'fear of losing prevents us from enjoying what we possess already.' People are forced to expend their energies on a 'thousand sad and painful precautions' where treasures are 'hidden or conveyed away' and enjoyment becomes 'sombre, furtive, and solitary' fearing to show itself 'lest cupidity should be informed of a chance to plunder.'[129]

When property *is* taken away the individual no longer needs to be anxious about protecting their assets, but they instead suffer the pain of losing. Bentham argues that property is often made the 'basis of my expectations, and of the hopes of those dependent upon me' forming part of one's 'plan of life.' In addition, property may have a 'value of affection – as an inheritance for my ancestors, as the reward of my own labour, or as the future dependence of my children.'[130] In terms reminiscent of Radin's personhood theory, Bentham asserts that 'our property becomes a part of our being, and cannot be torn from us without rendering us to the quick.'[131] The effects of insecure property are not limited to a solely individual perspective since an attack on the property of an individual 'excites alarm among other proprietors' spreading from 'neighbour to neighbour, till at last the contagion possesses the entire body of the state.'[132]

4.5.2 Security and private takings

Concerns about the security of property are equally valid in relation to State as well as private takings. However, whilst historically private takings promoted geographically discrete and temporally-limited projects, such as the building of a railroad or the erection of a specific bridge, this is no longer the case.[133] More recently private takings

[129] *ibid.*, 116.
[130] These concerns are echoed in the Second Dissent in *JA Pye (Oxford) Ltd v United Kingdom* (44302/02) (2007) 46 EHRR 45 (Grand Chamber) which is discussed in chapter 4 of this thesis.
[131] Bentham, *The Theory of Legislation*, 115.
[132] *ibid*., 116.
[133] See *Props of the Charles River Bridge v Props of the Warren Bridge* 36 US 420 (1837) (US Supreme Court). Here, even though private investors were rewarded for building a toll bridge by the granting of a monopoly to collect tolls, the monopoly was limited in time. See Alexander, *Commodity & Propriety:*

have been justified by economic development arguments. As such, projects in a specific locality may have a ripple-effect on other areas in the vicinity, encouraging neighbouring councils to raise their tax bases and look to economic development takings as well. Such ambitions may be praiseworthy in the abstract. However, whilst an end-point may be envisaged (such as increasing the tax base of the area to a certain level), economies need constant attention and nursing in order to thrive. The need for further economic improvement and development may always, mirage-like, appear to be in the distance. In a situation such as this property rights may become extremely fragile. Not only are courts likely to focus on the institutional competence of the taking party rather than the public-private label attached to them, but also such takings have no easily discernible and limitable end-point: everything is potentially up for grabs.

Broad interpretations of the public use and public interest fetters could be said to undermine the security of property rights generally. Where property rights are vulnerable to being taken by unknown parties (not only the State, but private parties as well), and at unknown times (economic development as a non-bounded concept), it seems as if any feelings of security in property rights are illusory. Not only are monetary losses a potential problem, but security in intangible property 'rights' may be vulnerable too. Where property is taken, individuals are no longer as free as they previously were to satisfy their own preferences. The focus narrows to protecting property and assessing risk rather than enjoying the independent legal and political sphere afforded by property.[134]

4.6 TYRANNY AND PRIVATE TAKINGS

The distrust with which private takings are viewed may be a natural product of the fear provoked by their capacity to tyrannize particular individuals or groups of individuals. As Sax notes, the process of reallocating property can provide States with a 'particularly apt opportunity for rewarding the faithful or punishing the opposition.'[135] Whilst examples may be drawn from both historical and modern authoritarian

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Competing Visions of Property in American Legal Thought, 1776-1970, 204ff for further discussion about the case.

[134] See chapter 5 of the thesis.

[135] JL Sax 'Takings and the Police Power' 74 Yale L J 36 (1964), 64.

governments, there is some merit to the argument that the unpredictable nature of such takings might be too slow and 'dull' a tool to be used as a systematic means of controlling selected subjects.[136]

Rather than the State itself using such an indiscriminate means of oppression, the likelier, and therefore more menacing, outcome of private takings transfers is the fear that factions of society could use such takings as a means of victimising outsiders, the poor, and the vulnerable. When private takings are prohibited and benefits redound more transparently to society at large, it is arguable that this produces a greater sense of societal tranquillity, since one 'man is not afraid of another, and no man afraid of the legislature.'[137] In these circumstances, it may be that the potential for animus and friction between selfishly motivated interest groups would be reduced.

It is unclear whether private takings have been used to tyrannise individuals or specific groups in England. However, the history of American takings law in this respect is unedifying. Regrettably, it appears that eminent domain may have provided an opportunity for systematic discrimination against minority groups, particularly African-Americans and Hispanics. Given that the Supreme Court decided the seminal civil rights case of *Brown v Board of Education*[138] in May 1954 and heard *Berman v Parker* in November of the same year, it is perhaps surprising that Justice Douglas made no specific comment about the racial composition of the population involved in *Berman*. The blighted area to be cleared was said to amount to 5,012 individuals, of whom 97.5% were African-Americans.[139] The impact of takings on African-Americans in other areas of the country was just as severe with public programs of highway building and urban renewal displacing some 10,000 Baltimore families, 90% of whom were African-Americans, in the period from 1951 to 1964.[140] Commentators have noted that

[136] Stoebuck 'A General Theory of Eminent Domain', 597.
[137] *Vanhorne's Lessee v Dorrance*.
[138] 347 US 483 (1954) (US Supreme Court). Here, the court held that the 'separate but equal' doctrine adopted in *Plessy v Ferguson* 163 US 537 (1896) (US Supreme Court) had no application in the field of public education, and that segregation of children in public schools solely on the basis of race deprived minority group children of equal educational opportunities, even though physical facilities and other factors might be equal.
[139] *Berman v Parker*, 28.
[140] Frieden and Sagalyn, *Downtown, Inc., How America Rebuilds Cities*, 29.

'blight' was a 'facially neutral term' in itself but 'infused with racial and ethnic prejudice.'[141]

4.7 JUDICIAL SCRUTINY AND PRIVATE TAKINGS

Judicial scrutiny of takings decisions could provide a valuable opportunity for the courts to act as a bulwark against an overly broad interpretation of the 'public use' doctrine, and to protect against tyranny. In a world where almost any taking will satisfy the public use requirement, it becomes more important than ever that the courts use their discretion to prevent property rights from being totally denuded of meaningful content. This situation is complicated by the fact that the Anglo-American and European courts are often highly deferential to legislative decisions in the first place. Additionally, where private bodies or individuals benefit from takings it is often impossible to bring claims for judicial review against such parties.

4.7.1 Judicial scrutiny in American takings cases

The US Supreme Court operates a highly deferential standard of review against legislative decisions noting that 'it is not for the courts to oversee the choice of boundary line' and that once the issue of public purpose has been decided, the 'amount and character of the land' to be taken rests in the discretion of the legislative branch.[142] The US Supreme Court merely recognises that the 'needs of society have varied between different parts of the Nation'[143] and that because of this the early cases, 'embodied a strong theme of federalism' and emphasised the 'great respect' owed to State legislatures and State courts in discerning local public needs.[144] Mansnerus notes that there are some State constitutions, such as Arizona and Montana, which specifically provide that the meaning of 'public use' is to be determined by the

[141] WE Pritchett, 'The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain' 21 Yale L & Policy Rev 1 (2003), 6. See also 46-47 where Pritchett argues that whilst *Brown* reflected a distrust of government to protect minority groups and to treat all citizens equally, the Supreme Court trusted local government to act in a non-discriminatory way when clearing property for development. Pritchett argues convincingly that this paradoxical approach by the Supreme Court had 'profound racial implications' and enabled the economic development public use doctrine to 'reshape the racial and economic geography of cities.'

[142] *Berman v Parker*, 35.

[143] *Rindge Co v Los Angeles*, 706.

[144] *Fallbrook Irrigation District v Bradley*, 158.

judiciary.[145] Generally though, the courts are deferential, preferring to avoid 'rigid formulas and intrusive scrutiny' and instead to give legislatures 'broad latitude' in determining what public needs justify the use of the takings power.[146] There is a danger though that this level of review may involve no real scrutiny at all; at some stage deference becomes passivity.

The Supreme Court held has held that the 'concept of the public welfare is broad and inclusive.'[147] Following *Kelo's* expansive equation of predicted economic benefits as a public use, it seems that almost any taking presented to the Court should pass muster under the public use clause. This is the point at which the doctrine of separation of powers and institutional competence step in, preventing the Supreme Court from inquiring into the viability and need for the project.[148] Inquiries into the predicted benefits of takings are generally cursory, since the level of review by the Supreme Court is one of minimal rationality. The Supreme Court defers to the legislature's determination of a project as serving a public use 'until it is shown to involve an impossibility.'[149] The Court has refused to depart from this attitude of judicial restraint on the basis that such a move would involve the courts deciding what is, and is not, a governmental function. However, the Court's minimal, rational-based, scrutiny is hard to justify given the importance of property rights to the exercise of other human rights.[150] State courts have taken a firmer line when scrutinising takings legislation and have even inquired into whether formal mechanisms exist that would ensure that the planned businesses continue to contribute to the local economy, as promised.

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[145] L Mansnerus, 'Public Use, Private Use, and Judicial Review in Eminent Domain'58 N Y U L Rev 409 (1983), 410 fn 11. E.g. Ariz. Const. art. II, 17 (1910) amended (1970) public use: 'shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.' Likewise, the Montana Constitution, art 1 para. 28: 'the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.' *Cf.* the Virginia constitution which states that the public use question is to be determined by the legislature: Va Const art 1, para. 11.

[146] *Kelo v City of New London*, 483.

[147] *Hawaii Housing Authority v Midkiff*.

[148] *Berman v Parker*, 32, stated that the Court's role in reviewing the legislature's decision that a public use exists is narrow.

[149] *Old Dominion Co v United States* 269 US 55 (1925) (US Supreme Court), 66.

[150] Mansnerus 'Public Use, Private Use, and Judicial Review in Eminent Domain', 428, observes that it is hard to justify property rights as worthy of less constitutional protection than economic rights. Such an approach is hard to justify when the interests at stake are home and community, social and family ties, a way of life and perhaps livelihood.

The effect of this cursory level of judicial review in takings cases is that the Takings Clause appears to set few limits on the exercise of eminent domain powers by the State. A broad interpretation of public use catches almost all plans, and by overlooking the need for a higher level of scrutiny based on the impact on personhood of taking property, the public use doctrine is left as 'little more than hortatory fluff.'[151] Justice O'Connor's dissent in *Kelo* warned that such a situation was unenviable, and argued that an 'external, judicial check' on the interpretation of the public use clause 'however limited' was necessary 'if this constraint on government power is to retain any meaning.'[152]

It appears that there may well be some merit to concerns about private takings based on their impact on personhood and security of property rights generally. If this is the case, it becomes even more important that courts are prepared to scrutinize takings cases, even where a public use is alleged. Otherwise, there is no meaningful mechanism for the courts to balance the interests of various individuals or to ensure that such takings are not being abused.

4.7.2 Judicial scrutiny in English and European takings cases

Whilst it is axiomatic that English courts may intervene when a decision-maker acts *ultra vires* in exceeding the powers granted to them by Parliament, there are difficulties when reviewing broad subjective powers and the accountability of private parties. There may not only be legislative discretion in 'identifying and interpreting purposes' but also as to the 'policies, standards, and procedures to be followed in achieving these purposes.'[153] The degree of deference, which higher courts will show towards reviewing an exercise of discretion for being ultra vires, appears to depend upon the legal character of the decision-maker and an implied assessment of the relative institutional competence of the reviewing court to query the decision made.[154]

[151] *Kelo v City of New London*, 497, (Justice O'Connor).
[152] *ibid.*
[153] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, Oxford, 1986), 29-30, 281-282.
[154] See R Clayton 'Principles for Judicial Deference' [2006] JR 109, 115, where he comments that: 'The fact that the court will acknowledge that the executive has special expertise which makes it better equipped to decide certain questions of fact … does not mean that it should concede to the executive's views on the crunch constitutional question.' J Jowell, 'Judicial Deference: Servility, Civility or

Discretionary decisions made by lower courts, or by those dealing with highly specialised areas of the law,[155] or policy and political issues are likely to be deferred to by reviewing courts.[156] A typical example of the judicial approach to policy driven areas may be seen in Lord Bingham's comments in the pre-HRA 1998 case of *R v Smith* that concerned a policy banning homosexuals serving in the Armed Forces. He noted that the 'greater the policy content' and the 'more remote the subject matter of a decision from judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational.' Thus, the courts will show 'even greater caution than normal' when reviewing decisions of a 'policy-laden, esoteric or security-based nature.'[157]

Likewise, in *James v United Kingdom* the Strasbourg court noted that national authorities would be 'better placed' than international judges to appreciate what was in the public interest given their 'direct knowledge of their society and its needs'. The content of 'public interest' was said to be 'necessarily extensive [given that] ... the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely.'[158] An additional problem for those challenging takings of property is that the ECtHR has distinguished between the margin of appreciation to be drawn in cases involving Article 1 and Article 8. In the former situation, the court is willing to respect the legislature's judgment of what is in the general interest 'unless that judgment is manifestly without reasonable foundation'. In relation to Article 8 however, the Strasbourg court looks to the context of the case 'with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant' due to its 'central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.'[159] Many of these benefits echo those also secured

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Institutional Capacity' [2003] PL 592; J Steyn, 'Deference: a tangled story' [2005] PL 346; and Dyson, 'Some Thoughts on Judicial Deference' [2006] JR 103.

[155] Such as the internal rules of a university, see for example *R v Hull University Visitor, ex parte Page* [1993] AC 682 (HL).

[156] E.g. *Notts CC v Secretary of State for the Environment* [1986] AC 240 (HL) and *R (Asif Javed) v Secretary of State for the Home Department* [2002] QB 129 (CA).

[157] *R v Ministry of Defence, ex parte Smith* [1996] QB 517 (CA), 556.

[158] At [46].

[159] *Connors v United Kingdom* (App no 66746/01), (2005) 40 EHRR 9, [82].

under Article 1, but clearly the addition of the 'home' in this equation allows for a greater level of judicial scrutiny under Article 8.

4.8 CONTROL OF PRIVATE ENTITIES

In addition to the problems raised by deferential standards of review, the courts are also faced with the difficulty of controlling private entities involved in private takings. Some parties may operate in a quasi-public capacity and therefore be amenable to control via judicial review as an administrative body. However, given that the Court will generally not look to the 'mechanics' of a taking when ruling whether it is permissible or not, it is possible that more wholly private corporations may benefit from takings either as a result of a direct private takings transfers, or because of the actions of a third party public entity. Any consideration of the legal accountability of privatised entities or contracted-out service providers in England under judicial review requires some appreciation of the difficulties raised by the perennial debate about the public-private divide in this sphere.[160] Defining the scope of judicial review is difficult. Traditionally, the outer boundary of judicial review has been shaped by a somewhat amorphous concept of 'publicness'.[161] An alternative approach, not seemingly favoured by the courts, has been put forward by Woolf who argued that the courts should look rather to controlling monopoly power as the criterion for deciding whether de facto powers should be subject to judicial review.[162]

One of the most significant difficulties is that often private bodies have contractual agreements with public authorities where responsibility or discretion has in effect been delegated. The basis of such delegation is normally the desire for a private body to deliver the end-product or service rather than the public authority; an example might be the provision of redeveloped housing by a private entity, with the public authority acting merely as a conduit for obtaining the relevant Compulsory Purchase Order. Services are organised around a 'central separation between "purchasers" and

[160] The thesis will not consider whether there should be a divide in the first place. For a more detailed discussion on this point see D Oliver 'Common Values in Public and Private Law and the Public/Private Divide' [1997] PL 630.
[161] *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA) where the Panel of Take-overs and Mergers was susceptible to judicial review despite having been established under prerogative, rather than statutory, powers.
[162] Woolf, 'Public Law – Private Law: Why the Divide?' [1986] Public Law 220.

"providers".[163] The approach taken by the courts does not appear to have kept pace with the challenges posed by contracted-out services with findings that public law obligations are unenforceable against service providers. This is on the basis that contracting-out provisions disentangle the service provider from the 'statutory embrace' of the public authority leaving their relationship to be governed solely by the terms of the contract between them.[164] This approach has been trenchantly criticised by commentators such as Craig who argues that contracting-out provisions should have the opposite effect since they 'explicitly and directly' confirm that private parties can carry out public functions, and thereby provide a greater degree of statutory underpinning.[165]

4.8.1 The Human Rights Act 1998 and private entities

An associated issue arising in relation to compulsory purchase cases, and the accountability of private parties in private takings, is the difficulty of knowing when a body exercising such powers is acting as a public authority for the purposes of s. 6 of the HRA 1998. In the absence of the HRA 1998 having full horizontal effect, it is clearly necessary to demonstrate that an entity is a public authority under s. 6 in order to enforce Convention rights, such as Article 1, against the entity involved. The difficulties inherent in applying the HRA 1998 to private parties are discussed in more detail in chapter 3.

5 CONCLUSION

Private takings have traditionally been viewed by the courts and the public with suspicion. However, other than denouncing such takings, little detailed consideration

[163] M Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997).
[164] *R v Servite Houses, ex parte Goldsmith* (2001) 33 HLR 369 involved an application for judicial review against Servite, a charity to which Wandsworth LBC had contracted out the provision of accommodation required under s. 21 of the National Assistance Act 1948.
[165] P Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review' (2002) 118 LQR 551, 564-567, where he also argues that the contractual relationship between a local authority and private service provider: 'does not tell us whether the function being performed … is subject to public law. Nor is it readily apparent why the fact that a function would be public if performed in house, should not be of direct relevance when deciding whether it is public when performed by a private service provider.'

has been paid previously to what the basis might be for this attitude. This chapter has outlined some of the underlying property concerns raised by private takings, and argues that there *are* some significant if often unarticulated objections to such transfers. Whilst some of the objections to private takings could apply to public takings as well, it seems that private takings *do* raise particular problems.

Despite their often low-key character, and the rhetoric employed against them, private takings are ubiquitous in Anglo-American law. There are particular difficulties with supervising such takings, and this issue is of concern given their ability to undermine both personal links with land, and the stability of property rights in a way which public takings do not. The thesis argues that understanding the objections to private takings helps to clarify the significance of the public-private divide entrenched in property protections. In the next three chapters, specific instances of private takings within the English property regime will be examined, in an attempt to appreciate their operation and their impact on doctrine and property concepts.

CHAPTER 3
PRIVATE ENTITIES AND POWERS OF COMPULSORY ACQUISITION

The first shock of a great earthquake had, just at that period, rent the whole neighbourhood to its centre ... and wholly changed the law and custom of the neighbourhood. In short, the yet unfinished and unopened Railroad was in progress; and, from the very core of all this dire disorder, trailed smoothly away, upon its mighty course of civilisation and improvement.[1]

There is not in the system of any civilized country ... a more singular anomaly than the constant, regular, and indeed, everyday interference of British Parliament with the most important interests and the most sacred [property] rights of individuals.[2]

1 INTRODUCTION

Some 150 years after the Victorian railway boom changed the British landscape forever, similar disruptions to those described above continue to alter neighbourhoods worldwide in the name of progress. Frequently, the success of large-scale infrastructure projects relies upon the strategic use of compulsory purchase powers to achieve clear title over numerous plots of land, whilst avoiding holdout problems. What is less well-appreciated is the extent to which private entities can exercise acquisition powers, not only when involved in realising public regeneration schemes, but also for their own benefit.

This chapter argues that, despite popular belief, there are many historical examples on both sides of the Atlantic of private companies possessing the power to acquire property compulsorily from other private parties. Despite their long-standing use and many

[1] C Dickens, *Dombey and Son - Works of Charles Dickens* (Household Ed, Shelton and Co, New York, 1862), 99-100.
[2] RW Kostal, *Law and English Railway Capitalism 1825-1875* (Clarendon Press, Oxford, 1994), 176, quoting from Railway Legislation, 2 (1845).

potential benefits, this chapter argues that private takings occurring under the auspices of delegated powers today should be viewed with greater caution due to differences of scope and form. The general concerns raised by private takings, as discussed in chapter 2, are liable to be exacerbated by the wide scope of modern private compulsory purchase powers. Not only are these powers broadly drafted, but their supervision and review also present significant challenges in an era of privatisation and a growing contractualisation of many State functions.[3] No position is taken on the *political* or *moral* desirability or otherwise of private acquisition powers. Rather, the focus here is on examining their history to gain a greater insight into their use.

This chapter thus begins with a contextual overview of various significant historical examples of the use of private powers of compulsory acquisition in England. In an echo of the chapter's epigraph, the overview focuses particularly on the noteworthy readjustment of private rights triggered by the canal and railway building booms in the 19th century; these demonstrate the long-standing governmental facilitation of, and reliance upon, private takings. Comparisons are then drawn between the legislative background and scrutiny afforded to these historic powers, and their modern counterparts, notably s. 226 of the Town and Country Planning Act 1990. Unlike other private takings discussed in this thesis, it is contended that those analysed in this chapter have a greater explicit potential to affect the wider community rather than merely individuals or small groups. Additionally, there are serious problems with challenging the use of these powers given the current interpretive limitations posed by both judicial review and human rights review in England.

2 THE ENGLISH EXPERIENCE – PRIVATE ACTS OF PARLIAMENT

It might be thought that legislation of the type exemplified by the American Mill Acts was the unique product of the challenges presented by the intense and rapid settlement of the New World. Whilst the *terms* of the Acts were particular to America, analogous legislation exercised an even greater sway in England, albeit against a very different constitutional backdrop. The historic existence of such statutory private takings in this

[3] Hunt, 'Constitutionalism and the Contractualisation of Government in the United Kingdom'.

country appears counterintuitive given Blackstone's supposed theoretical influence on property rights, and the 'lush flowering of absolute dominion talk in theoretical and political discourse' particularly in the eighteenth century.[4] However, as alluded to in chapter 1 social and economic institutions in England at Blackstone's time were not founded on absolute dominion rights but rather on property rights 'fragmented and split among many holders … property subject to arbitrary and discretionary direction or destruction at the will of others' and 'qualified and regulated for communal or state purposes.'[5]

2.1 PRIVATE ACTS OF PARLIAMENT

For centuries, Parliament has actively facilitated the exercise of private acquisition powers by enacting Private Acts in the name of economic advancement. Some of the clearest historical examples of English legislation explicitly promoting private takings are to be found in the many Private Acts authorising the building of canals and railways.[6] Such legislation has arguably played an integral role in enabling Parliament to readjust specific property rights in order to avoid the 'tyranny of monopoly' whilst nonetheless encouraging private enterprise.[7] The use of Private Acts, rather than Public Acts of Parliament, may well have allowed the Blackstonian myth of absolute dominion to flourish more strongly than might otherwise have been possible. Those affected by a private statute would be intimately interested in its terms, but wider society would often remain oblivious to the ramifications of the project at stake unless it was particularly contentious.[8]

2.1.1 Origins of private Acts of Parliament

Unlike the enactment of the American Mill Acts, the Private Bill procedure involves Parliament acting not only in its legislative capacity, but also abiding by a quasi-judicial

[4] Gordon, 'Paradoxical Property', 96.
[5] *ibid.*
[6] The Inclosure Acts are outside the ambit of this thesis but see n. 31 in chapter 1 of this thesis for reference to the nature of the legislation involved.
[7] Onslow, 'The Rise and Development of Local Legislation by Private Bill' Journal of the Royal Statistical Society, Vol 69 (1) (1906) 1, 4.
[8] Similar issues are raised by the categories of private taking considered in chapters 4 and 5 of this thesis.

decision-making process.[9] The constitutional framework surrounding this type of legislation is thus of a fundamentally different character to that existing in America, and has been greatly influenced by historical accident. Most probably, private legislation developed out of a practice, which existed by the reign of Henry IV, of individuals petitioning Parliament for extraordinary and peculiar powers over and above those granted by the common law.[10] Early private legislation was often highly personal in nature given that it usually related to matters of familial importance such as requests for divorce, and the alteration of settlements and entails.

Despite the growth of general or public statutes applicable to the whole community, private legislation continued to play an important role particularly in relation to property rights. Private Acts have encompassed the creation of ports, the deepening of river estuaries, the reclamation of the land from the sea and marshes and thereby permit the tracing of the 'rise, development, and … decay of the great industrial and commercial movements in England.[11] Private Acts continue to be used today in order to execute complex 'local' projects, although far less frequently than in previous centuries.[12] During the 1980s, for example, there was a resurgence of private legislation relating to railways, the London Underground, as well as harbours and river barrages.[13]

2.2 PRIVATE ACTS AND PARLIAMENTARY SOVEREIGNTY

Whilst both England and America faced the same dilemma as to how best to protect property rights and yet encourage entrepreneurship, it appears that the English strategy

[9] W McKay (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd ed, LexisNexis, 2004), 967, states that those applying for powers or benefits 'appear as petitioners for the bill, while those parties who fear that their interests may be adversely affected by its provisions have the opportunity to oppose it. Many of the formalities of a court of justice are maintained … and if the parties do not meet such requirements, the bill will not be permitted to make further progress.'
[10] OC Williams, *The Historical Development of Private Bill Procedure - Volume 1* (HMSO, 1948), 24.
[11] Onslow, 'The Rise and Development of Local Legislation by Private Bill', 5-6.
[12] The Public Transport and Works Act 1992 ('TWA 1992') was enacted in response to the report (HL 97, HC 625, 1987-1988) of a Joint Committee set up in 1987 to consider whether the matters dealt with in private bills during the 1980s could be dealt with more appropriately. Due to the enactment of the TWA 1992, the number of such petitions for private bills has dropped considerably; in 2002-2003, only three such private petitions were presented.
[13] McKay (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 966.

was shaped predominantly by pragmatism tinged with greed.[14] The lack of any clear conceptual framework for these takings may be seen as the result of two important issues: the lack of explicit written constitutional protection afforded to property rights; and the sovereignty of Parliament. Both of these factors served to obscure the underlying theoretical concerns presented by private takings of this type. Not only were questions about the values protected by property unlikely to arise, but those that did would be forestalled due to the lack of meaningful mechanisms for questioning the balance drawn.

For the English, the long-standing attraction of private statutes lay in their ability not only to discriminate between the conflicting property interests of opposing parties (as would happen in a court hearing), but to do so in a manner which prevented any further discussion or appeal. Once enacted, a Private Act allowed for the unassailable shifting of property rights. Until recently no one, and no body, had the power to gainsay the terms of a validly enacted statute.[15] Parliament traditionally possessed 'absolute despotic power' as the 'sovereign and uncontrollable authority'[16] in making or repealing legislation, and as such was immune to legal challenge even on the grounds that the terms of a statute had been obtained by fraud.[17]

As will be discussed later in this chapter, the English constitutional framework continues to affect judicial review and control of statutory powers in this arena. Particular supervisory challenges arise here which are without parallel in the United States. It seems that American courts rarely succeeded in avoiding the issue of private takings powers. Not only did explicit property protection exist at both state and Federal levels from early on, but there was a greater willingness to scrutinise, and strike-down, legislative actions which threatened to undermine the Constitution's pre-eminence, as demonstrated in the seminal case of *Marbury v Madison*.[18]

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[14] Anon, 'Connected with Railways' 9 L Rev & Q J Brit & Foreign Jurisprudence 102 (1848), 107: 'In this country… we have proceeded in the first place with our constitutional caution and in the next place with our constitutional love of speculation and greediness of gain.'
[15] See now s. 4 of the HRA 1998 which empowers the courts to make a declaration of incompatibility in the event that they are unable under s. 3 of that Act to interpret legislation in a Convention-compliant manner.
[16] Blackstone, *Book II, Commentaries on the Laws of England*, 2-9.
[17] *Pickin v British Railways Board* [1974] AC 765 (HL).
[18] *Marbury v Madison*, 5 US 137 (1803) (US Supreme Court).

3 THE CANAL BOOM

The use of private powers of compulsory acquisition to build toll roads, canals and railways in England began to grow from the 1750s onwards.[19] As in America, the importance of infrastructure-links to the economic wellbeing of the country cannot be underestimated. The development of canals across England allowed for previously landlocked and isolated areas to benefit from the ability to transport materials and goods by water, and thereby shaped the economic geography of the country.[20] As a result, canals were essential to economic and urban development for almost 100 years in facilitating the carriage of coal to ironworks, mills and factories along with other heavy commodities such as copper, tin, salt and china clay, and ensuring regular deliveries of grain and groceries.[21] Whilst the gains from canals were high, so were the initial costs particularly in relation to land. It was understandably rare for an economically useful canal to be built solely across one landowner's property,[22] with most projects requiring long strips of land crossing various counties and thereby affecting larger numbers of individuals.

Private Acts allowing for private takings thus proved to be vital in avoiding holdout problems from landowners, and did not require particular extra effort on the part of a canal's promoters. Most canals were funded by joint-stock companies which, following the Bubble Act of 1720, necessarily required Parliamentary approval for their incorporation.[23] Accordingly, it was not an arduous task to include an additional request for compulsory purchase powers in the petition for a Private Bill relating to incorporation as a joint-stock company. Following the economic success of the early 'trunk canals' such as the Trent & Mersey, a deal of financial speculation occurred in a

[19] McKay (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 965.
[20] MJ Daunton, *Progress and Poverty: An Economic and Social History of Britain 1700-1850* (OUP, Oxford, 1995), 287.
[21] J Simmons and G Biddle (eds), *The Oxford Companion to British Railway History from 1603 to the 1990s* (OUP, Oxford, 1997), 67.
[22] The most famous exception is, of course, the third Duke of Bridgwater who from 1759-1761 constructed a canal to transport coal from his estate at Worsley to Manchester and Liverpool.
[23] The Bubble Act of 1720 (6 Geo. 1, c. 18). For an interesting analysis of the reasons for passing the Act see R Harris 'The Bubble Act: Its Passage and Its Effects on Business Organization' The Journal of Economic History, Vol 54, No 3 (1994), 610. For a fascinating account of the growth in importance of the joint stock company see R Harris, *Industrializing English Law: Entrepreneurship and Business Organization 1720-1844* (CUP 2000).

brief period from 1789 to 1796, during which it became increasingly common to reallocate property rights between individuals and privately-owned joint-stock companies.[24] However, it was with the growth of the railways that the use of private compulsory purchase powers in England began to explode.

4 RAILWAY MANIA

At first, steam-powered railways were something of a novelty rather than viewed as a practical undertaking. Before long however, their economic potential began to be appreciated so that from 'something approaching … dislike, the feeling changed to an almost frantic adoption.'[25] The 'railway age' in England is most often associated with the opening of the Stockton to Darlington railway in 1825.[26] As such, an appreciation of this period acts as a valuable reminder of the ubiquitous and accepted presence of private takings in English law.

By the 1840s the expansion of the railways had led to the 'most dramatic infringement of private property rights in England since the Civil War' and a situation where few were, 'entirely safe from what contemporary observers justly referred to in the 1840s as the railway "invasion" of the land.'[27] An appreciation of the mechanisms used during the "railway mania" to accumulate parcels of land is instructive to modern eyes inasmuch as it demonstrates that when it comes to the use of private takings to promote infrastructural and economic development '*plus ça change ...*'.

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[24] Simmons and Biddle (eds), *The Oxford Companion to British Railway History from 1603 to the 1990s*, 68, note that in the period from 1789 to 1796 the country's 'leading civil engineer, William Jessop, appeared before House of Lords Committees on 27 waterway bills' and John Rennie another civil engineer appeared in relation to 16 such bills.

[25] 'On the Rights of Property Connected with Railways', 107.

[26] Others contend that the opening of the Liverpool & Manchester Railway in 1830 is the 'real' beginning of the railways, see Simmons and Biddle (eds), *The Oxford Companion to British Railway History from 1603 to the 1990s*, 412. In 1836, 29 companies were sanctioned in England to build 955 miles of railway line with an authorised capital of £22.9 million. Activity slowed only to reach a peak in 1846 when 272 companies were sanctioned to build 4,540 miles of line with an authorised capital of £132.6 million. Daunton *Progress and Poverty: An Economic and Social History of Britain 1700-1850*, 310-311. Daunton observes that the construction of the railway network was 'rapid' increasing from c. 500 miles in 1838 to 7,500 miles in 1852 'when the main routes were completed between all regions of the country.'

[27] Kostal *Law and English Railway Capitalism 1825-1875*, 144.

4.1 THE SCALE OF RAILWAY TAKINGS

The sheer scale of private takings in England in the mid nineteenth century can be appreciated best by reference to figures compiled from the Appendix to the Report of the Special Committee on Private Bills 1847-8 provided in tabular form by Williams.[28] From 1837 to 1842 around 20 to 25 private railway Bills were enacted annually. In 1844 this rose to 66, and in 1845 this rose again to 110 such Bills, before leaping in 1846 to some 550 railway Bills. In 1847 the number of such Private Bills decreased to 320. It is against this context of a mass readjustment of private property rights that the contemporary literary preoccupation with references to the railways can be understood.[29] Pollins observes that at the height of the railway boom, a new company needed only to place an advertisement of incorporation for it to be flooded with applications for shares. For example, the Great North of Scotland Railway received applications for more than three times the number of its shares in 1845, whilst the Direct Western Railway received 1,400,000 applications for its 120,000 shares.[30]

4.2 PUBLIC REACTIONS TO RAILWAY TAKINGS

Although the railway boom did have a wide impact on privately-held property rights, it should not be assumed from the emotive language used in contemporary accounts that railway companies were the villains of the piece,[31] or only intent on maximising profit to the detriment of society and the landscape.[32] For many railway investors the availability of private compulsory acquisition powers was regarded as essential in

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[28] Williams, 'The Historical Development of Private Bill Procedure - Volume 1', 59.

[29] G Eliot, *Middlemarch* (Penguin Classics, London, 1994), 553: 'railways were as exciting a topic as the Reform Bill or the imminent horrors of Cholera ... proprietors ... were yet unanimous ... that in selling land, whether to the Enemy of mankind or to a company obliged to purchase, these pernicious agencies must be made to pay a very high price to landowners for permission to injure mankind.' See C Dickens' description of the building of the London-Birmingham Railway immortalised in *Dombey & Son* part of which forms the epigraph to this chapter. I Carter *Railways and Culture in Britain: The Epitome of Modernity* (Manchester University Press, Manchester, 2001).

[30] H Pollins 'The Marketing of Railway Shares in the First Half of the Nineteenth Century' The Economic History Review, New Series, Vol 7, No. 2 (1954) 230, 233.

[31] W Collins, *No Name* (Harper & Bros, New York, 1863), 77, refers to the effect of investing in railway shares on one of his characters, the disreputable Captain Wragge: 'The railway mania ... had attacked even the wary Wragge ... and had left him prostrate in the end, like many a better man.'

[32] One notably impassioned and florid petition calling on the shades of 'Merry England' in opposing the coming of a railway is recounted in Pollins, 'A Note on Railway Constructional Costs 1825-1850', 396: 'I will not allow this [letter] to go without expressing … [my] horror at the rumoured projection of a rail road thro' this most interesting domain … [various 'shades' of 'Merry England'] … all call out against the dire and wicked devastation.'

allowing for greater certainty over the running and expansion of the operation. It was feasible for companies to negotiate wayleaves across an individual's land, rather than to acquire the freehold compulsorily, but the rents charged for these were often uneconomic. The financial difficulties and closure of the Stanhope & Tyne Railway in 1841, for example, were blamed on a one-off agreement to pay up to £280 a mile to the Bishop and Chapter of Durham Cathedral in return for a 13 mile wayleave.[33] Leases of railway land were also relatively uncommon and difficult to procure unless the railway passed through Crown lands, as in the Forest of Dean.

Private takings during the railway boom appear to have generated quite different responses in individuals, depending upon their exact circumstances and personal predilections. For some, particularly rural landowners, it seems clear that the personal nature of the powers used led to no injury to their sense of individuality or personhood.[34] Such reported attitudes may however say far more about the relative political influence of those affected, than about general contemporary perceptions of the underlying fairness of private takings. In one sense, unlike private takings today, the railway legislation was most likely to affect those who could best defend their property rights from attack.[35] Much of England was still owned by aristocratic landowners who not only stood to benefit personally from the growth of the railways, but who could also wield significant political influence over the terms of any acquisition.[36] The same cannot be said of those affected by modern private compulsory purchase statutes. Whilst popular dissent against airport expansion schemes, or regeneration projects, may be very effective there are fewer opportunities today for those affected by a taking to exercise direct political influence over the terms.

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[33] Simmons and Biddle (eds), *The Oxford Companion to British Railway History from 1603 to the 1990s*, 250.

[34] See D Spring, 'The English Landed Estate in the Age of Coal and Iron: 1830-1880' The Journal of Economic History, Vol 11, No 1 (1951) 3, 4. Rural landowners had broad economic interests such that, for those with mineral deposits particularly, the railways offered the opportunity to act as both landed gentleman and industrial entrepreneur.

[35] Today those entities promoting private acquisition powers are unlikely to be also on the receiving end. Instead, as noted in Justice Thomas' dissent in *Kelo v New London* and discussed in chapter 2 of the thesis at page 98, the losses in similar modern situations appear to fall 'disproportionately on poor communities.'

[36] Simmons and Biddle (eds), *The Oxford Companion to British Railway History from 1603 to the 1990s*, 251. The London & Birmingham Railway bought off opposition from the Earls of Clarendon and Essex by paying nearly £73,000, agreeing to a deviation and building a mile-long tunnel to avoid their parks in an area of land at Watford.

4.3 PARLIAMENTARY REACTIONS TO RAILWAY TAKINGS

Unlike in America where debate raged at the legislative level about the desirability of private powers of compulsory acquisition, Parliament appeared relatively untroubled and focused instead on streamlining the Private Bills procedure in order to make it more efficient.[37] As a result of this, a series of Consolidation Acts were enacted in the mid-1840s to ensure a greater degree of uniformity between similar Bills.[38] The most important statute in relation to property rights was the Lands Clauses Consolidation Act 1845 (the '1845 Act') which introduced the first statutory procedure for compulsory acquisition of land in England.[39] Under section 18 of this statute, any promoter or company wishing to purchase land compulsorily had to give notice of the proposals to all interested parties, and the 1845 Act also set out detailed compensation procedures.[40]

It is hard to gauge the level of scrutiny afforded to Private Bills compulsorily transferring property rights between individuals during the canal and railway boom. Whilst a vast amount of such legislation appears to have been promoted and passed, the Parliamentary procedures and the deep (often vested) interest of those reviewing the Bills militates against this being a cursory examination. Whatever the political or legal merits of allowing so many private takings to occur during the eighteenth and nineteenth centuries, it seems that this compulsory readjustment of property rights succeeded in encouraging entrepreneurship. Within a relatively short period of time England achieved a 'dense network of railway lines' which facilitated commerce between regions, encouraged social and geographic mobility, and contributed to increased business opportunities.[41]

By the latter stages of the railway boom there are the glimmerings of an appreciation of the tension between the need to protect property rights, and a desire to encourage

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[37] Sharman, 'The History of the Lands Clauses Consolidation Act 1845 - I', 17-18. See also [1986] Statute L Rev 78, 83.

[38] *Directors, Metropolitan District Railway Company v Sharpe*, 430, (Lord Selborne LC), '[the Consolidation Acts] … were passed … so that, when any particular undertaking afterwards came to be authorized, the special Act might be introduced in a short form … containing only such clauses as were suggested by the circumstances of the particular case.'

[39] 8 Vict c 18.

[40] 'On the Rights of Property Connected with Railways', 118 gives an overview of the procedure under the 1845 Act.

[41] JS Foreman-Peck, 'Natural Monopoly and Railway Policy in the Nineteenth Century' Vol 39, No 4, Oxford Economic Papers, New Series (1987), 699.

entrepreneurship. Analogous discussions occurred in America in relation to the meaning of 'public use' under the Takings Clause.

4.4 'PRO-ENTREPRENEURIAL DISCOURSE'

As discussed in chapter 1 in relation to the American Mill Acts, nearly all entrepreneurial actions may be said to produce some wider public benefit and could thereby justify takings, perhaps with the consequence that the 'property of the citizen would never be safe from invasion.'[42] The realisation in America that the equation of private economic gain with a public benefit might have adverse effects was bound up with a wider clash between two competing views: on the one hand, the importance of protecting absolute and exclusive dominion over property; and on the other, the desire to promote industrial development and economic growth. As always with this perennial debate, individuals fall either side of porous boundaries. Those calling for progress and the recognition of novel property rights, often find themselves later resisting identical calls from others on the grounds that *their* property rights are now in danger of being adversely affected. Few investors are prepared to commit money to a project without being assured that their property rights will receive legal recognition, and even monopoly protection. Conversely, protecting existing property rights against newcomers can hinder further economic growth and development.

The tension between these approaches in American takings jurisprudence has been noted by Greg Alexander. He convincingly contends that whilst there might have been an avowed desire to encourage entrepreneurship as a means of rapidly developing America and increasing its population, this did not mean that there was agreement about how best to achieve this aim. One of the 'two strands of pro-entrepreneurial discourse'[43] favoured providing legal protection for entrepreneurial activity by granting private investors monopoly privileges in return for constructing infrastructure. Others opposed monopolistic property interests as being anti-developmental and undemocratic.[44] The conflict between these two approaches can be seen in the attempts of the American

[42] *Chesapeake Stone Co v Moreland*, 765.
[43] Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776-1970*, 186.
[44] *ibid*.

courts to balance the protection of property rights and the promotion of development. As private takings under the Mill Acts became increasingly common, both the courts and state legislatures appear to have developed misgivings about the constitutional status of such transfers.[45] These reservations became particularly acute as the public benefit of private takings became more diffuse; it became impossible to know in advance when takings would be classified as for a private use and therefore unconstitutional.[46]

England does not appear to have entered into an overt 'pro-entrepreneurial discourse' of the type described by Greg Alexander in relation to the American Mill Acts. However, it seems that there was some belated discussion about the correct balance to be drawn partly due to various well-publicised business crashes. By 1844 for example, legislation was introduced which gave the government an option to buy out in 1869 all private railway companies established since 1844.[47] The legislative delay in acknowledging the potential dangers of over-excessive disruption to private property rights is likely to have been due to the piecemeal nature of the law in this area. The main legislative focus throughout the canal and railway boom appears to have been shaped by pragmatic concerns relating to streamlined processes rather than broader issues of principle. In the absence of explicit constitutional protection for property rights it seems probable that the significance of private takings was overlooked until the initial flurry of speculation and activity had ended. If any lesson can be drawn from examining the railway mania of the 19th century, it is that modern legislatures would do well to consider the significance of private takings for broader property principles when deciding how best to encourage private development and entrepreneurship.

4.5 PRIVATE ENTITIES AND GOVERNMENT

The foregoing historical discussion relates to a time when private companies were prepared to shoulder the financial risk of developing and investing in infrastructure. In

[45] Epstein, *Takings: Private Property and the Power of Eminent Domain*, 172 fn 25 refers to the case of *Miller v Troost*, 369: 'To say the least, such a law goes to the extreme limit of legislative power, and had not similar laws, in States having constitutional restraints similar to ours, been uniformly sustained by the courts, we should hesitate long before upholding this one.'
[46] Nichols 'The Meaning of Public Use in the Law of Eminent Domain', 619.
[47] Foreman-Peck, 'Natural Monopoly and Railway Policy in the Nineteenth Century', 701.

these circumstances, bending constitutional principles, and conceptions of property, may have seemed like an acceptable trade-off to encourage entrepreneurship.[48] It could similarly be argued that today's society faces challenges that are just as consuming and risky as those faced by earlier eras. The electorate understandably holds government politically accountable for tax spending and financial mistakes, and yet continues to expect high standards of living and support.

Bureaucratic and centralised administrations are not generally best placed to react speedily and efficiently in designing and managing redevelopment programs. Privatising services, or merely involving the private sector, has been seen as a solution for governmental inefficiency, lack of financial accountability, lack of managerial skills and authority, underperforming assets, unresponsiveness and lack of expertise.[49] The involvement of the private sector in these circumstances may be seen as an important means of reducing the cost of government, generating revenues, supplying infrastructure or other facilities that government cannot provide and doing so quickly, introducing competition and reducing the role of central government in society. Over time, successive governments have come to rely on public-private-partnerships,[50] contracting-out, and purely private entities.

Whilst the benefits provided by private actors may be undeniable, there are many reasons for caution. There are opportunities for potential abuse, decreasing service quality, a loss of social equity and a lack of incentives for private firms to take on unprofitable governmental functions.[51] Historically, as noted in this chapter, both American and English legislatures have allowed and facilitated the transfer of property rights between private parties in order to encourage infrastructural development. Despite this, the breadth of circumstances in which privatised bodies and contracted-out service providers may now exercise compulsory acquisition powers, and the low levels

[48] Alexander, 'Property as Propriety'.
[49] *ibid.*, at 112 – 117.
[50] ES Savas, *Privatization and Public-Private Partnerships* (Chatham House, New York, 2000).
[51] A Farazmand (ed), *Privatization or Public Enterprise Reform?* (Greenwood Press, Westport, Conn 2001), 15.

of accountability in relation to such entities, may have led to a significant change from a property perspective.[52]

5 MODERN COMPULSORY ACQUISITION POWERS

Broadly worded statutes aimed at economic regeneration can work without overly upsetting the balance of interest between private parties. However this is predicated on zealous judicial attention in order to ensure that rights are not overlooked or trampled upon. Traditionally, the terms of such private Acts would, naturally, be fairly narrowly drawn. Today, general Acts are used as the basis for compulsory purchase; the terms of such Acts provide general powers of compulsory purchase that can be exercised by specified bodies in order to achieve the broad purposes set out in the Act. As explained in chapter 1, these general Acts are usually coupled with a compulsory purchase order ('CPO'), rather than the provisional order procedure which required parliamentary approval.

The use of a CPO today entails the use of general compulsory purchase powers to take land for a particular purpose, as set out in the authorising Act; such purposes may relate to general concepts though such as regeneration. At the second stage the authority involved will specify the land required in a CPO, and this will be scrutinised by the relevant minister. In the event that there are objections to the CPO, which are not withdrawn, an inquiry will be held. Having scrutinised the Inspector's report and recommendations on the scheme the confirming minister can confirm, modify or reject the scheme in their decision letter.[53] The procedures which apply to most compulsory

[52] Privatised utilities are usually under the supervision of industry Regulators. See C Graham, *Regulating Public Utilities: A Constitutional Approach* (Hart Publishing, Oxford, 2000) for a detailed discussion of the duties, powers and responsibilities of Regulators in the utilities sector.

[53] Examples of decision letters in all categories exist e.g. confirmation – in a decision dated 15 February 2006 the Office of the Deputy Prime Minister confirmed a CPO based on the Leasehold, Reform Housing and Urban Development Act 1993 (The Urban Regeneration Agency (Edge Lane West, Liverpool) Compulsory Purchase Order 2005). This CPO was later successfully challenged in the High Court: see *Pascoe v First Secretary of State* [2007] 1 WLR 885 (QBD). An example of a modified scheme can be seen in a decision letter dated 2 November 2006 the Secretary of State for the Department for Communities and Local Government (North West) confirmed a CPO based on the Town and Country Planning Act 1990 with the modification that a relevant objector's plot was excluded from the order (The Lancashire County Council (Nelson Bus and Rail Interchange) Compulsory Purchase Order 2006). An example of a CPO which was rejected can be seen in the decision letter dated 18 September 2003 from the Office of the Deputy Prime Minster (North West) relating to a CPO based on s. 290 of the Housing Act 1985 (Borough of Pendle No. 101 (Nelson (West) No. 1) Compulsory Purchase Order 2001).

purchase proposals can be found in the Acquisition of Land Act 1981 ('the 1981 Act') with the assessment of compensation generally determined under the terms of the Compulsory Purchase Act 1965. One of the clearest English examples of the broad scope of modern statutory compulsory purchase powers is s. 226 of the Town and Country Planning Act 1990 (as amended) which is discussed below.[54]

5.1 S. 226 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Under this provision a local authority,[55] joint planning board or a national park authority has the power to acquire land compulsorily for 'planning purposes' as defined by s. 246(1). According to the Crichel Down Circular, powers under s. 226 are intended to provide a 'positive tool' in facilitating the assembly of land by acquiring authorities in order to implement proposals in their community strategies and 'Local Development Documents.'[56] The powers are suitable for use when assembling land 'for regeneration and other schemes' where the 'range of activities or purposes… mean that no other single specific compulsory purchase power' would be 'appropriate.' The powers are not to be used however in place of 'other more appropriate enabling powers', for instance s. 164 of the Public Health Act 1875, s. 239 of the Highways Act 1980 or s. 17 of the Housing Act 1985 amongst others.[57]

5.1.1 S. 226(1)(a) TCPA 1990

Under s. 226(1)(a) the authority may compulsorily purchase land where the authority subjectively thinks that the acquisition will 'facilitate the carrying out of development, re-development or improvement on or in relation to the land.' Acquisition under this provision must not be exercised unless the local authority, again subjectively, thinks that the development, re-development or improvement is 'likely to contribute to the achievement' of any one or more of the following objects: the promotion or improvement of the economic well-being of their area; the promotion or improvement

[54] Planning and Compulsory Purchase Act 2004 ('TCPA 1990'), s. 99.
[55] Defined in TCPA 1990, s. 226(8) as a county, district or London borough council.
[56] Crichel Down Circular.
[57] *ibid.*, Appendix A, c. 2.

of the social well-being of their area; and/or the promotion or improvement of the environmental well-being of their area.[58]

Examples of cases involving the use of broad s. 226(1)(a) TCPA 1990 powers include *Schaefer v Great Yarmouth Borough Council*,[59] a case where a CPO was made in order to acquire two vacant but not abandoned houses which were in a state of disrepair. Great Yarmouth argued that the CPO was justified given that the wider area was suffering from 'severe economic, environmental and social deprivation' and ranked fifth amongst the top ten most deprived areas in the country. The prevailing planning and housing policies therefore allegedly 'pulled in the direction of making best use of existing resources by encouraging the re-use of vacant houses.' In confirming the Inspector's recommendation to authorise the CPO in respect of the houses, the Secretary of State agreed that 'ongoing under-occupation and deterioration would be likely to cause continuing harm to the visual amenities of the area and the living conditions of nearby residents ... [and] concludes that the poor state of the ... properties ... provide a clear and compelling case in the public interest for compulsory purchase acquisition.'[60] In many ways, this type of approach mirrors the broad powers used in America to deal with blight or regenerate urban areas, as in *Berman v Parker* and *Kelo v New London*.

5.1.2 S. 226(1)(b) TCPA 1990

Alternatively, under s. 226(1)(b) the authority may acquire land 'which is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated. Challenges have been made to CPOs issued under this head that also concern dilapidated properties. In *Monen v Secretary of State*[61] the claimant argued that lack of maintenance of a domestic dwelling did not constitute valid grounds for making a CPO under s. 226(1)(b) TCPA 1990. The property in this case was said to be an eyesore, attracted vandals, was physically unsafe, was frequently vacant and had an overgrown garden, which encroached on the highway. All of these

[58] TCPA 1990, s. 226(1A).
[59] [2001] EWHC Admin 883.
[60] *ibid*., (Hooper J).
[61] [2002] EWHC 81 Admin.

factors 'had a depressing effect upon the amenity and value of neighbouring houses.'[62] The court dismissed the claim that s. 226(1)(b) TCPA 1990 was not wide enough to authorise this type of CPO, and confirmed that not only could a valid CPO be issued for these purposes, but that this interpretation was also supported by s. 215 TCPA 1990 which states that if it appears to the planning authority that 'the amenity of a part of their area ... is adversely affected by the condition of land in their area, they may serve on the owner and occupier of the land a notice under this section.'

5.2 EXPRESS AUTHORISATION OF PRIVATE TAKINGS UNDER TCPA 1990

Notably, s. 226(4) the TCPA 1990 expressly authorises the involvement of private entities in achieving the local authority's goals and provides for valid private takings:

> It is immaterial by whom the local authority propose that any activity or purpose mentioned [in s.226(1)] should be undertaken or achieved (and in particular the local authority need not propose to undertake an activity or to achieve that purpose themselves).

The inclusion of this provision demonstrates a positive desire on the part of the legislature to encourage private takings where this will encourage development and financial investment by private parties.

5.3 THE PLANNING ACT 2008

The planning regime in England and Wales is due to undergo further changes with the enactment of the Planning Act 2008 ('PA 2008') which will creates a 'new system of development consent for nationally significant infrastructure projects' covering energy, transport, water, and waste in an attempt to reduce the number of applications and permits required under current legislation.[63] In order to achieve these objects the PA 2008 establishes a new independent body, the 'Infrastructure Planning Commission' ('IPC'), with responsibility for examining applications for development consent for

[62] *ibid.*, (Sedley LJ) [3].
[63] The PA 2008 received royal assent on 26 November 2008 but many of the operative provisions are not yet in force.

nationally significant infrastructure projects. In making its assessment the IPC is to adhere to a framework set by national policy statements issued by the Secretary of State who has a wide discretion as to 'how prescriptive the policy should be.' Before designating a policy statement for the purposes of the PA 2008, it must have been the subject of public consultation, there must have been an appraisal of sustainability and any parliamentary requirements must have been satisfied. National policy statements relating to various energy sectors (including nuclear power, renewable energy and oil and gas infrastructure), as well as ports and national rail and road networks are likely to be designated during 2009-2010.

In the course of giving Development Consent, the IPC may also confer other rights on the developer, including the compulsory acquisition of land so long as the land is: (i) required for the development to which the development consent relates; (ii) is required to facilitate or is incidental to that development; or (iii) is replacement land which is given in exchange for order land under s. 131 or s. 132. Additionally under the statute, there must be a 'compelling case in the public interest' for the land to be acquired compulsorily.[64]

Attempts have been made in the PA 2008 to speed up the decision-making process in relation to large infrastructure projects. To this end, the IPC can appoint either a panel of examiners or a single examiner to hear the case. In either event, the examination must be completed within six months of the first meeting between the applicant and objectors, and the report issued within a further three month period before issuing the decision within a further three months. Legal challenges to orders relating to development consent can only be challenged under the PA 2008 by way of judicial review, and by submitting the claim form within six weeks from the date of the IPC publishing the relevant order.[65] Objectors still have a right to be heard but the IPC retains a discretion to impose time limits, prevent or allow cross-examination, and to appoint its own experts.[66] Whilst the changes ushered in by the PA 2008 will change the balance of power in relation to planning decisions by centralising scrutiny and removing much local-level decision-making power, there may be some benefit in

[64] PA 2008, s. 122.
[65] *ibid.*, s. 118.
[66] *ibid*., ss. 93-95.

allowing for more of a bird's-eye view to be taken of the desirability or otherwise of nationally significant development schemes. One of the concerns at this preliminary stage is the extent to which objections to schemes will be heard and considered.

6 JUDICIAL REVIEW OF CPOs

The validity of a CPO may only be challenged in the High Court by a 'person aggrieved'[67] within six weeks of the date on which notice of the confirmation of the CPO is published.[68] The grounds on which a CPO may be challenged are: (1) that there is no power in the 1981 Act or the enabling Act to authorise the order; or (2) that the requirements of the appropriate Acts and regulations have not been complied with such that the interests of the party applying to the High Court have been substantially prejudiced.

Section 25 of the 1981 Act states that a CPO cannot be questioned in any legal proceedings other than the s. 23 procedure. However, this 'ouster' clause has not prevented the courts from quashing a local authority's resolution to make an invalid CPO, nor from allowing judicial review of a decision to act on a notice to treat where there is 'bad conscience' on the part of the acquiring authority such as unreasonable delay, bad faith misconduct or abuse of powers.[69] It is possible for an 'aggrieved party' to apply for judicial review of a CPO in a wide variety of circumstances such as: using *ultra vires* powers; [70] ignoring relevant matters or taking irrelevant matters into account;[71] and flouting the rules of natural justice.[72] Additionally, whilst the CPO itself

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[67] A 'person aggrieved' includes any person with an interest in the land covered by the CPO. A more flexible approach was taken by Ackner J in *Turner v Secretary of State for the Environment* (1973) P & CR 123 where a person permitted to appear at a public local inquiry into a planning matter was a 'person aggrieved' and thus able to challenge a Minister's decision. See B Denyer-Green, *Compulsory Purchase and Compensation* (8th ed, EG Books, London, 2005), 51.

[68] 1981 Act ss. 23-25.

[69] *Simpsons Motor Sales v Hendon Corporation* [1964] AC 1088 (HL).

[70] Compulsory powers cannot be used for a purpose which is not within the enabling Act without acting *ultra vires* such as making an order for coast protection work and the creation of a promenade when the statute in question did not give a power to acquire land for any purpose other than coast protection – *Webb v Minister of Housing and Local Government* [1965] 1 WLR 755 (CA).

[71] *Prest v Secretary of State for Wales*; *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18 (Admin).

[72] *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 1 WLR 1255 (HL). Following a site inspection, the planning Inspector concluded that the foundations of the houses were unstable and could not be repaired. As a result, the Minister confirmed the CPO, but it was later held that

may be challenged under s. 23 of the 1981 Act, s. 54 of the Civil Procedure Rules also allows a decision to make an order, or a confirming Minister's decision not to confirm an order, to be subject to judicial review.

Analysing the courts' attitudes to judicial review of decisions relating compulsory purchase powers and private bodies is difficult; there are numerous ways in which private entities may exercise such powers. At one extreme is the rare situation where a public authority not only possesses compulsory purchase powers, but can also stand the financial risk of developing land; in these circumstances the role of the private sector is limited to acting as a contractor. One-step away, and far more common, is the situation where a local authority compulsorily purchases land and then delegates management and completion of the project to a private entity, sometimes by selling a long leasehold interest in the land to the private developer. Many statutes dealing with compulsory purchase powers, such as s. 226 (4) of the Town & Country Planning Act 1990 as amended by s. 99 of the Planning and Compulsory Purchase Act 2004, explicitly allow for such delegation, and back-to-back warranties and indemnities are usually sought to allow for a level of public insulation from the financial risks involved in developing.[73]

Moving slightly further along the range of possibilities are those situations where compulsory purchase powers are possessed by privatised entities that retain significant public overtones, such as private utility companies. Electricity companies are a prime example of quasi-public utilities in that whilst they are owned and managed by shareholders, they perform a vital societal function.[74] Further from this again are

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there had been a breach of natural justice since the foundations had not been an issue at the inquiry and thus the owner had not been able to put forward any evidence to counter the Inspector's finding.

[73] P Winter and R Lloyd, 'Regeneration, Compulsory Purchase Orders and Practical Related Issues' [2006] JPL 781, 789: 'Most CPOs will be based upon partnership arrangements either between different public sector bodies … or the more common "back-to-back" development agreement approach between the acquiring authority and a private sector developer/investor.' EJL Waring, 'The Legality of Back-to-Back Agreements and Compulsory Purchase' (case note on *Standard Commercial Property Securities Ltd v Glasgow CC* [2006] UKHL 50), [2007] Conv 265.

[74] Electricity Act 1989, Sch 3 provides for the compulsory acquisition of land by the electricity industry. Water utilities are somewhat separate from the other utilities in that they have an even more public character are often monopoly suppliers of one of the staples of life, and in addition have serious public health responsibilities as well as environmental standards to uphold. They have been rightly described as 'inhabitants of a no-man's land between the public and private sectors.' M Tether and G Mead, 'Status of Privatised Utilities in the UK after *Griffin v South West Water Services*' ICCLR 1994 5(11) 363; M Finger and R Levett, 'Thames Water Utilities Limited, UK' in *Limits to Privatization: How to Avoid Too Much of a Good Thing* (Report to the Club of Rome, 2005).

situations where a statute allows for the rebalancing of property rights between private individuals, such as occurs in Private Acts.

Previously, the ambit of the power contained in s. 226 was narrower since a local authority had to satisfy an objective standard in demonstrating that the compulsory purchase was 'required' or 'necessary in the circumstances of the case to accomplish one of the activities or purposes of the section.'[75] Clayton has argued that the amendments to s. 226 'may not be as profound as they appear' given that a CPO promoter still needs to 'meet the objective obligations' of satisfying the HRA 1998 requirements and demonstrating that a 'compelling' case in the public interest exists as required under the Circular. This approach rests however on a belief that these issues will be fully debated and appropriately valued by informed parties during the appropriate CPO inquiry.

7 JUDICIAL DEFERENCE AND CPOs

It is axiomatic that courts may intervene when a decision-maker acts *ultra vires* in exceeding the powers granted to them by Parliament. Whatever the basis for judicial intervention (whether based on legislative intent, judicial creativity, common law principles of good administration, or the importance of upholding the rule of law), the courts are well-practised at reviewing exercises of jurisdiction. There are however at least two significant difficulties faced by courts when reviewing compulsory purchase decisions: (i) modern general public Acts are cast in subjective and broad terms; and (ii) the increase in privatised and contracted-out services has led to problems with accountability since bodies integrally involved with the exercise of compulsory purchase powers may not be amenable to judicial review.

Despite judicial claims that public entities 'enjoy no unfettered discretions' and that there are 'legal limits to every power [they] … have', [76] it is unrealistic to argue that there are *meaningful* legal limits to many modern powers exercised by public

[75] Clayton 'New Directions in Compulsory Purchase', 135 and the reference to the Court of Appeal case of *Sharkey v Secretary of State for the Environment* [1992] 2 PLR 11 (CA).
[76] *R v Somerset County Council, Ex parte Fewings* [1995] 1 WLR 1037 (CA), 1042 (Sir Thomas Bingham MR).

authorities. Wide discretionary powers are used frequently as a matter of practical expediency allowing government policies to be promulgated in outline, whilst leaving the mundane details of implementation to be dealt with by the relevant decision-maker on a continuing basis. The difficulty of delineating the proper bounds of the decision-maker's discretion then falls to the courts. In exercising their jurisdiction the courts appear to be influenced by a number of factors, notably the legal character of the decision-maker and the relative institutional competence of the reviewing court to query the decision made.[77] Discretionary decisions made by lower courts, or by those dealing with highly specialised areas of the law,[78] or policy and resources issues are likely to be deferred to by reviewing courts.[79]

As such, the courts often defer to compulsory acquisition decisions due to their political and financial overtones. An example of this approach may be seen in the *Alliance Spring Co Ltd v First Secretary of State* case. The facts revolved around planning decisions prompted by the building of Arsenal Football Club's 'Emirates' Stadium. As part of the regeneration scheme, Islington Borough Council made a CPO under s. 226 TCPA 1990 to acquire and demolish various privately owned properties on 134 plots of land. By the time that the Inquiry was held 24 of the 33 statutory objections had been withdrawn, but following detailed hearings of the remaining objections the Inspector recommended that the CPO should not be confirmed.

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[77] *Cf.* the approach of the courts when scrutinising the Pathfinder legislation, which allows English Partnerships to purchase compulsorily properties under s. 162 of the Leasehold Reform, Housing and Urban Development Act 1993. See *Pascoe v First Secretary of State* and *R (Mortell) v Oldham Metropolitan Borough* [2007] EWHC 1526 (Admin),

[78] Such as the internal rules of a University, see for example *R v Hull University Visitor, ex parte Page*.

[79] E.g. *Notts CC v Secretary of State for the Environment*. Note also Lord Bingham's comments in relation to deference in *R v Ministry of Defence, ex parte Smith*, 556, which involved a challenge on the grounds of irrationality to a policy prohibiting homosexuals from serving in the armed forces, 'The greater the policy content of a decision, and the more remote the subject matter of a decision from ordinary judicial experience, the more hesitant the court must necessarily be in holding a decision to be irrational … Where decisions of a policy-laden, esoteric or security-based nature are in issue even greater caution than normal must be shown in applying the test…' Levels of deference are also high in American cases relating to takings with the US Supreme Court noting that it 'is not for the courts to oversee the choice of boundary line … the amount and character of the land' to be taken rests in the discretion of the legislative branch. *Berman v Parker*, 35. This type of minimal rational-based scrutiny is hard to justify given the importance of property rights to the exercise of other human rights, L Mansnerus 'Public Use, Private Use, and Judicial Review in Eminent Domain', 428 notes that it is hard to justify property rights as worthy of less constitutional protection than economic rights. Such an approach is hard to justify when the interests at stake are home and community, social and family ties, a way of life and perhaps livelihood.'

The Secretary of State disagreed with the recommendations and 'was minded to confirm' the CPO. It was this decision which was challenged in *Alliance Spring* under s. 23 Acquisition of Land Act 1981 on the basis that the planning decision to acquire and demolish the properties was being driven by Arsenal Football Club's desire for a larger stadium, rather than planning needs of the area as a whole. In dismissing the challenge, the court stated that the Secretary of State had correctly decided that the main purpose of the scheme was regeneration, albeit the 'trigger for the scheme was the desire of AFC for a new stadium with a substantially increased capacity.' As such the court held that the Secretary of State was entitled to reach his decision to confirm the CPO and commented that '[d]evelopments which result in regeneration of an area are often led by private enterprise.'[80]

The courts are loath to grant challenges to the grant of CPOs, even where this involves a private taking. This approach is understandable given the combination of factors influencing the courts' decisions in this area: (i) parliamentary sovereignty; (ii) express statutory authorisation for private takings; (iii) broad and subjectively worded statutes; and (iv) concerns about relative institutional competence. Not only are the courts therefore deferential towards the *grant* of compulsory purchase powers in the first place, but they also often face significant difficulties in reviewing and enforcing the *exercise* of powers under the terms of the relevant CPO due to the private nature of the entities carrying out the work. It behoves the courts to be more demanding inquisitors than they have generally proved to be when hearing legal challenges to altered CPOs, or uneconomical schemes.[81]

[80] [19], (Collins J).

[81] *Chesterfield Properties plc v Secretary of State for the Environment* 76 P & CR 117 (1997) (QBD) for instance involved a scheme involving the re-development of a town centre at an estimated cost of £40 million, of which £13 million was to come from public funds and the remainder from private sector investment. The Inspector found that the financial viability of the scheme was 'marginal', the Secretary of State confirmed the CPOs on the basis that the proposed scheme might be the last chance to revive the economy of the town centre. The court held that a CPO could be confirmed under s. 226(1)(a) of the 1990 Act (un-amended) without requiring a condition precedent that the confirming authority had to be satisfied that the development would be carried out. A case on a similar theme is *Royal Life Insurance v Secretary of State for the Environment* [1992] 2 EGLR 23.

8 JUDICIAL ACCOUNTABILITY OF 'PRIVATE' ENTITIES

Considering the accountability of privatised entities or contracted-out service providers under judicial review requires some appreciation of the difficulties raised by the perennial debate about the public-private divide. Some of the difficulties in this area have already been referred to above in chapter 2 of the thesis.

The 'reinvention of government' involves not only privatisation of public corporations into the private sphere, such as utility companies, but also the refashioning of 'techniques of public administration … in the mould of the private commercial sector' such that public services are organised around a 'central separation between "purchasers" and "providers".[82] The approach taken by the courts does not appear to have kept pace with the challenges posed by contracted-out services with findings that public law obligations are unenforceable against service providers. Contracting-out provisions disentangle the service provider from the 'statutory embrace' of the public authority, leaving their relationship to be governed solely by the terms of the contract between them.[83] This approach has been trenchantly criticised by commentators such as Craig who argues that contracting-out provisions should have the opposite effect since they 'explicitly and directly' confirm that private parties can carry out public functions, and thereby provide a greater degree of statutory underpinning.[84] Even were the courts somehow to expand notions of 'publicness' and thereby subject parties exercising private acquisition powers to judicial review this would not of itself be a panacea. As Aronson notes judicial review occasionally remedies 'individual grievances, but rarely provides systemic relief', additionally decisions to litigate can be 'happenstance.'[85]

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[82] Hunt 'Constitutionalism and the Contractualisation of Government in the United Kingdom' in M Taggart (ed) *The Province of Administrative Law*.

[83] *R v Servite Houses, ex parte Goldsmith* Moses J held in this case that public law obligations could not be enforced against the service provider. He added that the case: 'represents more than tension between public law and private law rights, but a collision. If I am right in my reasoning, it demonstrates an inadequacy of response to the plight of the applicants now that Parliament has permitted public law obligations to be discharged by entering into public law arrangements.'

[84] Craig, 'Contracting Out, the Human Rights Act and the Scope of Judicial Review', 564-567.

[85] M Aronson, 'A Public Lawyer's Response to Privatisation and Outsourcing' in M Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997).

9 HUMAN RIGHTS ACT 1998 PROTECTION

The incorporation of the ECHR into domestic law via the enactment of the HRA 1998 was described as 'bringing rights home.'[86] Unfortunately, it is still difficult to describe the precise effect of the HRA 1998 on land law, particularly since it is unclear whether or not its provisions have horizontal, as well as vertical, effect. In the event that the human rights protection encapsulated in Article 1 against deprivation of possessions has only vertical effect, purely private takings would be amenable solely to judicial review. As noted above, such a situation would prove problematic for an individual seeking to challenge a private taking given the impossibility of judicially reviewing acts by private parties. In the event that the acquiring entity can be shown to be public 'enough' to fall within the courts' remit for judicial review purposes, a deprived owner will still be unlikely to receive much satisfaction due to the vagaries of judicial review including: the difficulty of controlling broad statutory powers, the confines of parliamentary sovereignty, and levels of judicial deference.

It may be possible for private parties to claim the property protection afforded by the ECHR in domestic proceedings if the acquiring party is deemed to be sufficiently 'public' under s. 6 HRA 1998. This provision imposes a duty to act in a Convention-compliant manner on 'pure' public authorities such as government departments and local authorities. However, in relation to private entities exercising compulsory purchase powers s. 6(3) of the HRA 1998 is of greater interest since it defines which bodies will be treated as functional public authorities. The section draws a distinction between public authorities such as 'a court or tribunal'[87] and 'any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.[88] In applying the distinction contained in s. 6 between *core* public authorities and *hybrid* authorities the courts appear to have entered into a morass of confusion.

[86] *Rights Brought Home* CM 3782.
[87] HRA 1998, s. 6(3)(a).
[88] HRA 1998, s. 6(3)(b). Under s. 6(4) of the Act, the House of Lords acting in its judicial capacity (now the new Supreme Court) is capable of being a public authority for the purposes of the HRA 1998.

9.1 HYBRID PUBLIC AUTHORITIES

At times the House of Lords has signalled that it would take a broad approach towards 'hybrid' bodies by stressing the nature of the function being performed that should determine whether an entity would be a public authority under s. 6(3)(b) HRA 1998.[89] Factors to be considered according to the *Aston Cantlow* case included 'the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'[90] More recently the House of Lords revisited this issue in *YL v Birmingham City Council*[91] The case involved a decision as to whether a private care home for the elderly, providing accommodation under arrangements made with a local authority under was performing 'functions of a public nature' under s. 6(3)(b) HRA 1998 and thus compelled to act in a Convention-compliant manner.

9.1.1 YL v Birmingham City Council

The majority of their Lordships rejected the argument that the care-home provider could be treated as a public authority, partly because it was a private, profit-making company, and partly because of a distinction drawn between *arranging* the provision of care and accommodation under the National Assistance Act 1948 which was a governmental function, and the provision of that care, which was not. Lord Mance found that regulation by the state 'is no real pointer towards the person regulated being a state or governmental body or a person with a function of a public nature.'[92] Lord Neuberger was 'not persuaded' that Mrs YL's ability to sue the local authority, rather than the care provider, was 'likely to be significant, let alone substantial.' Such an approach ignores the concerns of the Parliamentary Joint Committee on Human Rights ('JCHR') that contractual rights are often inefficient and incapable of being relied on in any

[89] K Markus, 'What is Public Power: The Courts' Approach to the Public Authority Definition Under the Human Rights Act' in J Jowell and J Cooper (eds) *Delivering Rights: How the Human Rights Act is Working* (Hart Publishing Oxford, 2003); J Howell, 'The Human Rights Act 1998: Land, Private Citizens and the Common Law' 123 LQR 618 [2007]; R Clayton, 'The Human Rights Act Six Years On: Where Are We Now?' [2007] EHRLR 11.
[90] *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 546 (HL).
[91] [2008] 1 AC 95 (HL).
[92] *ibid.*, [116], (Lord Mance).

meaningful way to correct abuses of Convention rights.[93] Additionally, Lord Neuberger acknowledged that:

> [U]nattractive though it may be to some people, one of the purposes of contracting-out at least certain services … may be to avoid some of the legal constraints and disadvantages which apply to local authorities but not to private operators. I am in no position to decide on the relative strength of the two competing policy arguments: that is a matter for the legislature.[94]

It is unappealing to see judicial acceptance of public authorities deliberately structuring their relationships with private parties to avoid 'legal constraints and disadvantages'. It might be understandable to want to avoid excess bureaucracy, but giving this type of argument any influence when considering whether or not a private service provider, acting under some type of arrangement with a core public authority, should be held to be accountable for breaches of human rights law is unpalatable. The JCHR has also been scathing in its reports about the legal lacunae caused by the courts' interpretation of 'public' under the HRA 1998. As the JCHR noted, the gap caused in protection leaves many nominally private parties outside the ambit of human rights law, with 'significant and immediate practical implications' in an environment where 'many services previously delivered by public authorities are being privatised or contracted out to private suppliers, the law is out of step with reality.[95]

9.2 HORIZONTAL EFFECT OF THE HRA 1998

Whilst the HRA 1998 does not have a direct horizontal effect allowing it to be raised as a cause of action in its own right in proceedings between individuals, it has been argued that it may have an indirect horizontal effect.[96] The definition of 'public authority'

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[93] *Joint Committee on Human Rights - The Meaning of Public Authority Under the Human Rights Act* (HL Paper 77, HC 410 Ninth Report of Session 2006-2007) (the 'JCHR 2007 Report'), [60]: 'Human rights cannot be fully and effectively protected through the use of contractual terms. While [government] Guidance [on the content of such contract terms] may be useful as a "stop-gap" to reduce the adverse impact of the narrow interpretation of the meaning of public authority on service recipients, this Guidance cannot be a substitute for the direct application of the HRA to service providers.'

[94] *YL v Birmingham CC*, [152].

[95] JCHR 2007 Report, [4] note also the conclusion at [60] of the Report that: 'Human rights cannot be fully and effectively protected through the use of contractual terms.'

[96] Howell, 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law'; M Hunt, 'The Horizontal Effect of the Human Rights Act' [1998] PL 423; Bamforth, 'The Application of the Human Rights Act 1998 to Public Authorities and Private Bodies' [1999] CLJ 159; Phillipson, 'The Human Rights Act, Horizontal Effect and the Common Law: A Bang or a Whimper?' (1999) 62 MLR 824.

under s. 6 (3)(a) HRA 1998 includes the courts, which are therefore in a Convention-compliant manner.

Additionally, the courts have a duty under s. 3 HRA 1998 to interpret statutes compatibly with the ECHR, so far as possible. This duty applies to all statutes including those which govern private relations, such as between a landlord and tenant.[97] Furthermore, whilst domestic courts are not obliged to follow Strasbourg rulings, they are bound to take account of such judgments under s. 2 HRA 1998.[98] It is possible to argue that the combination of ss. 6 and 3 are such that the Article 1 property protection imported via the HRA 1998 can be raised in property disputes which involve statutory interpretation.[99] As such, the private 'takings' described in this thesis, which all take place against a statutory backdrop, and are 'sanctioned ... by legislation'[100] are amenable to human rights review and could benefit from 'proportionality' review.

10 CONCLUSION

This chapter has examined historical instances of expressly authorised private takings in England in the context of the canal mania and railway boom. This survey indicates a traditional willingness to accept compulsory private takings where they serve a general entrepreneurial aim, or increase social benefits by providing infrastructure. The thesis argues that this kind of private taking can bring to the fore an ever-present tension between maintaining existing property rights, and removing entrenched allocations and monopolies where this might encourage economic development.

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[97] *Ghaidan v Godin-Medoza* [2004] 2 AC 557 (HL) involved a private landlord and tenant and various provisions of the Rent Act 1977.

[98] *Kay v Lambeth LBC; Leeds CC v Price* [2006] 2 AC 465 [HL], [28] (Lord Bingham): 'it is ordinarily the clear duty of our domestic courts, save where and so far as constrained by the primary domestic legislation, to give practical recognition to the principals laid down by the Strasbourg court as governing the Convention rights.' See though the disparaging remarks made in *Doherty v Birmingham City Council* [2009] 1 AC 367, 400 (Lord Hope) where the House of Lords declined to follow the ECtHR approach in *Connors v United Kingdom* and *McCann v United Kingdom* (App No 19009/04), (2008) 47 EHRR 40.

[99] Howell, 'The Human Rights Act 1998: Land, Private Citizens, and the Common Law', 627, argues that there is an equally strong argument that the courts should also interpret the common law in a Convention-compliant manner, especially given the strong element of chance over whether or not legislation governs particular areas.

[100] B McFarlane, N Hopkins, S Nield, *Land Law: Text, Cases, and Materials*, (OUP, Oxford, 2009), 135.

It is argued that historically this approach has been kept within manageable bounds due to the temporal and geographic limitations of the schemes and projects involved in such forced transfers. Today, however these limits appear to be disappearing without sufficient attention being paid to the role that they might play in protecting the stability of property allocations. The thesis argues that the combination of very broad, subjective discretionary powers contained in general Acts of Parliament, particularly where these allow for transfers to facilitate ongoing economic development and entrepreneurial activities, are of concern.

It may be argued that such broad powers are the twenty-first century's equivalent to the American Mill Acts and the private Acts of the railway boom, and a necessity given the challenges faced in redeveloping England's city centres and housing stock. It is also arguable that the CPO procedure provides a more than adequate opportunity to challenge and influence schemes if need be. Whilst there is much merit in these points, they do not take account of the added pressures caused by the combination of increased privatisation and a lack of public accountability. It is possible for councils to review redevelopments at each stage, and to retain the freehold title to land used, but this level of supervision appears rare and is opaque to outsiders who may be more closely affected by the day-to-day operation of the project.

English law relating to amenability to judicial review has not kept pace with the problems posed. In circumstances where more and more private bodies are effectively endowed with powers of compulsory purchase, whether as back-to-back developers, under PPI schemes, or as once nationalised utilities, it is vital from a property perspective to know whether the use of such powers may be challenged. The answer to this question is unclear as the discussion relating to public functions demonstrates. In addition, those claimants wanting to rely on their Convention rights under Article 1 in domestic courts will also find the position to be unclear given the confusion over when a body will be a public authority under s. 6(3)(b) HRA 1998. None of this is satisfactory, particularly when assessing the contours of a constraint on the exercise of a draconian and far-reaching power.

The next chapter considers judicial attitudes to the second "category" of private takings considered in the loose taxonomy of the thesis: adverse possession. It will be argued that outside the confines of parliamentary sovereignty the courts reveal greater levels of concern about private takings.

CHAPTER 4
ADVERSE POSSESSION

> *A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.*[1]

1 INTRODUCTION

Unlike other private takings discussed in this thesis, the resulting shift in property rights from one person to another in a successful adverse possession claim is driven by historical fact, rather than demonstrable future need. The law not only tolerates squatters who persistently fail to respect the rights of others, but also rewards them with the property itself. It is therefore small wonder that many commentators appear to sympathise with Ballantine's representation of adverse possession as 'title by theft or robbery, a primitive method of acquiring land without paying for it.'[2] Whilst a reductionist and somewhat inaccurate description of the doctrine given that land cannot be stolen,[3] Ballantine's comment serves to highlight the two most basic requirements for any successful adverse possession claim, whether pre- or post-LRA 2002: that the 'real' or paper owner must be dispossessed or discontinue their possession;[4] and that the squatter must instead take possession, with the requisite intention.[5]

Traditionally, if such a change in possession continued for long enough, the paper owner would then be barred under statutes of limitation from asserting title to the land.

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[1] OW Holmes, 'The Path of the Law'10 Harv L Rev 457 (1897).
[2] HW Ballantine, 'Title by Adverse Possession' 32 Harv L Rev 135 (1918). See also *Buckinghamshire County Council v Moran* [1990] Ch 623, 644 (Nourse LJ), 'Limitation … extinguishes the right of the true owner to recover land, so that the squatter's possession becomes impregnable … limitation … perhaps can be described as possession as of wrong.'
[3] Theft Act 1968, s. 4(2) states that a person cannot steal land.
[4] S Jourdan, *Adverse Possession* (Butterworths LexisNexis, 2003), 4-02: 'A "paper" title is one where the documents on the face of them give the true owner the right to such possession.'
[5] *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419 (HL), 446.

As a result of which, and due to the operation of the English doctrine of relativity of title, the adverse possessor would then be left with a relatively stronger title than anyone else. In unregistered land the paper owner's title was extinguished due to the operation of the Limitation Act 1980 ('LA 1980').[6] In registered land under the LRA 1925 there was no automatic extinction of title but instead the paper owner held his title on trust for the squatter, and the squatter gained a statutory right to a registered estate.[7] Today, under the LRA 2002 the 'mere passage of time' no longer generates a right for the squatter to be registered as the new owner of the land involved, instead 'registration is everything.'[8]

For all of the relative familiarity of the mechanics of adverse possession, the underlying principles involved in this area remain puzzling. This chapter contends that the unease with which the doctrine is viewed is symptomatic of a deeper unarticulated uncertainty about the role of private takings and their impact on property. It will be noted that many of the justifications given for *allowing* adverse possession mirror the arguments discussed in chapter 2 which *discourage* private takings. In assessing adverse possession through the lens of private takings it becomes clear that the justificatory confusion for the doctrine in England rests on an historic disinclination to categorise different situations clearly, and an 'excessive concentration on the crudely limited model of the self-interested squatter who invades ... tracts of land.'[9] The changes introduced by the LRA 2002 in this area have made explicit various tacit distinctions in the English doctrine of adverse possession.

The historic monolithic approach failed to distinguish between: (i) possession of abandoned land; (ii) entry under mistaken belief;[10] and (iii) contested trespassory

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[6] LA 1980, s. 17: 'At the expiration of the period prescribed by this Act for any person to bring an action to recover land ... the title of that person to the land shall be extinguished.'

[7] LRA 1925, ss. 75(1)-(2). The Law Commission, *Land Registration for the Twenty-First Century - A Consultative Document* (LC254) (1998), [10.27] suggests that the trust was unnecessary since the squatter needed only to apply for registration. See also E Cooke 'Adverse Possession: Problems of Title in Registered Land' (1994) 14 Legal Studies 1, 5-6 who notes that the squatter of registered land had two distinct interests: (i) their own freehold title acquired as soon as they entered possession; and (ii) a beneficial interest in the paper owner's estate.

[8] EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (17th ed, OUP, Oxford, 2006), 148-149.

[9] Gray and Gray, *Elements of Land Law*, [9.1.13].

[10] This category is defined more closely below, but it is used in the thesis to relate to possession which *is adverse* to the owner's title, albeit that there is some degree of good faith.

adverse possession.[11] Because of this confusion, the justifications given for the doctrine were also confused and unconvincing when applied without distinction. It is argued that since the paradigm property preference is for voluntary transfers of property, types (i) and (ii) are acceptable because they effectively conform to this model, albeit in an attenuated way, and the justifications given for adverse possession can be more easily appreciated in this context. Type (iii) adverse possession is viewed with suspicion and dislike by the English courts and commentators because it is in effect a non-consensual transfer of property between individuals – a private taking. This chapter argues that type (iii) adverse possession claims (despite being prevalent in the case law), are in fact the outlier scenario, tolerated because of the significant benefits once ensuing from the doctrine in relation to type (i) and type (ii) claims. Having set out the various categories of adverse possession and the justifications which apply to them, the chapter examines the mechanics of adverse possession and judicial reactions to the doctrine. It is argued that the case law and the revolutionary changes ushered in by the LRA 2002 underline the disquiet felt by the legislature and judiciary at private takings, despite the presence of justifications ostensibly for the doctrine.

2 ACQUISITION SCENARIOS

At the outset, the thesis noted that English law favours consensual transfers. Against this setting, the doctrine of adverse possession initially appears perverse, particularly in a system of registered title where it runs 'counter to the fundamental concept of indefeasibility of title' that is so central to this system.[12] However, in giving its reasons for retaining a modified version of adverse possession in registered land, the Law Commission noted the utility of the doctrine in situations where: (i) the registered proprietor has disappeared and cannot be traced; (ii) where there have been dealings 'off the register'; (iii) where the register is inconclusive, for example in relation to

[11] This is somewhat of a misnomer since all categories of adverse possession involve trespass because the possession is inimical to the owner's title, but refers to those situations where there is an element of deliberate acquisitive or 'bad faith' possession, which is lacking in the other two scenarios.
[12] The Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271) (2001), [14.3].

boundaries and short leases; and (iv) entry into possession under a reasonable mistake as to rights.[13]

The doctrine of adverse possession has been relied upon, following the Real Property Limitation Act 1833 ('RPLA 1833) and the LA 1980,[14] to generate a new title in three different acquisition scenarios: (i) possession of seemingly unowned or abandoned land; (ii) entry under mistaken belief; and (iii) contested trespassory adverse possession of land subject to another person's existing title. Each of these categories will be considered in turn, but it is worth noting for now that categories (i) and (ii) echo the justifications given by the Law Commission for retaining adverse possession under the LRA 2002, whereas (iii) does not. This classification differs from that suggested by Margaret Radin, who distinguished between: (a) 'color of title'; (b) 'boundaries'; and (c) 'squatters'.[15] The thesis argues that Radin's grouping ignores type (i) categories of adverse possession, as set out in this thesis. Her (a) and (b) categories (color of title and boundaries), can be combined and viewed as merely different instances of the category (ii) scenario explicated above. Radin's third category, 'squatters', is analogous to type (iii) contested trespassory adverse possession scenarios set out in the thesis. The taxonomy of adverse possession used in this thesis is set out below, and the justificatory explanations for the doctrine are applied to individual categories.

3 POSSESSION OF UNOWNED OR ABANDONED LAND

Adverse possession serves a valuable purpose in enabling land that is not considered to be 'worth the price of possession proceedings' to be brought back into commercial circulation.[16] Good title can be created even in situations where there is no known proprietor, or where land has been abandoned through the discontinuance of

[13] The Law Commission, *Land Registration for the Twenty-First Century - A Consultative Document* (LC254), [10.13-10.16]. The Irish government put forward similar reasons when intervening as a third party in the Grand Chamber hearing of *JA Pye (Oxford) Ltd v United Kingdom* (Grand Chamber), which will be discussed further below. They submitted that adverse possession served the functions of: quieting titles; dealing with failures to administer estates on intestacy; pursuing a policy of using land to advance economic development; perfecting titles in cases of unregistered land; and dealing with boundary disputes. In addition, the Irish submission noted that ownership of land 'brings duties as well as rights' and that the duty on owners to take some action to maintain possession was not unreasonable.
[14] These statutes are discussed below at page 162.
[15] MJ Radin, 'Time, Possession, and Alienation' 64 Wash U L Q 739 (1986), 746.
[16] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [14.6(2)].

possession.[17] Land, in this acquisition scenario, is viewed as a 'precious resource', which should be 'kept in use and in commerce.'[18] This category of adverse possession has parallels with the Roman doctrine of *occupatio* of *res nullius*, which was a mechanism for obtaining title to unowned or abandoned things.[19] In Roman law, the land or thing first had to be open to acquisition in being susceptible to ownership and unowned,[20] and then there had to be a 'reduction to possession with the intention to acquire ownership by the occupier', which could be inferred from the act of taking.[21]

3.1 ADVERSE POSSESSION AND LOCKEAN JUSTIFICATIONS

As with Roman law, the continued marketability of land is also an important objective of the common law.[22] To this extent, adverse possession assists by preventing 'land ownership and the reality of possession ... [becoming] completely out of kilter.'[23] English law reflects an understandable preoccupation with physical and mental possession. These requirements for a successful adverse possession claim are discussed below, but it is argued that whilst possession is substantively and evidentially significant, it also resonates with Lockean ideas of labour and first acquisition.[24] Locke spoke of the mixing of labour with objects appropriated from their natural state, such as acorns from under an oak tree. The combination of labour and materials taken from the common transmuted these previously unowned things into property.[25] According to him, whenever a person removed a thing 'out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property.'[26] Likewise, adverse possession rewards the first

[17] A typical example of discontinuance may be seen in *Hounslow LBC v Minchinton* (1997) 74 P & CR 221, 230 (Millett LJ): 'it was the [council's] ... predecessor in title which erected the fence in such a position as to exclude access by the council [to the disputed land] ... to my mind it is strong evidence of discontinuance of possession by the true owner.'
[18] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [2.72].
[19] FS Ruddy, 'Res Nullius and Occupation in Roman and International Law', 36 U Mo Kan City L Rev 274 (1968).
[20] Hence the detailed discussions by the Roman jurists about wild and tame animals.
[21] E Metzger (ed), *A Companion to Justinian's Institutes* (Duckworth & Co, London, 1998), 58.
[22] Again parallels may be drawn with the common law bias towards facilitating the alienability of land.
[23] *Land Registration for the Twenty-First Century - A Consultative Document* (LC254), [10.7].
[24] As will be discussed below, Locke's labour theories have been (unconvincingly) manipulated in an attempt to justify trespassory adverse possession. The problems presented by this approach largely disappear if the different acquisition scenarios are considered separately.
[25] Locke, *Two Treatises of Government*, 288, [28].
[26] *ibid*., [27].

person who 'grabs' unowned or abandoned land, and brings it into economic use, with title so long as they can demonstrate a sufficient degree of physical possession or expenditure of labour.

In circumstances where property might be acquired from the common in a Lockean fashion, Margaret Radin asks whether the law reflects a similar sympathy for 'someone who does likewise with owned but unused property, especially if she does not know it is owned?'[27] The type (i) category of adverse possession is also favoured by the law and economics school, with Posner contending that it is 'highly desirable' from an economic standpoint that valuable resources should be 'made subject to a right of exclusive use, control, and benefit in someone.' Without such a right, 'incentives to invest in the production of valuable goods will be suboptimal – for example, the owner of farmland will have no assurance that he will be able to reap where he has sown.'[28] This approach is predicated on approaching the land from the point of view of the labouring squatter, rather than guaranteeing the stability of property to the (dormant) paper owner, precisely because the owner cannot be traced or has abandoned the land.

Arguably, it matters less in the grand scheme of things which of two people has ownership and matters more that paper rights can be efficiently combined with possessory rights. This is particularly so where details of current ownership are unclear to the point of non-existence. Adverse possession can thus be seen as a method for shifting ownership without needing negotiations or transfers and can help to return abandoned land to the 'common pool of unowned resources' for someone else to appropriate.[29] It seems that it is possible to argue that focusing on dormant versus working land can gesture 'however clumsily, in the direction of a much more legitimate social goal – that of moving scarce resources into the hands of those who place the highest value on them.'[30]

[27] Radin, 'Time, Possession and Alienation', 750.
[28] R Posner, 'Savigny, Holmes, and the Law and Economics of Possession' 86 Va L Rev 535 (2000), 551.
[29] Posner, 'Savigny, Holmes, and the Law and Economics of Possession', 559.
[30] Fennell, 'Efficient Trespass: the Case for "Bad Faith" Adverse Possession', 1065.

3.2 LAND AS A PRECIOUS RESOURCE

However, although this type (i) category of adverse possession makes much sense, it sits uneasily with an admiration of nature and an enjoyment of wilderness given that its foundation is based notions of 'cultivation, manufacture, and development.'[31] Adverse possession might thus conceivably be viewed as an 'instrument of social policy for moulding the behavior of owners', which 'prods lazy owners into putting their land into production' and being vigilant about their rights.[32] The focus on exhibiting sufficient factual possession has been criticized as equating dormant land with waste, 'reflecting an era when cleared land symbolized both civilization and economic progress.'[33] As such the possession requirements of the doctrine appear to be predicated on, what Sprankling terms, a 'pre-development nineteenth century ideology that encourages economic exploitation.'[34]

This focus on exploitation has been argued to be at the expense of wild lands and thus 'fundamentally antagonistic to the twentieth century concern for preservation.'[35] Arguing that the limitations model of adverse possession, which sees any impact on land as by-product rather than a primary end, is more 'mirage than reality', Sprankling concludes that adverse possession of wild lands will generally be satisfied by meeting an unusually low legal threshold. The consequences of such an approach are that wilderness areas or dormant land will be most susceptible to successful adverse possession claims.[36] As observed by the Second Joint Dissent in the Grand Chamber

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[31] CM Rose, 'Possession as the Origin of Property' 52 U Chi L Rev 73 (1985), 88.

[32] JE Stake, 'The Uneasy Case for Adverse Possession' 89 Geo LJ 2419 (2001), 2435. Elsewhere (at 2436), Stake concedes that limitation statutes are a 'poor stick' to 'prod owners towards production' given that the paper owner can avoid the loss of title 'merely by monitoring.'

[33] Sprankling,'An Environmental Critique of Adverse Possession', 856.

[34] See also Horwitz, *The Transformation of American Law, 1780-1860*, 31, who discusses the fundamental transformation of property from a 'static agrarian conception' to a dynamic, instrumental, and more abstract view of property that emphasized the newly paramount virtues of productive use and development.'

[35] Sprankling, 'An Environmental Critique of Adverse Possession' 816 and 827, comments that in American law even minor actions such as gathering firewood, seasonal grazing or limited timber removal may meet the common law requirements of possession. Such activities will often be inferior in quality and duration to those taking place on developed land due to 'topography, parcel size and owner absence.' He thus argues that adverse possession law in the wild lands context is best explained not by the limitations model, but by the development model. This approach is inherently hostile to the preservation of wilderness.

[36] *ibid.*, 827. Although Sprankling acknowledges that almost a third of the United States' land mass (some 730 million acres) is immune to adverse possession on the basis that it belongs to the Federal government.

hearing of *Pye*, a policy favouring active rather than passive owners ignores the 'legitimate rights and expectations of the registered property owners' to keep their property 'unused for development at a more appropriate time' or to maintain their property as 'security for their children or grandchildren.'[37]

3.3 DEVELOPMENTAL BIAS OF THE COMMON LAW

It is notable that English law also generally displays a distinct preference for possession which is developmentally or economically beneficial. Faced with two competing claims to a piece of land, the person who makes the most use of, or demonstrates the greatest evidence of, physical possession of the land is likely to be favoured. This is understandable from an evidential point of view, but it also reflects the inherent weakness of the common law when faced with other types of non-invasive land 'use'. The owner who purchases land with the deliberate intention of leaving it fallow for use as a nature reserve, or just because they like the notion of owning some 'untouched' land, may find that this does not prove weighty enough evidence of factual possession. A squatter making economic use of the land, even to a small degree, might well have been favoured as in the *Redhouse Farms (Thornden) v Catchpole* case discussed below.[38] The common law's traditional inability to recognise or ascribe sufficient value to non-economic uses of land is mirrored in its strained approach to other types of 'property' use, such as aboriginal rights.

One important exception to the developmental bias of adverse possession in England may be seen in the different limitation periods applying to Crown land and the foreshore.[39] The limitation period under the LA 1980 for Crown lands was 30 years, and for the foreshore was 60 years.[40] This latter period has been retained in relation to

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[37] *JA Pye (Oxford) Ltd v United Kingdom* (44302/02) (2008) 46 EHRR 45 (Grand Chamber), [para 8 of Second Joint Dissent].

[38] [1977] 2 EGLR 125, referred to at page 152 of the thesis, provides a domestic example of the problem highlighted by Sprankling in the American context.

[39] Crown Lands are described in *Land Registration for the 21st Century: A Conveyancing Revolution* (LC271), [11.3], as comprising: land belonging to government departments; the Crown Estate which is land held by the monarch in right of the Crown in her political capacity; the monarch's private estates, such as Sandringham; the Royal Duchies of Cornwall and Lancaster; and land subject to the Crown Lands Act 1702 which comprises royal palaces and parks. The foreshore is defined in LRA 2002, Sch 6, para 13(3) as 'the shore and bed of the sea and of any tidal water, below the line of the medium high tide between the spring and neap tides.'

[40] LA 1980, ss. 15, 18, and Sch. 1 paras 10-11.

Crown foreshore under the LRA 2002.[41] Here, in relation to land which is likely to have a special heritage or environmental significance, English law *does* offer greater protection against invasive use.[42]

Similarly, the changes introduced by the LRA 2002, which will be discussed further below, enable the Crown to grant itself a fee simple of land previously held in demesne.[43] These lands are 'very substantial' and include: the foreshore around England and Wales, except where it has been granted away or is vested in a private owner; land which has escheated to the Crown; and the ancient lands of the Crown which have never been granted away in fee.[44] Under the LRA 1925 the Crown was unable to register title to its demesne land since it had no estate in this land which could be registered under the provision stating that 'estates capable of subsisting as legal estates shall be the only interests in land in respect of which a proprietor can be registered.'[45] The Crown's ability to register Crown lands significantly strengthens the Crown Estate's ability to protect them against encroachments by adverse possessors, since the changes introduced by the LRA 2002 mean that mere lapse of time does not of itself generate title to registered land.

4 ENTRY UNDER MISTAKEN BELIEF

The second acquisition scenario combined within the English doctrine of adverse possession is the type (ii) category, described here as entry under mistaken belief. Prior to the LRA 2002, English law did not explicitly include a notion of good faith squatting.[46] However, the inclusion of this category within the thesis is an attempt to separate out those historic situations where a squatter entered into possession to the exclusion of the paper owner in the mistaken belief that they owned the land, or where

[41] LRA 2002, Sch 6 para 13.
[42] This approach may reflect a growing social realisation of the importance of environmental protection.
[43] LRA 2002, s. 131 defines demesne land as 'land belonging to Her Majesty in right of the Crown which is not held for an estate in fee simple absolute in possession.'LRA 2002, s. 79 (voluntary registration of demesne land) and s. 80 (compulsory registration of grants out of demesne land).
[44] *Land Registration for the 21st Century: A Conveyancing Revolution* (LC271), [11.7].
[45] LRA 1925, s. 2(1).
[46] LRA 2002, Sch 6 para 5(2)(a). *Prudential Assurance Co Ltd v Waterloo Real Estate Inc* [1999] 2 EGLR 85, 87, (Peter Gibson LJ), noted that the cases do not apply a different test 'where there was a trespasser who was not aware that he was trespassing'.

there was uncertainty about the exact legal boundaries.[47] Adverse possession in this sense may well be unwitting, but is not consensual.[48] It may occur 'through ignorance or mistake, without any understanding of the legal position on the part of *either* the paper owner *or* the adverse possessor', and even where the 'claimant was unaware of the true ownership of the property or believed that it was already his.'[49] Nonetheless, after the lapse of sufficient time, possession in these circumstances can cure defective titles. In the unregistered system, this category of adverse possession facilitated the investigation of title making it cheaper by linking the time periods required for a good root of title and limitation periods.[50]

In some ways, this category of adverse possession can be likened to another Roman procedure, this time *usucapio*. The policy behind this Roman method of acquisition was to benefit innocent people who had acquired property defectively by not following the correct formalities of *mancipatio*, and who therefore possessed the property to the exclusion of others but lacked full *dominium* or rights of ownership over the property in question.[51] *Usucapio* was a form of prescriptive acquisition where long possession eventually converted possessory title into full ownership. Whilst the principles evolved over time, its final form required several elements: (i) possession; (ii) lapse of time;[52] (iii) continuity; (iv) good faith;[53] (v) *iusta causa*;[54] and (vi) property capable of being usucapted.[55] These requirements appear to have grown out of the institution's attempt 'to validate fully a merely equitable title. To claim such validation it was, of course,

[47] *Land Registration for the Twenty-First Century - A Consultative Document* (LC254), [10.8].
[48] The LRA 2002 has changed this to an extent by allowing for successful adverse possession claims to be raised where there are circumstances which have raised an equity by estoppel under Sch 6, para 5(2).
[49] Gray and Gray, *Elements of Land Law*, [9.1.50].
[50] M Dockray, 'Why Do We Need Adverse Possession?' [1985] Conv 272, 277-284.
[51] A Borkowski and P du Plessis, Textbook on Roman Law (3rd ed, OUP, Oxford, 2005), 197-199. *Mancipatio* was a highly formal process akin to a type of imaginary sale, which required: the presence of the transferor and transferee; the property to be transferred (this could be a symbolic clod of earth for land); at least five witnesses; a *libripens* (person holding scales); and a formal set of words asserting title to the property.
[52] According to Gaius' *Institutes* (G.2.42), the Twelve Tables (c. 450BC) set the time periods at two years' continuous possession for land, and one year for moveables. These periods were not altered until Justinian's reign (527-565AD) when they were extended to 10 years' possession for land (20 if the parties resided in different provinces), and 3 years for moveables.
[53] That is, whether the possessor believed that his possession was held honestly, including a mistaken belief that he was the owner providing that the mistake was one of fact, and reasonable in the circumstances.
[54] The relevant section in Justinian's *Institutes* (J.2.6 pr) states that usucapion applies when a thing is bought, received by gift or on the basis of any other just cause, such as an inheritance or exchange.
[55] Policy reasons excluded some property from *usucapio* including lands in wardship, dotal property, and stolen property.

necessary to show equities in one's favor.'[56] The inclusion of good faith within the Roman doctrine of *usucapio* is significant given the introduction of this concept into the doctrine of adverse possession under the LRA 2002. This aspect will be discussed further below when examining the changes brought about by this statute. The thesis argues that it is this second category of acquisition which is now the paradigm adverse possession scenario under the LRA 2002, despite having been reported relatively rarely in cases up until now.

4.1 QUIETING TITLES

The significance of this category of adverse possession is bound up with the need to quiet titles. As time passes, 'witnesses die, memories fade, and evidence gets lost or destroyed' and in these circumstances statutes of limitation can resolve many ensuing issues by 'adopting a conclusive presumption against attempting to prove claims after a certain period of time has elapsed.'[57] If there were no mechanism for eliminating old claims to property, marketability of title would suffer due to the difficulties of discovering and releasing such claims. In this way, adverse possession is just 'one facet of the law of limitation' and has the laudable aim of protecting defendants from stale claims, and encouraging the ease with which land can be bought and sold.[58]

However, this justification for the continued existence of adverse possession is not without its detractors. A threshold question is whether as a society we want owners to be forced to bring actions to recover their possessions. It has been argued that normally we expect the state to protect owners by enforcing their property rights against incursions by other people, rather than forcing those 'protective processes' upon owners by encouraging litigation which is 'not otherwise desired by the owner.'[59] Similarly, it has been observed that the existence of adverse possession makes a system of title registration less reliable and more uncertain. The elements of a claim are 'fuzzy', 'open-textured' and call for complex and highly fact-specific evidence and judgments

[56] M Radin, 'Fundamental Concepts of the Roman Law', 13 Cal L Rev, 207 (1924-1925), 222.
[57] TW Merrill, 'Property Rules, Liability Rules, and Adverse Possession', 79 Nw U L Rev 1122 (1984), 1128.
[58] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [14.54].
[59] Stake, 'The Uneasy Case for Adverse Possession', 2438.

as to the past uses of the land and the mental state of the possessor during those uses. [60] This should not be the case however in type (ii) situations since the 'squatter' *will* be making use of the land as if they owned it, and will doubtless believe that they have good title to the land on the basis of the defective conveyance thus proving the requisite physical and mental possession should be relatively straightforward. Additionally, the previous owner's decision to convey the land, albeit defectively, will also act as clear evidence of their intention to discontinue possession, thus providing further support for the 'squatter's claim.

4.2 NO SLEEPING ON RIGHTS

An allied justification offered for type (ii) adverse possession is that the doctrine prevents those 'who go to sleep on their claims' from receiving assistance from the courts in recovering their property.[61] This justification focuses attention on the actions of the owner of the land rather than the squatter. Under this view, the 'shift in entitlements' taking place under adverse possession rules acts as a 'penalty to deter [the owner] from ignoring their property or otherwise engaging in poor custodial practices.'[62] This rationale again appears to focus on policy decisions favouring active owners, rather than passive or dormant landowners, as discussed above in relation to type (i) adverse possession.[63]

The Law Commission has acknowledged that this rationale is unconvincing, particularly if, as argued here, that type (ii) adverse possession is the paradigm scenario. There may well be situations where a landowner, particularly local authorities, may be incapable of policing all of their holding in order to ensure that 'no one is encroaching on it.' Similarly, there may well be instances where slight incursions take place, this

[60] *ibid.,* 2442.
[61] *RB Policies at Lloyd's v Butler* [1950] 1 KB 76, 81 (Streatfeild J). This can be more colloquially stated as 'you snooze, you lose' according to Stake, 'The Uneasy Case for Adverse Possession', 2434.
[62] Merrill, 'Property Rules, Liability Rules, and Adverse Possession', 1130.
[63] See also Rose, 'Possession as the Origin of Property', 81, who considers that if an owner does not communicate their ownership to the outside world sufficiently clearly and quickly then it is possible where the 'communicator dallies too long' that the public will believe the interloper such that the owner finds that the 'interloper has stepped into his shoes and has become the owner.' The majority in *JA Pye (Oxford) Ltd v United Kingdom* (Grand Chamber) drew attention to the ease with which Pye could have challenged the actions of the Grahams during the requisite 12-year period in order to prevent the adverse possession from continuing to run.

time to the knowledge of the owner, but the owner is 'reluctant to take issue' perhaps due to a desire to avoid souring neighbourly relations and potentially bringing 'opprobrium upon him or her in the neighbourhood.'[64] The LRA 2002 has changed the emphasis of adverse possession in relation to this justification so that owners can now leave their land dormant, and are not required to police their property. However long someone is in adverse possession of land for, they will not be able to gain title automatically. Under the LRA 2002, which is discussed below, owners who leave their land untended or who refrain from suing squatters are no longer viewed as reprehensible and deserving of the loss of their property rights. In this sense, the changes ushered in by the LRA 2002 have bolstered the inherent and systemic preference for voluntary transfers of property rights in English law.

4.3 PERSONAL NEXUS

In *Moody v Steggles*[65] Fry J explained that '[w]here there has been long enjoyment of property in a particular manner it is the habit, and, in my view, the duty, of the court, so far as it lawfully can, to clothe the fact with right.'[66] This justification, referred to in the epigraph to the chapter, is often proffered in relation to adverse possession on the basis that over time the adverse possessor's interests become more and more entwined with the land that they are occupying such that they develop legitimate expectations that the true owner will 'continue to allow her to control the property.'[67]

Radin's work, drawing on Hegel's theory that 'ownership is accomplished by placing one's will into an object' such that the claim to an object becomes stronger as the holder becomes 'bound up with the object', has been illuminating in this context. The personal nexus justification makes sense in the type (ii) adverse possession scenario since the relative strengths of the adverse possessor's and true owner's interests in the property

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[64] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [2.71]. *Hayward v Chaloner* [1968] 1 QB 107 (CA), 111, provides an example of a situation where an owner is reluctant to enforce their strict legal rights due to a feeling of neighbourliness or charity: 'I would not ask the church for 10s. a year. If the rector had given me 10s. I should have put it in the offertory box.' See Stake, 'The Uneasy Case for Adverse Possession', 2432-2433 who discusses the way in which adverse possession rules can work against neighbourliness by forcing owners to be extra vigilant of their rights.

[65] *Moody v Steggles* (1879) 12 Ch D 261. The case arose in the context of easements, but the sentiment is applicable to adverse possession.

[66] Merrill, 'Property Rules, Liability Rules, and Adverse Possession', 1131.

[67] JW Singer, 'The Reliance Interest in Property' 40 Stan L Rev 611 (1988), 666-667.

are dynamic, and reflect the fact that 'over time the bond between persons and objects can wax and wane.'[68] This viewpoint sees the adverse possessor's interest as 'initially fungible' but becoming more personal as it matures with time, whilst at the same time the 'titleholder's interest fades from personal to fungible and finally to nothingness.'[69]

There are difficulties with the personality or attachment theory as a justification for adverse possession in that a policy which transfers 'entitlements to individuals in order to protect extra-legal expectations' would 'inevitably undermine the general security of property rights.' [70] Additionally, the personality theory cannot explain why a new adverse possessor is entitled to tack their possession onto the original adverse possessor's title.[71] The point at which each party's interests have waxed or waned sufficiently for attachment or disentanglement to have occurred is also unclear. The thesis contends that the personal connection in type (i) and (ii) categories of adverse possession develops more suddenly than may be apparent from Radin's description. In both of these scenarios, the acquiring possessor's interest waxes suddenly when they go into possession believing that they have a right to do so. The personality theory does not provide sufficiently bright-line rules or justify the operation of adverse possession in type (iii) scenarios, but it does recognise a dynamic shading of proprietary interests in land.

5 CONTESTED TRESPASSORY POSSESSION

It is this third acquisition scenario that is said to be 'tantamount to sanctioning a theft of land.'[72] The thesis contends that it is this type (iii) category, contested trespassory adverse possession, which is the root cause of judicial dislike of the doctrine because it is a private taking.[73] English law has not previously distinguished between the different acquisition scenarios set out in this thesis, but where there is clear evidence of

[68] Radin, 'Time, Possession and Alienation', 741, and Radin, 'Property and Personhood'.
[69] Radin, 'Time, Possession and Alienation', 748-749.
[70] Merrill, 'Property Rules, Liability Rules, and Adverse Possession', 1132.
[71] Stake, 'The Uneasy Case for Adverse Possession', 2456.
[72] *Land Registration for the Twenty-First Century - A Consultative Document* (LC254), [10.5].
[73] The approach of the ECtHR towards this category of adverse possession is discussed below.

deliberate 'bad faith' acquisitive adverse possession English judges have been critical of the result, despite being bound to give effect to successful claims.[74]

It is difficult to make strict Lockean arguments work in relation to type (iii) adverse possession since Locke's labour theory arose in the context of first acquisition, not later transfers. Here there is no clear evidence of abandonment by the owner, since they actively resist the squatter's claim. Similarly, the other justifications which make sense in the context of type (i) and (ii) categories of adverse possession, such as personal nexus, are unconvincing in relation to type (iii) trespassory adverse possession because there is often a difference of opinion about the extent to which the owner's links with the land have waned. Despite its prevalence in the case law, this 'consciously wrongful seizure of land' is likely to constitute the 'least common form' of modern adverse possession.[75] It is submitted that the preponderance of contested trespassory adverse possession claims, as opposed to type (i) and (ii) claims, reflects the greater sense of outrage provoked by them. In type (i) claims there will not be anyone to oppose the possession, and type (ii) claims are unlikely to reach court as frequently since there will often be a less knowingly hostile background to the possession.

The thesis argues that the benefits historically ensuing from adverse possession in type (i) and (ii) scenarios were such that they outweighed the disadvantages caused by the concomitant authorization of type (iii) contested trespassory adverse possession. Epstein observes that the effectiveness of limitation statutes would be 'wholly undermined' if they were used 'to bar only invalid claims ... [since] the statute would bar claims only after they are litigated, when it is too late.'[76] The thesis argues that much of the justificatory confusion in English law has been caused by disregarding the simple fact that 'protection of the guilty is not an end in itself, but the inevitable and necessary price paid in discharging the primary function of protecting those with proper title.'[77] Adverse possession has traditionally allowed the archetypal 'scoundrel' to benefit from the doctrine, on the basis that the 'overall gains ... seem so large that a substantial portion must inure to everyone subject to the rules ... [because] [e]veryone

[74] See the discussion below on pages 171-172 relating to *Hayward v Chaloner* [1968] 1 QB 107 (CA).
[75] Gray and Gray, *Elements of Land Law*, [9.1.13].
[76] RA Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' 64 Wash U L Q 667 (1986), 678.
[77] *ibid*., 679-680.

shares ... in the reduction in the administrative costs of operating the system ... and they retain their full rights of suit where these have their greatest value.'[78]

As will be discussed below, judicial decisions exhibit flashes of ambivalence towards individual squatters. Nonetheless, when considering contested adverse possession claims in the abstract, the judiciary often appear to deplore the operation of adverse possession rules. In *JA Pye (Oxford) Limited v Graham*, for example, Lord Bingham noted that the adverse possessors themselves 'were not at fault'. However, he added that under the doctrine they had not only 'enjoyed the full use of the land without payment for 12 years', but, '[a]s if that were not gain enough, they [were] ... then rewarded by obtaining title to this considerable area of valuable land without any obligation to compensate the former owner in any way at all.'[79] The notion that the courts dislike type (iii) adverse possession receives some support from Helmholz's study into judicial attitudes towards squatters where he concluded that 'the trespasser who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title ... than the trespasser who acts in an honest belief that he is simply occupying what is his already.'[80]

Before discussing particular instances of judicial attitudes to adverse possession, the chapter describes the operation of the mechanics of the rules; these illustrate the various undifferentiated functions historically pursued by the doctrine, and provide useful context when arguing that trespassory adverse possession is a taking, rather than a regulation of property.

6 MECHANICS OF ADVERSE POSSESSION

Several different sets of adverse possession rules apply in England depending upon whether the land is registered or not, and whether or not the period of adverse possession was completed before the LRA 2002 came into force on 13 October 2003. Despite the varied rules, the essential requirements remain similar, encompassing

[78] *ibid.*
[79] [2003] 1 AC 419 (HL), 426.
[80] RH Helmholz, 'Adverse Possession and Subjective Intent', 61 Wash U L Q 331 (1983), 332.

notions of possession, relativity of title and the limitation of actions. Whilst the changes introduced by the LRA 2002 have attenuated the circumstances in which adverse possession may occur, the doctrine itself has not been abolished. It is now limited to 'good faith' situations where adverse possession remains necessary in the interests of fairness or to ensure that land remains saleable.[81]

6.1 ADVERSE TO THE OWNER'S INTEREST

Time in adverse possession claims only begins to run once the claimant takes 'adverse' possession of the land. The meaning of possession is explored in the following section, but first it is important to consider what 'adverse' means in this context. Schedule 1 para 8(1) of the LA 1980 states that:

> No right of action to recover land shall be treated as accruing unless the land is in the possession of some person in whose favour the period of limitation can run (referred to below in this paragraph as 'adverse possession') ... the right of action shall not be treated as accruing unless and until adverse possession is taken of the land.

This meaning of 'adverse' possession thus refers solely to 'whether the defendant squatter has dispossessed the paper owner by going into ordinary possession of the land for the requisite period without the consent of the owner.'[82] In other words, the court must consider whether the 'squatter' demonstrates an intention 'to occupy and use the land as [their] ... own.'[83] Possession cannot be adverse where it is enjoyed under 'lawful title or by the leave or licence of the paper owner.'[84]

[81] LRA 2002, Sch 6, paras 5(2)(a) and (b). MJ Goodman, 'Adverse Possession of Land – Morality and Motive' 33 Mod L Rev 281 (1970), 283, questions whether this echoes the requirement in Roman law that possession should have been taken bona fide and with a *iusta causa* for taking possession such as a purchase or gift from someone wrongly believed to be the true owner, or by a method of transfer believed to be effective. See also Radin, 'Time, Possession and Alienation' 747 who questions whether squatters making economic use of land should be classified as 'bad faith' in the first place.
[82] *JA Pye (Oxford) Ltd v Graham* (HL), 434 (Lord Browne-Wilkinson).
[83] *ibid*., 446 (Lord Hope).
[84] Gray and Gray, *Elements of Land Law*, [9.1.46].

6.2 POSSESSION

According to the House of Lords in *JA Pye (Oxford) Ltd v Graham*, a case which involved registered land in the pre-LRA 2002 regime, courts must consider two central questions when deciding adverse possession claims. These are, in the classic formulation of Slade J, whether the squatter can demonstrate: (i) factual possession, or a sufficient degree of physical custody and control over the land in question; and (ii) an intention to possess, or an intention to exercise custody and control on and for one's own benefit over the land.[85] The House of Lords decision in *Pye* acts as a useful primer to the law in this area, particularly since after some doubt, it has been confirmed that the domestic courts should follow the Grand Chamber's decision that the LRA 1925 adverse possession regime *is* compatible with the ECHR. This latter decision is examined in greater detail, along with the rest of the *Pye* litigation below.[86]

6.2.1 Intention to possess

There is no need for the change in possession to be hostile, nor is there any requirement for a 'confrontational, knowing removal of the true owner from possession'.[87] All that is necessary is that possession of the land should be without the paper owner's consent. Whilst the House of Lords averred that adverse possession has 'always' incorporated a mental component,[88] this may not be a fully accurate account of the historical common law but rather a somewhat more recent adoption.[89] What is clear though is that intention to possess seems to be viewed by modern courts as *the* deciding factor in discriminating between factual acts of 'persistent' trespass and exclusive enjoyment of the fee simple.[90] In practice, it is almost impossible to separate out the two elements of factual possession and intention since they are bound so tightly together: normally, a squatter

[85] *Powell v McFarlane* (1977) 38 P & C R 452, 470.
[86] See *Ofulue v Bossert* [2008] WLR 22 (CA), in conjunction with *JA Pye (Oxford) Ltd v United Kingdom* (Grand Chamber). *Cf. Beaulane v Palmer* [2006] Ch 79.
[87] *JA Pye (Oxford) Ltd v Graham* (HL), 434-435 (Lord Browne-Wilkinson).
[88] *ibid.*, 435, (Lord Browne-Wilkinson): 'there has always, both in Roman law and in common law, been a requirement to show an intention to possess in addition to objective acts of physical evidence.'
[89] O Radley-Gardner, 'Civilized Squatting' 25 OJLS 727 (2005), 737-741 who traces the origins of the intention to possess to an importation and adaptation from the German Pandectist writers of the nineteenth century, particularly Savigny and Jhering. F Pollock and RS Wright, *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888), 4-5 also refer to Savigny's influence.
[90] *Roberts v Swangrove Estates Ltd* [2007] 2 P & CR 27 (Ch D). Decision affirmed in *Roberts v Swangrove Estates Ltd* [2008] Ch 439 (CA).

will manifest their internal mental intention to possess the land for the time being by some sort of outward conduct.[91]

6.2.2 Factual possession

Given the 'drastic results' of a change in possession, possessory acts must be sufficiently clear or 'open' so that, were the owner present on the land, they would appreciate that the squatter was dispossessing them and not merely acting as a persistent trespasser.[92] This requirement of open possession thus ensures that the paper owner is 'given every opportunity of challenging the possession before it can mature as a threat to his own title.'[93]

The ease with which the owner can discover the existence of an adverse possessor appeared to be a telling factor against finding for the applicant companies in the Grand Chamber's decision in *Pye.* The Chamber noted that the squatters' possession was open and that very little action on the part of the paper owner would have stopped the limitation period running against them. The time period begins to run from the date that the adverse possessor dispossesses the paper owner, or enters into possession after the paper owner has discontinued their possession.[94] The difference between dispossession and discontinuance is narrow. In *Buckinghamshire County Council v Moran*, Nourse LJ approved the distinction drawn by Fry J in *Rains v Buxton*[95] who explained that dispossession involves a situation where 'a person comes in and drives out the others from possession' whereas discontinuance occurs where 'the person in possession goes out and is followed into possession by other persons.'[96] In requiring dispossession the courts are in looking for signs that the squatter has gone into 'ordinary possession' of

[91] Waldron, *Liberal Rights: Collected Papers 1981-1991*, 643.
[92] *Powell v McFarlane*, 480 (Slade J).
[93] Gray and Gray *Elements of Land Law* [9.1.45]. Rose 'Possession as the Origin of Property' sees the possession requirements as an issue of communication.
[94] LA 1980, Sch. 1, para 1.
[95] (1880) 14 Ch D 537.
[96] *Buckinghamshire CC v Moran*, 636. The case involved dispossession, see *Hounslow LBC v Minchinton* (1997) 74 P & CR 221 (CA) for an example where the Court of Appeal agreed that there had been discontinuance of a strip of land by the Council's predecessor in title who had fenced the land so as to deny themselves access.

the land 'for the requisite period without the consent of the owner'[97] rather than signs of 'any element of aggression.'[98]

In deciding whether acts amount to sufficient possession courts assess the 'character and value of the property, the suitable and natural mode of using it' and the way in which the owner might reasonably be expected to protect their interests.[99] *Red House Farms (Thorndon) Ltd v Catchpole* represents a well-known example of this approach in practice. Here, the land involved was so marshy that using it for wildfowl shooting was sufficient evidence of factual possession. Similarly, in *London Borough of Hounslow v Minchinton*[100] squatters enclosed a strip of rough land of about 3 feet wide at the bottom of their garden. The acts of possession relied upon were insubstantial and consisted of trimming a hedge, weeding, keeping a compost heap and looking after elderberry bushes. This was however the 'only sensible use of the … rough land at the end of a garden' and therefore legally sufficient.

In *Inglewood Investment Co Ltd v Baker* however, similar intermittent acts such as rubbish clearing, children playing and shooting rabbits and foxes were too transient to found a successful adverse possession claim.[101] The type of terrain involved can also prove to be problematic as demonstrated in *Roberts v Swangrove Estates Ltd*, a case which involved four competing adverse possession claims to some 18,000-20,000 acres of the foreshore and bed of the tidal estuary of the River Severn.[102] Whilst each of the claims had a readily visible boundary at the shoreline, every other boundary was either unmarked riverbed or water depending on the considerable tides affecting the Severn.[103]

6.3 POSSESSION AND RELATIVITY OF TITLE

Possession does not exist in a vacuum but has been bound up ineluctably with common

[97] *J A Pye (Oxford) Ltd v Graham*, [36] (Lord Browne-Wilkinson).
[98] *ibid*., (Lord Hope), [69].
[99] *Lord Advocate v Lord Lovat* (1879-80) L R 5 App Cas 273 (Lord O'Hagan), 288.
[100] (1997) 74 P & CR 221.
[101] (2003) 2 P & CR 23.
[102] *Roberts v Swangrove Estates Ltd* (Ch D).
[103] *ibid.*, [5]–[6]. The area was valued for dredging purposes – at stake were quantities of high-quality sand that could be sold to the construction industry with little need for processing [17].

law feudal notions of 'seisin'.[104] The historical background not only explains the development and operation of the doctrine of adverse possession, but, more significantly, also highlights the immense sea-change wrought in this area of the law by the LRA 2002 with its shift to title by registration rather than a register of title.[105] The post-LRA 2002 rules on adverse possession actually serve to strengthen existing property rights and make this category of private taking much harder to achieve. This point will be expanded upon below, but in order to appreciate the effect of the LRA 2002 more fully, it is first necessary to explore briefly the notions of seisin and relativity of title.

6.3.1 Seisin and possession

In the twelfth century the conception of seisin as 'a condition rather than an event, a relationship between person and land' appears to have been equated with de facto possession.[106] In the medieval world, the root of title relied upon the 'raw fact of sustained possession' where ownership of an estate was founded 'ultimately on the successful assertion of de facto control.'[107] However, by the end of the Middle Ages, notions of seisin and possession appear to have diverged considerably. From this point on, seisin applied only to immoveable property and it had become a 'great mystery': determining who was seised no longer relied upon obvious physical possession of a piece of land, but required detailed knowledge of the law.[108] In order to bring some order to the potential chaos, conflicting claims to seisin were resolved initially by recourse to a simple first-in-time rule: the person who could base his title upon the earliest seisin would be entitled to recover the land.[109] The simplicity of this rule worked well in a world where a vassal seised by his lord could not then be disseised

[104] FW Maitland, 'The Mystery of Seisin' 2 LQR 481 (1886) notes that 'the further back we trace our legal history the more perfectly equivalent do the two words *seisin* and *possession* become.'
[105] Gray and Gray, *Elements of Land Law*, [2.2.5].
[106] Simpson, *A History of the Land Law* (OUP, Oxford, 1986), 40 referring to SFC Milsom *The Legal Framework of English Feudalism: The Maitland Lectures Given in 1972* (Cambridge Studies in English Legal History, CUP, 1976), 39-41.
[107] Gray, 'Property in Common Law Systems', 249.
[108] Simpson, *A History of the Land Law*, 41.
[109] RA Epstein, 'Possession as the Root of Title' 13 Ga L Rev 1221 (1979), 1222-1223 validly notes that manorial courts with 'modest remedial powers' were unlikely to choose or 'even stumble upon' property doctrines 'whose enforcement requires elaborate administrative machinery.' In this context, the rule that possession lies at the root of title 'becomes an attractive starting point for resolving particular disputes over the ownership of particular things.'

without recourse to a higher authority, namely one of the King's writs. The common law presumption that the current possessor of the land had seisin was fundamental in ensuring the continuing focus on physically possessing land, although this presumption of seisin could be rebutted by providing other evidence.

6.3.2 Relativity of title

From the earliest times, possession has been and remains a surprisingly complex and fundamental concept. It not only includes relationships of right between a person and a corporeal estate in land, but also relationships of fact where the law is concerned with physical occupation of the land. These two facets of possession need not, and often do not, correlate. It is therefore possible, and indeed common, for the right to possess an estate to be vested in one person whilst another person is in factual occupation. Such situations occur every day for example in a leasehold relationship where the landlord may well be in legal possession of the property through the receipt of rents, whilst the tenant is factually possessed of the land in terms of physical occupation.[110] Such a separation of facets of possession also occurs whenever a squatter dispossesses the paper owner of land.[111]

Historically, in an attempt to achieve simplicity, the law has looked to de facto possession as the 'litmus test'[112] for resolving competing title claims based on possession as of right, and has acknowledged that titles at common law are not absolute but 'always and essentially *relative*.'[113] Under this type of common law regime there can be no Romanist notion of absolute ownership or dominion, but instead only relative and shifting degrees of possession, which can be distinguished solely by comparison with another's title.[114] This approach meant that traditionally, and still in relation to

[110] LPA 1925, s 205(1)(xix): '"Possession" includes receipt of rents and profits or the right to receive the same, if any ...'
[111] M Wonnacott, *Possession of Land* (CUP, Cambridge, 2006), 4.
[112] Sprankling, 'An Environmental Critique of Adverse Possession', 819.
[113] Gray, 'Property in Common Law Systems', 248-249.
[114] It is worth querying the extent to which Roman rights were ever this absolute. The remaining substantive Roman law has been divorced from the difficulties of evidential enquiries. Jurists advised on the content of the writs; issues of proof and evidence would be a matter for the *iudex*, and subject to debate at the possessory interdict stage, before the burden of proof shifted in the *vindicatio*. It would have been outside the purview of jurists, whose writings have influenced later generations, to qualify abstract notions of title by reference to evidential difficulties. *Cf.* the common law, where legal title and proof have been inextricably linked, such that the inherent uncertainty of title is to be seen more clearly.

unregistered land, an estate in land can be simultaneously 'valid and void' depending upon the relative strength of the other claimant's title.[115] Whilst there can therefore be a 'radical' distinction between the original owner and the rest of the world, other claimants may still find that their own flawed possession is dispositive against everyone else.[116]

7 LIMITATION PERIODS

Whilst in theory relativity of title can help to differentiate between competing claims, it still leaves a practical and legal quagmire. It is impossible, relying solely on relativity of title, to determine categorically whose claim to the land is void; instead, every title remains in the no-man's land of being forever potentially voidable.[117] In these circumstances, where there are potentially multiple valid titles to the same asset, it is vital not only to have clear priority rules in order to determine the relative strength of competing claims, but also to narrow down the scope for bringing such actions.[118] The mechanics of limitation appear to have influenced the decision of the ECtHR in *Pye v United Kingdom* that the doctrine of adverse possession was a regulation of title, not an expropriation. The Strasbourg court had previously held that limitation periods were Convention-compliant, albeit in the context of damages in a civil action.[119] Before assessing the merits of the Grand Chamber's decision in *Pye*, it is first necessary to examine the way in which English limitation statutes have historically operated in this area. The chapter argues these statutes have long facilitated private takings, despite not labelling them as such.

7.1 HISTORICAL STATUTES OF LIMITATION

As might be expected from such a pragmatic legal system, English law has had several limitation periods relating to property rights. These indicate, as with compulsory purchase statutes, that English law has long tolerated and facilitated functional private

[115] D Fox, 'Relativity of Title at Law and in Equity' [2006] CLJ 330, 335.
[116] Epstein, *Takings: Private Property and the Power of Eminent Domain*, 347.
[117] This is subject to the caveat that varying standards of proof will also affect the strength of titles; a high standard of proof can render one person's arguable claim to title practically void. Thus, manipulated requirements can reflect the influence of various underlying policy decisions at play.
[118] Fox, 'Relativity of Title at Law and in Equity', 337.
[119] *Stubbings v United Kingdom* (22083/93) (1997) 23 EHRR 213.

takings. The modern practice of fixing on a set period in a limitation statute as occurs in the Limitation Act 1980 ('LA 1980'), rather than a particular date, was introduced as early as 1540.[120] Before then, limitation statutes such as the Statute of Merton in 1235[121] and the Statute of Westminster in 1275[122] had limited actions by reference to specific regnal dates.[123] Fast-forwarding to the Real Property Limitation Act of 1833,[124] which abolished the majority of real actions, the limitation period within which ejectment proceedings had to be exercised became twenty years.[125] The statute also stated that the limitation period in relation to land was 'deemed to have first accrued at the time of such dispossession or discontinuance of possession.' As such, the old rules relating to whether the defendant obtained seisin became irrelevant.[126] It was only in 1874 with the enactment of the Real Property Limitation Act 1874 that the more familiar modern twelve-year period was introduced.[127] This period has long been closely connected in unregistered land with the length of root of title which a vendor must deduce.[128]

Of all the forerunners to modern limitation statutes, most commentators view the Limitation Act of 1623[129] as particularly significant due to its avowed aim of 'quieting … men's estates, and avoiding of suits' – terms which begin to presage the content of more modern limitation statutes. Neither the 1540 nor the 1623 statutes strictly barred *title* to the land, but only the right of entry or the right of action.[130] Hence, despite the *right* to recover land being barred, it was still possible for a person to reassert title

[120] Act of Limitation, 32 Hen VIII, c 2 (1540).
[121] Limitation of Writs Act, 1235 (Statute of Merton), 20 Hen III, c 8 (1235).
[122] Limitation of Prescription Act, 1275 (Statute of Westminster I) 3 Edw I, c 39 (1275).
[123] E.g. The Statute of Merton limited the date for Writs of Right to the coronation of Henry II in 1154. The Statute of Westminster decreed that the earliest date that could be cited in a Writ of Right was 1189 (the coronation of Richard 1). This effectively introduced a limitation period of eighty-six-years, whilst other Writs such as Mort d'Ancestor could only cite claims of seisin dating from the coronation of Henry III in 1216.
[124] Real Property Limitation Act 1833, 3 & 4 Will IV, c 27.
[125] Simpson, *A History of the Land Law*, 152. See also S Jourdan, *Adverse Possession* for discussion of the action of ejectment, 2-11- 2-13.
[126] *JA Pye (Oxford) Ltd v Graham* (HL), 433, (Lord Browne Wilkinson): 'From 1833 … old notions of adverse possession, disseisin or ouster from possession should not have formed part of judicial decisions … the only question was whether the squatter had been in possession in the ordinary sense of the word. That is still the law.'
[127] Real Property Limitation Act 1874, 37 & 38 Vic, c 57, section 8.
[128] The limitation period for land is 12 years (LA 1980, s. 15) and the period for which title has to be deduced for the sale of freehold land is 15 years (Law of Property Act 1969, s. 23).
[129] Limitation Act, 21 Jac 1, c. 16 (1623).
[130] Simpson, *A History of the Land Law*, 150.

immediately if the land could be recovered peaceably.[131] This approach may be compared with the 'violent'[132] terms of section 34 of the Real Property Limitation Act 1833, which not only barred title once the requisite time had run but also explicitly extinguished title.[133] This approach is mirrored by section 17 LA 1980, which similarly extinguishes title at the end of the limitation period.[134]

7.2 THE LIMITATION ACT 1980

Section 15(1) of the LA 1980, which applies to unregistered land today as well as registered land adversely possessed before 13 October 2003, stipulates that no action 'shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him.' Land in this context is defined as including 'corporeal hereditaments, tithes and rentcharges, and any legal or equitable estate or interest therein … but … does not include any incorporeal hereditaments.'[135] In unregistered land, as noted in the introduction to this chapter, the squatter does *not* gain the land by 'Parliamentary conveyance' of the paper owner's legal estate to the squatter.[136] Instead, the previous owner's title is extinguished and the squatter holds a fee simple in the land under a new title.[137]

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[131] Harpum, Bridge and Dixon, *Megarry & Wade: The Law of Real Property*, 1440.
[132] *Sykes v Williams* [1933] Ch 285 (CA) (Lord Hanworth MR).
[133] Section 34 of the 1833 Act stated that: '[a]t the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.' The position adopted by s. 34 has carried through into s. 17 LA 1980, albeit that this area has been muddied somewhat by the unsatisfactory decision of *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510 (HL) where it was held that a lessee whose own title had been extinguished by adverse possession was still able to surrender the lease to enable the lessor to evict the squatter. Note *Spectrum Investment Co Ltd v Holmes* [1981] 1 WLR 221 (Ch D) which held that the situation will be different where the squatter registers their interest after the limitation period has expired against the tenant. Here, the surrender by the tenant would be ineffective.
[134] LA 1980, s. 17 'at the expiration of the period prescribed by this Act for any person to bring an action to recover land … the title of that person to the land shall be extinguished.'
[135] LA 1980, s. 38(1). The exclusion of easements in this context is offset by the availability of prescriptive easements, although the theoretical justification for such claims rests on the fundamentally different basis of presumed grant.
[136] Although made in the context of leasehold estates Lord Radcliffe's comments in *Fairweather v St Marylebone Property Co Ltd*, 535, about the title gained by a squatter are pertinent: '[h]e is not at any stage ... a successor to the title of the man he has dispossessed ... His title ... is never derived through but arises always in spite of the dispossessed owner.'
[137] *Tichbourne v Weir* (1892) 67 LT 735.

In relation to adversely possessed registered land under the LRA 1925, the registered proprietor remains the legal owner of the estate until the squatter is registered in their place. Section 75(1) LRA 1925 provided therefore that the proprietor's legal title remained extant at the end of the limitation period, but was thenceforth to be held on a bare trust for the squatter who could then apply for registration in place of the paper owner. Here, the combination of registration and the LA 1980 served to act as a Parliamentary conveyance. Whilst being an aspect of law of limitations, 'adverse possession does not merely bar claims ... [its] effect is positive.'[138] The net effect of these pre-LRA 2002 statutory provisions was to facilitate the forced transfer of property rights from one individual to another where adverse possession had occurred. The situation here involves private takings expressly sanctioned by legislation, without however any provision for compensation. The post-LRA 2002 regime has changed this approach by dis-applying the LA 1980 time limits in relation to actions for the recovery of land, as well as actions for redemption.[139]

7.3 NEUTRALITY OF LIMITATION PERIODS

Statutes of limitation thus play a valuable, if rough-and-ready, role in controlling the number of potential challenges to an owner's legal title.[140] Potential claimants also benefit from knowing whether they can still bring a claim, without needing to resort to litigation to determine whether they can bring a case in the first place.[141] Likewise potential defendants benefit from the doctrine in knowing that so long as they can demonstrate a good root of title stretching back for 15 years, they will be safe from adverse possession claims. In this sense, the limitation period promotes the forward-looking marketability of land as well as the backwards-looking protection of title.[142] Generally neutral in their terms, statutes of limitation seek to balance the desire of claimants to have a fair and sufficient period in which to bring their actions, whilst also

[138] *Land Registration for the Twenty-First Century - A Consultative Document* (LC254), [10.6].
[139] LRA 2002, ss. 96(1), (2).
[140] The Law Commission, *Limitation of Actions* (LC270) (2001), [1.6]: '[i]t will never be possible to achieve complete fairness between the parties (indeed the imposition of any limitation period could be regarded as doing "rough justice" to the claimant).
[141] Epstein, 'Past and Future: The Temporal Dimension in the Law of Property', 677: 'The key value of the rule … stems from the way in which the well-crafted statute of limitations shapes the primary conduct of private parties, thus preventing certain kinds of cases from being litigated at all.'
[142] Dockray, 'Why Do We Need Adverse Possession?'.

protecting defendants from stale claims in circumstances where it may be difficult to obtain reliable testimony.

The double-edged nature of these statutes is particularly evident in adverse possession claims. Depending upon the circumstances, limitation periods may thus prove to be highly detrimental to a paper owner by depriving them of the ability to dispossess long-term interlopers; or, ownership may be strengthened since statutes of limitation allow potential defendants to assume that 'potentially litigious events will no longer haunt' them.[143] Sedley J in *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* described the supposed neutrality of limitation periods and adverse possession thus:

> Parliament has prescribed the effects of a sufficient period of adverse possession without reference to circumstances ... the deserving and the undeserving alike may be caught or spared by the operation of the Limitation Acts. The law, correspondingly, leans neither towards nor against the extinction of titles ... for policy reasons it simply provides for it to happen in certain situations.[144]

In fact, neither the pre- nor the post-LRA 2002 adverse possession regimes are neutral in action. As will be discussed later in this chapter, the pre-LRA 2002 case law implicitly (and sometimes openly) reveals judicial suspicion and dislike of adverse possessors, and the post-LRA 2002 rules clearly disadvantage squatters to the benefit of the paper owner.[145]

8 PYE AND PRIVATE TAKINGS

At first sight, it seems axiomatic that adverse possession is functionally a private taking given that possession over a period of time results (in certain circumstances) in a 'bar to enforcement of the former owner's right of exclusive possession and eventually in the loss of that right, without the cooperation and against the will of the former owner and without receiving value or compensation.'[146] In relation to unregistered land, as noted above, section 17 of the LA 1980 acts so as to extinguish the paper owner's title to the

[143] NH Andrews, 'Reform of Limitation of Actions: The Quest for Sound Policy' [1998] CLJ 589, 594.
[144] [1998] 4 All ER 948.
[145] Helmholz, 'Adverse Possession and Subjective Intent' notes a similar judicial dislike of 'bad faith' trespassers in practice in American adverse possession cases.
[146] van der Walt, *Property in the Margins*, 177.

land without any reference to a court. The old rules relating to registered land involved the registered owner losing beneficial title to the land due to the operation of the statutory trust imposed by section 75 LRA 1925, and then legal title. However the various statutory mechanisms operate, rights to a particular plot of land previously owned by one individual, can later be enjoyed legally and beneficially by another individual due to the operation of adverse possession rules. In considering the definition of private takings employed in the thesis,[147] it is clear that adverse possession *is* a taking since there is an appropriation and occupation of land by someone other than the officially designated owner, against the designated owner's wishes, accompanied by the intention permanently to deprive the official owner of the land.

However, this conclusion differs from that reached by the majority of the Grand Chamber of the ECtHR in Strasbourg. This section analyses the issues raised both domestically in the case of *JA Pye (Oxford) Ltd v Graham*, and later by the ECtHR in *JA Pye (Oxford) Ltd v UK* and argues that these cases, and the resultant labelling of the transfer involved, reveal much about judicial attitudes to private takings. The case concerned adverse possession of registered land under the LRA 1925 regime, and thus has a now limited immediate impact given the changes introduced by the LRA 2002. However, many of the comments made in the course of the litigation help to illuminate broader property issues raised by the doctrine of adverse possession. The most notable aspect of the *Pye* litigation for present purposes is the way in which courts at all levels failed to agree on the correct application of well-known rules to a relatively clear set of facts. It is argued that this uncertainty indicates judicial unease with private takings, particularly when they arise in the guise of contested trespassory adverse possession claims.

8.1 DOMESTIC APPROACHES TO PYE

The facts of *JA Pye (Oxford) Ltd v Graham* were relatively straightforward. The Grahams knowingly remained in occupation of 25 hectares of agricultural land worth some £2.5m after their licence from JA Pye (Oxford) Ltd ('Pye'), the registered owner, had expired. For a 15-year period until 1999, the Grahams used the whole of the

[147] See pages 19-21 of the thesis.

disputed land for farming without Pye's permission. Events came to a head when Mr Graham registered cautions at the Land Registry against Pye's title on the ground that the Grahams had dispossessed Pye and obtained title via adverse possession. Pye issued proceedings in the High Court to cancel the cautions and sought possession. These claims were contested by the Grahams on the basis that they had adversely possessed the land, and that Pye was now not only barred under the LA 1980 from bringing an action to recover the land, but also held the land on trust for the Grahams.[148] *Pye* eventually wound its way up to the House of Lords where both Lord Bingham and Lord Hope expressed concerns about the human rights implications of adverse possession, particularly in relation to the operation of the LRA 1925 rules in registered land. The historic justifications for adverse possession, which revolved primarily around quieting titles in unregistered land, made little or no sense in the registered system where relativity of title and possession should have been of little import.

The discussion of the human rights issues presented by viewing adverse possession as a taking was however necessarily brief. Unfortunately for Pye, their potential Article 1 argument was hampered by the non-retrospective effect of the HRA 1998 which had not been in effect at the relevant times,[149] and the unambiguous nature of the LA 1980's terms.[150] However, in the House of Lords, Lord Hope spoke of the 'apparent injustice of the result'[151] and Lord Bingham echoed the misgivings of Neuberger J at first instance.[152] The justifications for adverse possession had been subject to fierce criticism by Neuberger J who viewed the law as effectively an uncompensated taking:

> [I]t is hard to see what principle of justice entitles the trespasser *to acquire the land for nothing* from the owner simply because he has been permitted to remain there for 12 years. To say that ... the owner who has sat on his rights should therefore *be deprived of his land* appears to me to be illogical and *disproportionate* … in a climate of increasing awareness of human rights

[148] LRA 2002, s. 75(2). The LRA 2002 provides for transitional arrangements which will apply where the completion of the limitation period had given rise to a trust before the LRA 2002 came into force. In these circumstances the squatter is entitled to be registered as proprietor of the estate under Sch. 12, para 18(1)

[149] The HRA 1998 came into force on 2 October 2000. The facts of the case took place before the enactment of the HRA 1998; the hearing before Neuberger J took place on 17-19 January and 4 February 2000.

[150] *JA Pye (Oxford) Ltd v Graham* (HL), [65]. Had there been some ambiguity in the LA 1980, s. 3(1) of the HRA 1998 could have been used to 'read-down' the provisions in a Convention-compliant matter since it applies irrespective of when the legislation involved was enacted.

[151] *ibid.*, [67].

[152] *ibid.*, [1].

> including the right to enjoy one's own property, it does seem *draconian to the owner and a windfall to the squatter* that ... the *owner should lose* … land to the squatter *with no compensation* whatsoever [Emphasis added].[153]

This passage is clearly studded with explicit references to notions of acquisition, deprivation and the lack of financial compensation.

8.1.1 Pye in the Court of Appeal

Despite Neuberger J's impassioned denunciation of adverse possession, the Court of Appeal did not view the facts as a potential breach of Article 1. Instead, the court found for Pye on the basis that the Grahams had not possessed sufficient intention to possess.[154] It is argued that this approach reflects the malleable nature of the doctrinal requirements of adverse possession, which can be employed to defeat private takings. Pye argued before the Court of Appeal that the court was under a statutory duty under ss. 3 and 6(1) HRA 1998 to define and apply adverse possession rules in a Convention-compliant manner. The Grahams contested this arguing since they had successfully possessed the land for four years before the 1998 Act came into force, *they* should benefit from any Convention-compliant approach by gaining peaceful enjoyment of their possessions, rather than Pye.[155] In dismissing the Article 1 arguments in relation to the LA 1980, Mummery LJ noted that limitation periods:

> [D]o not deprive a person of his possessions or interfere with his peaceful enjoyment of them. They deprive a person of his right of access to the courts for the purpose of recovering property if he has delayed the institution of his legal proceedings for 12 years or more after he has been dispossessed of his land by another person who has been in adverse possession of it for at least that period. The *extinction of the title* of the claimant in those circumstances *is not a deprivation of possessions* … for which the payment of compensation would be appropriate: *it is simply a logical and pragmatic consequence of the barring of his right to bring an action* after the expiration of the limitation period. [Emphasis added][156]

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[153] *JA Pye (Oxford) Ltd v Graham* (Ch D), 710.
[154] *JA Pye (Oxford) Ltd v Graham* [2001] Ch 804 (CA), 817-819.
[155] *Holy Monasteries v Greece*. A person becoming an owner of land by adverse possession is entitled under Article 1 to have *their* ownership protected.
[156] *JA Pye (Oxford) Ltd v Graham* (CA), 821-822. See also Keene LJ at 822 who noted that the Convention itself expressly recognises the validity of procedural time limits for actions brought under the ECHR, under article 35(1). The terms of the LA 1980 had been deemed Convention-compliant in *Stubbings v United Kingdom*.

Mummery LJ added that even *were* the Convention to apply, the provisions contained in the LA 1980 would be within the state's margin of appreciation under Article 1. The conditions were only those reasonably required to 'avoid the real risk of injustice in the adjudication of stale claims' and to ensure 'certainty of title and to promote social stability by the protection of the established and peaceable possession of property from the resurrection of old claims.' As such, the conditions were not disproportionate, especially given that the limitation period was 'reasonable … the conditions are not discriminatory … and [were] not impossible or so excessively difficult to comply with as to render ineffective' the legal rights of the paper owner to recover possession.[157] As noted above, Mummery LJ's approach does not take full account of the LA 1980 in extinguishing title under the pre-LRA 2002 regime.

8.1.2 Pye in the House of Lords

The House of Lords allowed the Grahams' appeal on the basis that the Grahams *had* dispossessed Pye, however their Lordships noted their dissatisfaction with the operation of the doctrine. The result of Pye's inaction was that the Grahams obtained title to the land at stake for free. No Article 1 claim could be pursued given the pre-HRA 1998 timing of the case, but in the context of discussing this point, Lord Hope expressed dissatisfaction with the LRA 1925 rules. Lord Hope noted that 'one might have expected the law – in the context of a statutory regime where compensation is not available – to lean in favour of the protection of a registered proprietor against the actions of persons who cannot show a competing title on the register.' He commented on the fortunate realisation that the LRA 2002 would make it much harder for squatters to gain title such that its effect 'will be to make it much harder for a squatter ... to obtain a title to [land] ... against the wishes of the proprietor.' Lord Hope did not rely on the absence of compensation as a justification for the unfairness of the doctrine but rather on the 'lack of safeguards against oversight or inadvertence on the part of the registered proprietor.'

[157] *JA Pye (Oxford) Ltd v Graham* (CA), 822.

8.2 PYE IN THE ECTHR

The concerns raised by the House of Lords about the transfer of property rights resulting from a successful adverse possession claim found their voice in the ECtHR. On appeal by Pye, the Chamber held by a four-to-three majority that Pye's rights under Article 1 *had* been violated.[158] Whilst adverse possession could be justified as being in the public interest by avoiding protracted uncertainty about title, it could still be argued that the operation of adverse possession was disproportionate and therefore an infringement of Convention rights. In categorizing adverse possession as a deprivation of possessions, the Chamber dismissed the UK government's submission that adverse possession provisions and limitation periods should be regarded as incidents of, or a limitation on property rights from the time they are first acquired. The Chamber noted that Article 1 does 'not cease to be engaged merely because a person acquires property subject to the provisions of the general law, the effect of which is in certain specified events to bring the property right to an end.' This would depend rather on whether the law qualified the property right at the moment of acquisition or deprived the owner of 'an existing right at the point when the events occur and the law takes effect.[159]

This approach appears compelling given that Pye owned the registered freehold title to the land and would have continued to do so unless and until someone else, such as the Grahams, adversely possessed that land. In this sense the LRA 1925 and the LA 1980 were viewed by the Chamber as '"biting" on the applicants' property rights only at the point at which the Grahams had completed 12 years' adverse possession' rather than 'delimiting the right at the moment of its acquisition.'[160] Despite precedent indicating that the application of limitation periods would normally fall within Article 6 ECHR, the Chamber held that there was 'no reason' why they might not also fall within other Articles. Here given that s. 15 LA 1980 coupled with s. 75 LRA 1925 'clearly had such an impact on the applicants' property rights ... [by] depriv[ing] [them of their land]' it

[158] The dissenting judges argued that Pye had 'not had to bear an excessive or individual burden' since they lost their land because of the 'foreseeable operation of legislation on limitation of actions' and that they could have stopped time running against them by 'taking minimal steps to look after their interests.' As such the deprivation of possessions 'was compatible with Article 1 ... even in the absence of compensation.'
[159] *JA Pye (Oxford) Ltd v United Kingdom* (44302/02) [2005] ECHR 921 (IV Chamber), [51].
[160] *ibid*., [52].

was permissible to rely upon Article 1.[161] Nor could the government escape liability by arguing that it was the Grahams' actions which deprived Pye of their property rights, since the Chamber held that 'but for the provisions of the 1925 and 1980 Acts, the adverse possession of the land ... would have had no effect on [Pye's] ... title ... It was the legislative provisions alone which deprived the applicants of their title and transferred the beneficial ownership to the Grahams.'[162]

Additionally, the legislation and its effect could not be justified as proportionate or as striking a fair balance given the lack of procedural safeguards and draconian effect of the legislation. In referring to the new provisions of the LRA 2002, the Chamber commented that Parliament 'itself recognised the deficiencies in the procedural protection of landowners' and thus given the circumstances, Pye had been subject to an individual and excessive burden.[163]

8.2.1 Pye in the Grand Chamber

After the Chamber's judgment, the United Kingdom requested that the case be referred to the Grand Chamber of the ECtHR.[164] By a majority of ten-to-seven, the Grand Chamber overturned the Chamber's decision. The court agreed that Article 1 was applicable since Pye had lost ownership of 23 hectares of land because of the operation of the 1925 and 1980 Acts.[165] However, because the land was lost due to the operation of limitation period rules, which the Grand Chamber classified as part of the general land law, they classified the case as falling with the category of a non-compensable *control of use* of land, rather than a *deprivation* of possessions under Article 1.[166]

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[161] *ibid*., [54].
[162] *ibid*., [56]. See also A Goymour, 'Proprietary Claims and Human Rights - A "Reservoir of Entitlement"?' [2006] CLJ 696, 711.
[163] *JA Pye (Oxford) Ltd v United Kingdom* (Grand Chamber), [74]-[75].
[164] Under article 432 of the Convention and rule 73 of the Rules of Court.
[165] *ibid*., [63]: 'The Court finds inescapable the Chamber's conclusion that Article 1 of Protocol No. 1 is applicable.'
[166] *ibid*., [66].

8.2.2 The majority in the Grand Chamber

The majority of the Grand Chamber considered that the 12-year limitation period pursued a legitimate aim in the general interest, and that extinguishing title could not therefore be said to be manifestly without reasonable foundation. In addition they noted that the LRA 2002 did not abolish the relevant provisions of the 1925 and 1980 Acts thus confirming the domestic view that the traditional general interest remained valid,[167] and that the statutes had been in force for many years before Pye even acquired the land. Even under the Convention-compliant terms of the LRA 2002 no compensation was payable so the lack of compensation in the case of Pye's situation was not determinative. The Grand Chamber was also swayed by the fact that very little action on the part of Pye would have stopped time running, and that it would have been possible to commence an action for recovery. It was also possible for Pye to argue (as had happened in this case) before the domestic courts that the Grahams had not been in adverse possession of the land.[168]

According to the majority, therefore the acquisition of unassailable rights by a squatter had to go hand-in-hand with a corresponding loss of property rights for the paper owner. These arrangements fell within the UK's margin of appreciation, unless the results were so anomalous that they rendered the legislation unacceptable by not striking a fair balance, which was not the case according to the majority of the Grand Chamber.[169] Additionally, they pointed to practical considerations, which meant that limitation periods had to apply regardless of the size of the claim so it was irrelevant that the Grahams had made a substantial sum of money as a windfall.[170] The Grand Chamber's decision is yet another example of the deferential standard generally applied in European cases under Article 1. It would have been logically more consistent, if politically difficult, to hold that *Pye* involved a deprivation of possessions under Article 1, even if the Grand Chamber then held that no or minimal compensation would be due.

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[167] *ibid*., [73].
[168] *ibid*., [80].
[169] *ibid.*, the First Joint Dissent disagreed with the majority on this point arguing at [12] that they were 'unable to accept that the general interest would extend to depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation.'
[170] *ibid*., [83]-[84]. Again, the First Joint Dissent parted company with the majority on this point stating at [13] that they were 'quite unable to accept that the adverse possessor has any legitimate interest in obtaining the windfall of acquiring title to the land itself without payment of compensation.'

As noted in relation to *James v United Kingdom*, there is no automatic need for market value compensation to be paid for a deprivation to be deemed Convention-compliant.

8.2.3 The First Dissent in the Grand Chamber

Several judges dissented in the Grand Chamber. The First Joint Dissent[171] observed that the categories under Article 1 were not 'watertight,' but agreed with the majority that the case involved a control of use issue rather than a deprivation. They concurred that the statutory provisions were not intended to deprive property owners 'in furtherance of a social policy of redistribution of land or transfer of ownership', but rather 'represented generally applicable rules designed to regulate questions of title.' As such, the ensuing loss of title was a control of use, rather than a deprivation of possessions.[172] Where those of the First Dissent differed from their colleagues in the majority was on the question of whether a fair balance had been struck between Pye's rights as registered owner, and the general interest served by the doctrine of adverse possession. The impact of adverse possession on the registered landowner was regarded as 'exceptionally serious'; in judging the proportionality of the measures it was 'a highly material factor' that the statutes 'went further than merely precluding the registered landowners from invoking the assistance of the courts to recover possession of their land, by depriving them of their beneficial ownership of it.'[173]

The First Joint Dissent added that the absence of compensation did not automatically make the control of use disproportionate, but that this made the 'loss of beneficial ownership the more serious' and required 'particularly strong measures of protection' for the paper owner's property rights 'if a fair balance was to be preserved.'[174] They attached 'considerable importance' to the fact that the LRA 2002's new rules regarding the balance of protection between paper owners and squatters 'represented more than a

[171] Judges Rozakis, Bratza, Tsatsa-Nikolovsk, Gyulumyan and Sikuta.
[172] *ibid*., [6]: 'However, like the Chamber, we would emphasise that the three "rules" of Article 1 are not distinct or watertight … the principles governing the question of justification are substantially the same, requiring both a legitimate aim and the preservation of a fair balance between the aim served and the individual property rights in question.'
[173] *ibid*., [14].
[174] *ibid*., [16].

natural evolution.'[175] In concluding, the First Joint Dissent held that Pye had been required to 'bear an individual and excessive burden such that their rights under Article 1 ... were violated' due to being deprived of the beneficial ownership of land to which they held the registered title.[176]

8.2.4 The Second Dissent in the Grand Chamber

The dissenting opinion of Judge Loucaides and Judge Kovler[177] to the Grand Chamber's decision in *Pye* stated that the judges had 'great difficulty in accepting that adverse possession could serve any general interest' in relation to registered land. They did not accept the views of the majority that the continued existence of adverse possession under the LRA 2002 demonstrated 'the necessity of maintaining the present system of adverse possession.' In addition, the judges of the Second Joint Dissent were not persuaded by one of the other justifications offered for adverse possession: that it encourages landowners 'to exploit, improve, or make use of their land.' In the judges' view, such encouragement could be achieved by less onerous means than depriving a registered owner of their beneficial title to land 'except by a proper process of compulsory acquisition for fair compensation.' They added that the system 'shows disrespect for the legitimate rights and expectations of the registered property owners' which included amongst other things 'the possibility of keeping their property unused for development at a more appropriate time … or to maintain their property as security for their children or grandchildren.'

The judges of the Second Joint Dissent added that the current approach looked as though it 'is intended to punish a registered lawful owner of land for not showing sufficient interest in his property' by rewarding a squatter with title. Such an approach was 'illogical and disproportionate.' The judges added briefly that they were 'inclined to take the view' that the principles of adverse possession were 'a case of deprivation of possessions' rather than a 'control of use', and that they had been guided 'by the rule that the Rule of Law is inherent in all the Articles of the Convention.'

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[175] *ibid*., [19].
[176] *ibid*., [21].
[177] The 'Second Joint Dissent'.

8.3 PYE AND PRIVATE TAKINGS REASSESSED

It is hard to agree with the majority of the Grand Chamber's decision that adverse possession really fits into the category of 'control of use' rather than 'deprivation' given that the practical effect of the law in this area is to deprive the owner of their full bundle of rights, rather than restricting the exercise of certain rights in the bundle. No doubt, practical considerations focusing upon payment of compensation and the widespread existence of similar property rules in other jurisdictions also played a part in the Grand Chamber's decision.[178] More interestingly though in the context of the thesis, is not so much *what* was decided in *Pye*, but *how* the case was decided. In applying a well-known and common doctrine, the courts at all levels in the *Pye* litigation reveal a surprising lack of finesse and certainty about how to interpret the facts before them. As an instance of a private taking, whether labelled as such or not by the courts, this instance of adverse possession appears to have caused a deal of confusion and palpable unease. The thesis argues that this is indicative of the unease with which the courts view type (iii) contested trespassory adverse possession claims.

In particular, the domestic approaches to *Pye* reveal several things. Firstly, the extent to which the doctrine of adverse possession contains sufficiently malleable categories to enable judges to reach surprisingly different conclusions on the same facts and in the context of a well-known set of rules. This is a doctrine which allows for a deal of discretion to be exercised (whether consciously or not) in rewarding or withholding property rights from individuals.

Secondly, the case emphasises the ambivalent nature of judicial attitudes towards squatters. At times, the judges refer to the Grahams as having 'acted honourably throughout' and keeping the land in good heart, and yet despite their reliance on well-established rules of the English property regime the judges reach their conclusion 'with no enthusiasm'.[179] Thirdly, Lord Hope's comments referred to above appear to reflect a rarely articulated level of disquiet about the private takings occurring under adverse

[178] Although the Strasbourg jurisprudence does not require that full market compensation needs to be paid before a redistribution will be deemed to be Convention-compliant: *Lithgow v United Kingdom* (1986) 8 EHRR 329; *James v United Kingdom*.
[179] *JA Pye (Oxford) Ltd v Graham*, (HL) [2] (Lord Bingham).

possession.[180] Here, in an echo of Bentham's concerns discussed in chapter 2 of the thesis, we find there is similar judicial dismay about the fragility of property rights, which should be secure, needing to be jealously watched over by a (registered) owner. It is also arguable that Lord Hope's comments exhibit a preference for property protection rather than liability protection in this context.[181] After all, as he notes the 'unfairness in the old regime ... lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards ... [against the loss of the property itself].'

9 JUDICIAL ATTITUDES TOWARDS ADVERSE POSSESSION

The criticisms levelled at the doctrine of adverse possession by those involved in the *Pye* litigation are nothing new. Whilst it is 'inconsistent to view someone as a thief or a bad faith actor' when they are doing nothing other than 'knowingly employing the law's own process for acquiring land'[182] there is little doubt that certain types of squatters are referred to pejoratively. This may appear strange in the context of a property regime, which has deliberately relied upon this 'muddy' informal mechanism in avoiding the unpalatable application of more crystalline rules.[183] Whilst the common law traditionally restricts informally created property rights in land, it has pragmatically accepted that exceptions should apply, such as implied trusts and proprietary estoppel.[184] It seems surprising therefore, that those availing themselves of the benefits of adverse possession, which served a vital role in a world of relative title and which are historically embedded in the common, are regarded with antipathy by the courts. As noted at the beginning of this chapter, this paradoxical approach can be clarified by separating different acquisition scenarios.

Where possessors fit within a type (i) or (ii) category, judges have been traditionally favourable towards squatters, and hostile towards absentee or dormant paper owners.

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[180] See page 163 above.
[181] Calabresi and Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral'.
[182] LA Fennell, 'Efficient Trespass: the Case for "Bad Faith" Adverse Possession' 100 Nw U L Rev 1037 (2006), 1044.
[183] CM Rose, 'Crystals and Mud in Property Law' 40 Stan L Rev 577 (1988).
[184] N Hopkins, *Informal Acquisition of Rights in Land* (Sweet & Maxwell, London, 2000) provides a useful overview of such rights.

Judicial approaches towards these categories accord with Green's arguments that the law of adverse possession reinforces a mythic 'ideal English landowner' who is a 'natural guardian' of the land and therefore supporting the fabric of society rather than undermining it.[185] However, where an adverse possessor appears who fits within the type (iii) contested trespassory adverse possession category, the courts are often far more pejorative.

9.1 SQUATTERS 'AND ALL THINGS NOT NICE'

One notable example of a case likely to have reminded judges that adverse possession 'smells of stealing, squatters and all things not nice'[186] is that of *Hayward v Chaloner*. The actions of The Reverend Stephen Mason Chaloner left the Court of Appeal bristling with indignation after he successfully claimed that he had adversely possessed part of his parishioners' land. The land was originally let to the Rector's predecessor-in-title at 10 shillings a year by the Haywards' aunt. Being 'staunch supporters of the church', both the Haywards and their aunt allowed the serving Rector to use the land as a garden without asking for rent, on the basis that they would only 'have put it in the offertory box'. Unfortunately, their forbearance led to Chaloner later successfully claiming title to this land via adverse possession, and thereby the right to sell the land off to a coach company.

The distaste with which the judges viewed the merits of Chaloner's claim is obvious from the case report. Davies LJ 'bitterly' regretted that he was 'unable to agree to the dismissal of this appeal', and commented approvingly on the conduct of Chaloner's counsel who 'conducted the case, which one could not help feeling that he found distasteful, with dignity, fairness and firmness throughout.'[187] Davies LJ then proceeded to rebuke The Reverend Chaloner for not doing the 'only Christian and decent thing' and accepting the decision of the lower court which had found against him. Russell LJ

[185] K Green, 'Citizens and Squatters: Under the Surfaces of Land Law' in S Bright and JK Dewar (eds), *Land Law: Themes and Perspectives* (OUP, Oxford, 1998). Lord Browne-Wilkinson's description at [17] in *Pye* in the House of Lords reflects this preoccupation. He commented on the Grahams' actions in 'farming all the year round' spreading dung, harrowing and rolling the land, fertilising and liming and cutting hay. Whilst these elements went to the question of establishing factual possession, there seems to be an important element of approval for the way in which they behaved whilst squatting.
[186] G McCormack, 'Adverse Possession - The Future Enjoyment Fallacy' [1989] Conv 211.
[187] *ibid.*, (Davies LJ), 1077.

commented on the fact that the 'generous indulgence' of the Haywards, 'loyal churchmen all', had resulted in a 'free accretion at their expense to the lands of their church' and concluded by bemoaning the fact that since legally the Court of Appeal had to allow Chaloner's appeal, all that the Haywards could look forward to was a reward 'in the next world.'[188]

9.2 IMPLIED LICENCE

It is also arguable that judicial dislike of successful adverse possession claims has been reflected historically in the now-defunct doctrine of implied licence, which was resorted to on occasion to defeat squatters' claims.[189] Whilst the theory of implied licence was later viewed as 'an original heresy' of Lord Denning's own[190] it does serve as a further indication of judicial hesitation in applying adverse possession in order to prevent an 'uncompensated shift of economic value to the squatter or interloper.'[191] As the Law Commission noted however, it is 'noteworthy that, on at least one occasion, where the courts had developed a doctrine that significantly curtailed the circumstances in which title could be acquired by adverse possession, Parliament intervened to reverse the errant doctrine.'[192]

9.3 THE LAW COMMISSION'S APPROACH TO ADVERSE POSSESSION

The Law Commission demonstrates an equally confused approach to adverse possession. It notes that the doctrine can serve a useful purpose in situations where the registered proprietor has disappeared and cannot be traced, 'even if the adverse possessor is (as will commonly be the case) a "land thief".' The squatter is to be tolerated '[h]owever distasteful such situations may be' because the doctrine 'does at least ensure that in such cases land remains in commerce and is not rendered sterile.'[193]

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[188] *ibid.*, (Russell LJ), 1080.
[189] *Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and BP Ltd* [1975] 1 QB 94. Overturned by the operation of the LA 1980, Sch. 1, para 8(4): 'it shall not be assumed by implication of law that… [the squatter's] occupation is by permission of the person entitled to the land merely by virtue of the fact that his occupation is not inconsistent with the latter's present or future enjoyment of the land.' Briefly resurrected in *Beaulane v Palmer* before being overruled in *JA Pye (Oxford) Ltd v Graham* (HL).
[190] *Buckinghamshire County Council v Moran*, 646 (Nourse LJ).
[191] Gray and Gray, *Elements of Land Law*, [9.1.2].
[192] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [14.2].
[193] *Land Registration for the Twenty-First Century - A Consultative Document* (LC254), [10.13].

This approach lumps all types of acquisition together without drawing a clear distinction between this type (i) taking, and the type (iii) category.

The thesis argues that they are fundamentally different with type (i) takings effectively conforming to the preference for voluntary acquisition since there is no one to object to the possession. Type (iii) takings do however involve an opportunity for private non-consensual transfers to take place. The Law Commission does acknowledge that the type (ii) situation, which it categorises as 'dealings "off the register"' and boundary mistakes, are acceptable and does not involve land theft since there is 'every reason why the person in occupation should be registered as proprietor.'[194]

10 ADVERSE POSSESSION AND THE LRA 2002

The Law Commission's proposals for the reform of adverse possession, since enacted by the LRA 2002, focused on two main issues: (i) growing public disquiet about the bias of the old rules towards squatters rather than paper owners; and, (ii) the difficulty of justifying the doctrine in a system of registered title.[195] Whilst the rules relating to the substance of adverse possession claims remain the same whether or not the land involved is unregistered or registered under the LPA 1925, or the LRA 2002, the mechanics of registration are very different. The provisions of the LRA 2002 dealing with adverse possession crystallize a sea-change in approach ensuring that the registered owner's property rights receive greater protection from squatters than previously. The law of adverse possession no longer facilitates private takings, but rather makes them almost impossible. This change of heart by the legislature is all the more significant given previous reactions to judicial attempts to limit the application of adverse possession statutes via the use of the 'implied licence doctrine' discussed above.

[194] *ibid.* [10.14].
[195] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [2.70].

10.1 THE MECHANICS OF POST-LRA 2002 ADVERSE POSSESSION

Under the LRA 2002 a squatter is prevented from gaining title automatically via adverse possession, no matter how long they have been on the land.[196] Instead, after 10 years' adverse possession the squatter may, with some exceptions,[197] apply to the registrar to be registered.[198] It is at this point however that the balance shifts significantly in favour of the registered owner and others with an interest in the land. This is because under the new rules the Registrar must give notice of the application not only to the registered proprietor of the estate in question, but also to any chargee, superior registered estate, or to any person with an interest in the adversely possessed estate.[199] The law then further bolsters the already strong position of the registered owner and other interested parties by allowing them to serve a counter-notice requiring the Land Registry to dismiss the application peremptorily.[200]

In the event that a counter-notice is served, the registrar *must* reject the squatter's application for registration, unless the squatter can establish one of the limited exceptional grounds permitting registration despite an objection: (i) that there is an estoppel in the squatter's favour; (ii) that there is some other reason why the applicant is entitled to be registered; and (iii) that there has been a boundary-mistake.[201] In this way, the LRA 2002 makes draws a significant distinction between permissible claims, and those which are contested trespassory adverse possession claims and therefore increasingly difficult to achieve. If the squatter remains in adverse possession of the property for a further two years, they are then be entitled to apply once again to be registered.[202] At this point, the registered proprietor is unable to object, and the squatter

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[196] LRA 2002, s. 96(3).
[197] *ibid*., Sch 6, para 1. Examples include situations where a judgment for possession has been given against the squatter within the past two years, or where the registered owner is mentally incapacitated.
[198] *ibid*., s. 97 and Sch. 6 para 1(1).
[199] *ibid*., Sch 6, para 2(1).
[200] *ibid*., Sch 6, para 5.
[201] *ibid*., Sch 6, paras 5(1)-(4). See also *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [2.74] of these 'exceptional grounds, the only significant one is where a neighbour can prove that he or she was in adverse possession ... and believed on reasonable grounds for that period that he or she owned it. This exception is intended to meet the case where the physical and legal boundaries do not coincide.'
[202] LRA 2002, Sch 6, para 7. It is however, still open to the paper owner to object to the application on the factual ground that the squatter had not stayed in *adverse* possession for those last two years.

is then registered in place of the previous owner.[203] The two-year period is deemed to be a 'reasonable period'[204] to enable the registered proprietor or chargee to take steps to evict the squatter or start proceedings to do so, or to regularise possession by negotiating a bilateral agreement under which the squatter stays as the proprietor's tenant or licensee.[205] It is therefore possible that type (iii) claims could succeed, but given that these will normally occur in a contested situation it is unlikely that no objection to the application will be made.

10.2 CONSEQUENCES OF THE LRA 2002 REGIME

The paper owner is thus given 'one chance, but only one chance'[206] to terminate a squatter's adverse possession; the alleged risk of losing title through 'inadvertence' vanishes.[207] This fundamental change in emphasis is based on an understanding that registration should 'of itself provide a means of protection against adverse possession'; although, it was acknowledged by the Law Commission that this did not mean giving the paper owner 'unlimited protection.'[208] The result of this new process is that the impact of relativity of title has been limited and title has shifted from factual possession to registration. Thus, the LRA 2002 has introduced an era where it is the 'fact of registration and registration alone that confers title.'[209] So long as land is registered, the result of the LRA 2002 is that 'mere lapse of time'[210] will not bar the registered owner's title, even if the squatter remains in possession for decades.[211] The law in this area has thus provided greater protection from private takings.

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[203] *ibid*., Sch 6, paras 4 and 7.
[204] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [14.55]. The marketability of land is to be upheld according to the Law Commission and in circumstances where a registered proprietor 'fails to take steps to vindicate his or her title' within two years of being given a clear warning to do so, the Law Commission considers that it 'should be extinguished' and that the squatter should obtain the land otherwise possession and title could remain 'permanently out of kilter'.
[205] *ibid*., [14.56]. *BP Properties Ltd v Buckler* (1988) 55 P & CR 337 suggested that a landowner could unilaterally make a squatter their licensee on the basis that the paper owner's state of mind was relevant. This was disproved in *Buckinghamshire County Council v Moran*, (Nourse LJ), 644.
[206] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [2.74].
[207] *JA Pye (Oxford) Ltd v Graham* (HL), [2] (Lord Bingham).
[208] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [14.6(1)].
[209] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [1.10].
[210] *ibid*., [2.74].
[211] LRA 2002, s. 96(3) which disapplies the operation of LA 1980, s. 17.

10.2.1 Shadow Estates

This transformation in the law may lead to the creation of much longer-lasting 'shadow' possessory estates than have occurred up until now. Wonnacott observes that in the past 'shadow' estates subsisting behind a registered estate 'have always been rather rare and short lived' because squatters had a *right* to be registered as the proprietor of the estate once the owner's title had been barred by 12 years' adverse possession. In these circumstances either: (i) the shadow estate would be destroyed in the event that the registered owner regained possession; or, (ii) it would be 'upgraded' in time to the registered estate. Under the new regime however, 'the only sensible advice' to be given to a squatter is 'to keep very quiet' since any attempt 'to upgrade the "shadow" estate will now almost certainly result in its destruction.'[212] Cobb and Fox also argue that urban squatters of forgotten property are 'likely to be motivated to live outside the land law system [of the LRA 2002] and so to use the property, but outside the framework of the property or housing market', since the 'possibility of remaining undiscovered will be preferable to risking loss of use.'[213] It is entirely possible that the difficulty in gaining title via adverse possession could lead to a greater distortion of the register's mirror principle, with an increase in the number of long-term, informal, and unannounced possessory titles. Only time will tell whether or not these reservations about the changes ushered in by the LRA 2002 will be borne out in practice.

11 CONCLUSION

The new principles introduced by the LRA 2002 were intended to cement the pre-eminence of registered title by ensuring that the register should be 'a complete and accurate reflection of the state of the title of the land at any given time.'[214] An attendant result has been to strengthen the protection afforded to individuals against the occurrence of private takings. The chapter argues that the inherent and systemic preference for voluntary transfers of property rights in English law is satisfied more by

[212] Wonnacott, *Possession of Land*, 49.
[213] N Cobb and L Fox, 'Living Outside the System? The (Im)morality of Urban Squatting After the Land Registration Act 2002' 27 Legal Studies 236 (2007), 258.
[214] *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (LC271), [1.5].

type (i) and (ii) categories of adverse possession, than by type (iii) contested trespassory adverse possession claims. Analysing adverse possession in this way not only reveals the embedded nature of private takings within the common law, but also clarifies the confused justifications for the doctrine. Adverse possession illustrates an instance of the private redistribution of property rights 'secreted in the interstices of existing doctrines,' and this recognition may be a step towards developing coherent principles that 'would, first, allow us to redistribute property rights openly and, secondly, establish the proper limits of redistribution.'[215]

Viewing adverse possession as a private taking illuminates the differing property pressures at play. Where transfers further the economic use of land, or value personal connections with land, or respect the stability of long-possession, they are more likely to be accepted by the courts. In situations where these factors are less clearly made out it seems that the courts are more reluctant to further private takings. Whilst some commentators have argued that the presence of squatters might 'actually increase and stabilise rather than undermine public and legal order and lawfulness'[216] this is not an approach generally accepted by the English courts. Traditionally, they have been reluctant to explore the notion that 'the existing distribution of land may itself express or conceal inequity'[217] and thus reflect a bias towards protecting extant property rights, unless the economic arguments in favour of changing this are compelling. An example of this approach may be seen in *Southwark London Borough Council v Williams* where Lord Denning refused to accept that homelessness could act as a defence to trespass. He cautioned that if it were to be a defence, 'no one's house could be safe' and that 'for the sake of law and order' the courts should 'take a firm stand. They must refuse to admit the plea of necessity to the hungry and the homeless: and trust that their distress will be relieved by the charitable and the good.'[218]

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[215] Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights*, 44.
[216] van der Walt, *Property in the Margins*, 184. See also EM Peñalver and SK Katyal, 'Property Outlaws' 155 U Pa L Rev 1095 (2007) who argue that property law should be careful not to provide too great a deterrent to property outlaws, or those who conscientiously and non-violently refuse to abide by existing property arrangements.
[217] KJ Gray and PD Symes, *Real Property and Real People* (Butterworths, London, 1981), 103.
[218] [1971] Ch 734, 744.

The next chapter considers a third and final illustrative category of private takings, this time where partial property rights are reallocated compulsorily between individuals. In the course of this chapter, the tensions between stability and change, and inclusion and exclusion rise once again to the surface.

CHAPTER 5
CROSS-BOUNDARY RIGHTS

[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law.[1]

"Good fences make good neighbors."...
"Why do they make good neighbors? ...
Before I built a wall I'd ask to know
What I was walling in or walling out
And to whom I was like to give offence."[2]

1 INTRODUCTION

Courts perennially face the problem of how best to regulate competing property interests between individuals and neighbours. This final illustrative chapter examines two separate and distinct aspects of English land law affecting the balance of property interests between individuals: (i) statutory rights of way under the Access to Neighbouring Land Act 1992; and, (ii) the discharge of freehold covenants. Unlike the other case studies in the thesis, these takings do not involve the outright transfer of title to land. Instead, particular 'sticks' or rights included in the typical owner's bundle of property rights,[3] are compulsorily reallocated between private parties. This category of transaction is phenomenally frequent and exists in diverse forms. The widespread existence and acceptance of such private takings is a significant achievement in any

[1] *Entick v Carrington* (1765) 95 ER 807, 817.
[2] R Frost, 'Mending Wall' from *North of Boston* in *Early Poems* (Penguin, London, 1998), 51-52.
[3] Penner, 'The "Bundle of Rights" Picture of Property'. The bundle of sticks metaphor has received explicit judicial recognition in the United States, see for example *Hodel v Irving* 481 US 704 (1987), 716, where reference is made to the pre-eminence of the right to exclude as one of the most essential sticks in the bundle, and *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) (US Supreme Court), 435, where physical invasion was described as 'chopping through the bundle taking a slice of every strand.'

property regime, particularly when these reallocations of individual rights generally occur without fanfare.

In categorising these transactions as takings, no normative position is taken as to the *levels* of just compensation that might result from this label or their contribution to wider public utility. Rather it is argued there is merit in examining these private takings and affirming the importance of greater transparency in acknowledging and balancing the property interests involved in such non-consensual transfers of property. The thesis contends that the English legislature and courts exhibit a cautious approach to these transfers. Whilst not described by the authorities as private takings, the chapter argues that they are effectively treated as such, and that the statutory balancing act that takes place enables many of the concerns raised in chapter 2 to be taken into account.

The chapter begins with a brief examination of the competing interests at play in cross-boundary rights of this kind, before considering the terms of the Access to Neighbouring Land Act 1992. Parallels are drawn with similar measures in New South Wales, and reference is made to America before turning briefly to the history and content of freehold restrictive covenants in English law. The statutory regime governing their modification and discharge under s. 84 LPA 1925 is then discussed. The chapter concludes with reference to the wider property implications raised by these non-consensual rearrangements of property interests, and argues that English law appears to view these as private takings, despite being only a partial taking of the affected landowner's property interests.

2 RIGHTS DISRUPTIONS

Rose argues that despite the rhetoric of property security, all regimes 'routinely "build in" a variety of rights disruptions that amount to expropriations' so as to ensure that a system will not 'collapse of its own brittleness.'[4] These 'rights disruptions' are based primarily on the need to: (i) remove obsolete or uncertain claims in a 'housekeeping' role; and (ii) control congestion and common pool losses through 'regulatory'

[4] Rose, 'Property and Expropriation: Themes and Variations in American Law', 5.

disruptions.[5] Pragmatism and familiarity with property reallocations made on these grounds means that these disruptions often go unnoticed. It is therefore often only when Rose's third category of 'extraordinary' disruption occurs, namely those motivated by revolutions, warfare and other upheavals, that cognisance is taken of the deeper property issues revealed by takings.[6]

This chapter argues that whilst housekeeping and regulatory disruptions frequently go unnoticed, this does not accurately reflect their significance for a property regime. In viewing the statutory creation of easements and the modification and discharge of restrictive freehold through the prism of private takings, it becomes possible to focus more explicitly on the property value choices made by courts and legislators. A useful analogy can be drawn from geological research into tectonics: the movement of plates of the earth's crust shifting and folding produces fault-lines and fractures. Usually, the movements of tectonic plates, as with shifting property values, go unnoticed. Nevertheless, in certain areas of the earth's crust the immense pressures caused by colliding plates produce highly visible and tangible effects, such as earthquakes. This type of clash could be likened to Rose's 'extraordinary' rights disruptions. More significant though in marking the long-term influence of value choices on the development and operation of property regimes, are those muted and indistinctly visible movements indicating the slow build up of fault-lines, or tensions, between competing values encapsulated in notions of property. These act as a valuable precursor indicating areas of particular pressure.

3 EXCLUSION AND ABSOLUTE PROPERTY

Blackstone's reference to the 'sole and despotic domininion which one many claims and exercises … in total exclusion of the right of any other individual in the universe' emphasises the importance of an owner's right of exclusion to the classic liberal conception of property.[7] This facet of property retains a totemic significance as the

[5] *ibid*., 8-14.
[6] These expropriations are 'extraordinarily public and searingly controversial, expropriations that in a sense draw the lines around a whole community, and define who is in and who is out.' Rose, 'Property and Expropriation: Themes and Variations in American Law', 24.
[7] Blackstone, *Book II, Commentaries on the Laws of England*.

most valuable stick in an owner's bundle of property rights.[8] Typical of this absolutist approach is the case of *John Trenberth Ltd v National Westminster Bank Ltd*,[9] which involved two adjoining properties, one of which operated as a bank and was in a dangerous state of repair. Unfortunately, the property's dilapidated state could not be remedied without gaining access from the neighbouring property. Having entered into negotiations to gain permission to enter their neighbour's land, which was unforthcoming, the owners of the bank found themselves in 'an impossible position.' There was 'on the one hand the Scylla of the dangerous building and there was on the other hand the Charybdis of trespassing upon the plaintiffs' land, and they chose ... to go ahead and trespass.' The dilemma facing the bank's owners was compounded by being under a statutory duty to remedy the dangerous state of their building due to its location abutting the highway. Walton J observed that the trespass had been deliberate, and 'if flagrant invasion of another's rights of property of that nature is not sufficient to call forth the interposition of a court of equity, I do not know what invasion could be said to do so.'[10]

In dismissing the bank's call for damages as a remedy rather than an injunction against the trespass, Walton J upheld the rights of the aggrieved owner asserting that:

> [T]the fact that any damage would be trifling is the very reason why an injunction should be granted. People are not to infringe the property rights of others and then say "And I am entitled to go on doing it because I am really doing you no tangible harm, and five-pence will amply compensate you for that harm."[11]

The decision made by Walton J to uphold an owner's right to exclude, and to protect this with property rule rather than liability rule protection, reflects a long-standing view

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[8] Gray, 'Property in Common Law Systems', 265, notes that: '[i]n some deep sense the sustained exercise of exclusory power is perhaps all there is to the grand claim of proprietary ownership. Behind all the brave philosophical and political rhetoric of conventional property talk there lurks only the unattractive rumble of state-sanctioned *force majeure*.'

[9] [1980] 1 EGLR 102.

[10] *ibid.*

[11] *ibid*., 103. Note though indications following *Jaggard v Sawyer* [1995] 1 WLR 269 that the grant of monetary damages as a remedy rather than an injunction is growing in acceptability. According to this formulation, damages should be awarded in lieu of an injunction where: (i) injury to the claimant's rights is small; (ii) when the injury is capable of being estimated in money; (iii) where a money payment is adequate compensation for the injury; and (iv) where an injunction would be oppressive to the defendant. In *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287, 315-316, Lindley LJ observed that the court's jurisdiction to award damages in *lieu* of an injunction did not mean that the court was a 'tribunal for legalising wrongful acts' by a defendant able and willing to pay damages.

of the centrality of this right, although some later commentators have viewed the decision as a *cause célèbre.*[12] Traditionally though, the right to exclude has been viewed as a touchstone of property, such that Felix Cohen's 'Dialogue on Private Property' reduced the functional core of property to asking whether it could be labelled thus:

> To the world:
>
> Keep off X unless you have my permission, which I may grant or withhold.
>
> Signed: Private citizen
> Endorsed: The state[13]

In the absence of exclusion, it has been argued that property would 'dissolve into the chaos of the commons' with everything constantly up for grabs. In *Kaiser Aetna v United States* Justice Rehnquist described the right to exclude strangers as a 'fundamental element of the property right.'[14] Similarly, Charles Reich refers to the 'importance of private property' to individuals, in enabling them to form 'a small but sovereign island of ... [their] own.'[15] Within this area '[w]him, caprice, irrationality and antisocial activities' are protected so long as they do not harm others, and the owner 'may do what all or most of his neighbors decry.'[16]

There is a sense in which exclusion, or the right to keep people off property, harks back to ideas of territoriality. Carol Rose argues that this approach is the wrong way of looking at property in that it requires positive action in constantly guarding 'some area against challenge'. The 'distinctive hallmark of property' is viewed more accurately in negative terms in that it equates to the '*absence* of challenge from others' such that

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[12] Law Reform Commission (New South Wales) *Right of Access to Neighbouring Land* (Report 71, 1994), [2.1], was concerned by the notion that refusal of entry by the servient owner in similar circumstances might lead to the deterioration of the dominant property with 'consequential financial loss for the owner.' See also The Law Commission Report *Rights of Access to Neighbouring Land* (LC151) (1985), 9.

[13] FS Cohen, 'Dialogue on Private Property' 9 Rutgers L Rev 357 (1954), 374.

[14] 444 US 164 (1979) (US Supreme Court).

[15] CA Reich, 'The New Property', 774.

[16] *ibid*., 771. An extreme example of this approach relates to the railroad magnate Charles Crocker's 40ft high 'spite fence', which surrounded his neighbour's house on three sides in the Nob Hill area of San Francisco. Crocker hoped to drive his neighbour away so that he could incorporate the plot into his own. Allegedly, the fence was one of the main tourist attractions in the city in the late 19th century. Both properties were later destroyed in the 1906 earthquake and fire, and San Francisco's Grace Cathedral now stands on the site. Today California limits the height of such 'spite fences' to 10ft. Anon, 68 ABA J 958 (1982), 961.

what makes 'something "property" is precisely that others routinely recognize and respect one's claims' and thus 'all of us are relieved of the debilitating expense and effort of constant vigilance.'[17] Thus, limitations on the right of an owner to exclude others necessarily affect the 'propertiness' of property; such interferences may however be justifiable where the property is non-excludable on physical, legal or moral grounds.[18]

3.1 STABILITY AND FLEXIBILITY

Despite the proprietary significance of exclusion, this right has long been undermined in reality by a variety of limits on an owner's absolute rights.[19] In recognising these incursions, the courts tread a fine line between upholding a significant, if not *the* most, important aspect of property, and operating a sufficiently flexible property regime. As stated elsewhere in this thesis, courts and legislatures are faced by the paradoxical imperative to protect the stability of property, whilst also facilitating change. The tension between these two competing calls can be seen clearly when considering 'housekeeping' rules relating to the creation of statutory rights of way, and the discharge of covenants. Despite their low-key status, both of these property transfers exemplify issues raised by takings and their wider impact on property concepts.

3.2 TEMPERING ABSOLUTE RIGHTS

Many owners actively choose to invite others onto their land by extending a generally revocable licence, or creating a lease. Alternatively, an owner may grant others a non-

[17] Rose, 'Property and Expropriation: Themes and Variations in American Law', 3.
[18] See Gray, 'Property in Thin Air', 269ff on the deep significance of the notion of excludability and its importation of a 'hidden structure of rules which critically define the legal phenomenon of private property.'
[19] For example the doctrine of common callings and anti-discrimination legislation. Much concern focuses today around limiting rights of absolute exclusion in the context of 'quasi-public' spaces such as shopping centres. See KJ Gray and SF Gray, 'Civil Rights, Civil Wrongs and Quasi-Public Space' (1999) 4 EHRLR 46 for a wide-ranging discussion of the issues raised by these situations and the case of *CIN Properties Ltd v Rawlins* [1995] 2 EGLR 130 (CA), later heard by the European Commission of Human Rights in *Mark Anderson and Others v United Kingdom* (33689/96) (1998) 25 EHRR CD172. See also *Appleby v United Kingdom* (44306/98) (2003) 37 EHRR 38. Similarly, new limits on exclusion may be developing in the context of rural space, see Gray and Gray, 'Private Property and Public Propriety'.

possessory but more permanent proprietary right in the form of an easement.[20] These familiar rights attach to a particular piece of land thereby allowing the owner of that 'dominant' tenement to use or enjoy rights over the 'servient' land of another person, or to restrict its use in some manner.[21] As an incorporeal hereditament, and under the statutory definition of 'land' set out in s. 205 (1) (ix) LPA 1925, easements are a species of land, as well as representing a burden on the servient tenement.[22] Owners may also seek to impose contractual limitations on the use of neighbouring property, or accept restrictions themselves in order to benefit from a uniform neighbourhood.[23]

Whilst owners may prize clearly drawn boundaries, and the ability to exclude others from 'their' land, there are occasions where the rigid compartmentalisation of property holdings is both self-defeating and opposed to the public interest. Land-holdings can frequently become more valuable specifically *because* of the existence of cross-exploitative rights, such as rights of way or covenants, granted across boundary lines.[24] These statutory mechanisms provide opportunities to bypass intransigent owners and allow for a practical tempering of the absolutist property paradigm.[25] Lord Macnaghten noted that whilst it 'is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament,' the courts 'ought to be very careful not to allow an action ... to be used as a means of extorting money.'[26] The statutory regimes discussed below are an attempt to prevent holdout problems of this type, but their concomitant effect is to

[20] This chapter does not examine implied easements as examples of private takings since their justificatory roots lie in a form of (often highly) attenuated consent, rather than being a wholly non-consensual private transfer of property rights. Implied easements include easements of necessity and common intention; quasi-easements under *Wheeldon v Burrows* (1879) 12 Ch D 31 (CA); the application of s. 62 LPA 1925; and prescriptive easements.

[21] A positive easement could be a right of way or the right to install or use a pipe or drain. A negative easement relates to a right to receive something from the servient land, such as support, or light through a defined opening.

[22] *Willies-Williams v National Trust* (1993) 65 P&CR 359, 361 (Hoffmann LJ).

[23] Freehold covenants are frequently used to restrict the type of business which can be carried on in a neighbourhood, and prevent over-development.

[24] S Gardner, *Introduction to Land Law* (2007), 158-160. See generally SE Sterk, 'Neighbors in American Land Law' 87 Colum L Rev 55 (1987).

[25] Rotherham, *Proprietary Remedies in Context,* 196 and 345-347 argues that in many areas 'the law corresponds with absolutist notions of property in form only' and as such it is time that these fictions were 'openly reconsidered' as part of a much-needed shift from an absolute paradigm to a new discourse.

[26] *Colls v Home and Colonial Stores Ltd* [1904] 1 AC 179 (HL), 193. The case related to an action for light.

impact adversely on an owner's discretion over the priority of the relevant values that the land holds for them.[27]

4 STATUTORY ACCESS RIGHTS

One important limitation on an owner's right to exclude others exists in the Access to Neighbouring Land Act 1992 ('ANLA 1992'), which is discussed below in the context of similar legislation from New South Wales. There are several other examples of statutes that confer rights similar to an easement, such as the Party Walls Act 1996,[28] and various statutory rights possessed by utility companies to enter property but these are outside the ambit of the thesis. Additionally, various other statutory rights of way across land exist but these are not strictly categorised as easements. This is because there is no need for the user of these rights to possess any form of dominant land before being entitled to their benefit.

These latter statutes are not considered in the thesis since they are public rights rather than specifically private rights, but their operation raises many of the same underlying issues concerning the right to exclude. Examples include: public rights across commons and waste land;[29] rights under a local or private Act or scheme under Part 1 of the Commons Act 1899; access agreements or orders under Part 5 of the National Parks and Access to the Countryside Act 1949; rights of access under s. 19(1) of the Ancient Monuments and Archaeological Areas Act 1979; and rights to access open country as part of the 'right to roam' under the Countryside Rights of Way Act 2000.[30] More recently, Part 9 of the Marine and Coastal Access Bill introduced provisions imposing a duty upon the Secretary of State to secure a long distance coastal route 'the English coastal route'. The Bill does not contain compensation provisions on the basis that the

[27] Gray and Gray, *Elements of Land Law* [1.5.39].
[28] The thesis does not examine the Party Walls Act 1996 because arguably it does not involve a private taking. The Act allows an individual to access their neighbour's land to do necessary work to boundary structures. In one sense, this work is thus advantageous to both parties since they retain a clear boundary and as such cannot easily be viewed as a one-sided transfer of benefit.
[29] LPA 1925, s. 193.
[30] JL Anderson, "Countryside Access and Environmental Protection: an American View of Britain's Right to Roam" Env L Rev 9 (2007) 241 provides a useful American critique of the CRoW legislation.

legislation 'provides sufficient flexibility' when planning the route to 'avoid situations where the coast access rights will cause significant financial loss.'[31]

5 ACCESS TO NEIGHBOURING LAND STATUTES

This section of the thesis considers two specific statutes, one from England the other from New South Wales in Australia, which expressly cut across the right of an owner to exclude others by creating a right of access to neighbouring land for specified purposes. The statutes that will be discussed are ANLA 1992 and the Access to Neighbouring Land Act 2000 (NSW) ('NSW Act'). These particular statutes have been selected for discussion because of the similar motivations behind their enactment, and their shared common law background. This chapter argues that in comparison with the NSW legislation, the English law in this area demonstrates a greater degree of vigilance about the grant and exercise of statutory rights of entry, which is symptomatic of the unease that these types of private taking appear to engender in English courts.

Grattan argues that this type of legislation, especially the ANLA 1992, embodies an explicitly proprietarian approach to access, and thereby sets out a normative view of how 'proper' neighbours *should* behave, rather than merely seeing access in terms of economic efficiency and maximum utilisation of resources.[32] This approach contrasts with the emphasis placed elsewhere by English courts on the significance of economic use of land.[33] These statutes differ from Grattan's so-called 'first-generation' access

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[31] *Taking Forward the Marine Bill: The Government Response to Pre-Legislative Scrutiny and Public Consultation* (Cm 7422, Sept 2008), [3.8.9]-[3.8.12].

[32] S Grattan, 'Proprietarian Conceptions of Statutory Access Rights', in E Cooke (ed) *Modern Studies in Property Law: Volume II* (Hart Publishing, Oxford, 2003), 356. See also DS Grattan, *The Logos of Land: Economic and Proprietarian Conceptions of Statutory Access Rights* (2006), (unpublished PhD thesis, Faculty of Law, University of New South Wales). GS Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1176-1970* also focuses on the tension between economic and proprietarian conceptions of property.

[33] See for example the traditional pro-development bias when proving factual possession in adverse possession claims, as discussed in chapter 4 of the thesis. Similar underlying economic justifications have been referred to previously by the English courts, when recognising easements of necessity to avoid landlocked sterile plots of land e.g. *Nickerson v Barraclough* [1980] Ch 325 (Megarry VC), 334, '[t]here is a rule of public policy which requires that land should not be rendered unusable by being landlocked.' Note though the decision of the Court of Appeal in the case which reversed Megarry VC's judgment on the grounds that public policy did not play a part in the doctrine, but that instead it rested on an implication from the circumstances. The justifications used for implied easements are outwith the scope of the thesis, but form an area for further research.

legislation including s. 88K Conveyancing Act 1919,[34] in that they: (i) permit access rights only for a particular facilitative purpose; (ii) the rights subsist only for a limited period of time; the legislation is contained in a stand-alone statute; and (iv) the legislation is administered by lower courts.[35]

5.1 FINANCIAL MOTIVATIONS

Following the recommendations made in the Law Commission's Report *Rights of Access to Neighbouring Land*[36] the ANLA 1992 was enacted on 16 March 1992.[37] The stated aim of the Act was to enable people who 'desire to carry out works' which are 'reasonably necessary for the preservation of that land' to obtain access to neighbouring land.[38] Before the ANLA 1992, 'there was nothing that ... an owner could do to compel his neighbour to co-operate with him.'[39] The courts had begun to acknowledge explicitly that, despite the traditional emphasis on an owner's right to exclude others, it would be 'convenient ... to enable property developments to be expeditiously and economically completed, to allow, on properly commercial terms, some use to be made by the developers of the land of neighbours.' This approach, it was argued, would help to remove the 'dog in a manger' behaviour allegedly encouraged in landowners by the grant of injunctions against trespass.[40] The Law Commission lamented the fact that the absence of a right of access to neighbouring land 'means that properties throughout the country are liable to deteriorate for want of repair.' As such, it was argued that there would be 'consequential financial loss to their owners and some detriment to the public, who have an interest in the maintenance in good repair of the country's stock of housing or other buildings.'[41]

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[34] Discussed below at page 198.
[35] Grattan, 'Proprietarian Conceptions of Statutory Access Rights', 354.
[36] *Rights of Access to Neighbouring Land* (LC151) (1985).
[37] ANLA 1992 came into force on 31 January 1993 (The Access to Neighbouring Land Act 1992 (Commencement) Order 1992 SI 1992/3349).
[38] Preamble to ANLA 1992.
[39] J Gaunt and P Morgan (eds), *Gale on Easements* (18th ed, Sweet & Maxwell, London, 2008), 481. See also *Woollerton and Wilson Ltd v Richard Costain Ltd* [1970] 1 WLR 411, 413: 'The plaintiffs, while not complaining of any damage, apprehension or inconvenience have, so they would have the court believe, only one object in these proceedings, namely to prevent the jib of the crane swinging over their premises; and something more than £250 which the defendants have offered would have been required to induce them to change their mind.'
[40] *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* (1987) 38 BLR, 87 (Scott J).
[41] *Rights of Access to Neighbouring Land* (LC151) (1985), [3.8]-[3.15].

Similar legislation, the NSW Act[42] was also recommended by the NSW Law Reform Commission ('NSW Commission') in its Report on *Rights of Access to Neighbouring Land.*[43] As with the English legislation, the NSW Commission noted that whilst people 'buy houses and land for privacy and security' and believe that 'they should have the right to deny entry to their property to anyone they choose' such attitudes are no longer automatically worthy of protection. The pressures of 'modern living conditions, the desire of owners and that of the public generally, to keep properties maintained or developed' are such that 'property related rights need to be reassessed.'[44] Referring expressly to the financial consequences that might result from a lack of access the Commission noted, in similar terms to the Law Commission in England, that there 'may be the deterioration of the property with consequential financial loss for the owner. It could be argued that such deterioration is contrary to the public interest of having residential and commercial premises properly maintained.'[45]

5.2 GROUNDS OF APPLICATION

Under ANLA 1992, where a person lacks the necessary consent to enter adjoining or adjacent 'servient land' in order to carry out 'works' to any 'dominant land',[46] they may apply to the county court for an 'access order'[47] entitling them to do so.[48] Applications for access orders are regarded as pending land actions in both unregistered and registered land, and require protection by an entry on the Charges Register, or as a notice under the LRA 2002.[49] Once the order has been made it may be registered in unregistered land under s. 6 LCA 1972 or protected under the LRA 2002 by a notice

[42] Commenced 1 January 2001.
[43] Law Reform Commission (New South Wales) *Right of Access to Neighbouring Land* (Report 71, 1994).
[44] *ibid*., [1.7].
[45] *ibid*., [2.1].
[46] 'Servient' and 'dominant' land are defined in s. 1(1) ANLA 1992. According to s. 8(3) 'land' for the purposes of the Act does not include a highway.
[47] Section 1(1) ANLA 1992.
[48] Both the county court and High Court have jurisdiction under s. 7(1) ANLA 1992, but under art 6A of the High Court and County Courts Jurisdiction Order 1991, SI 1991/724 (as amended) applications for access orders must be commenced in the county court.
[49] In unregistered land, it will not bind a purchaser without express notice unless it is registered LCA 1972, s. 5(7). In registered land a pending land action may only be protected by a notice under the LRA 2002, s 32(1), (87)(1)(a).

and thus is capable of binding successors in title.[50] In commencing a claim, the dominant owner must set out details of: (i) the dominant and servient land involved and whether residential property is involved; (ii) the nature of works required; (iii) reasons why entry to the servient land is required; (iv) names and addresses of the people who will carry out the works; (v) the proposed date of the works; and (vi) whether provision has been made for insurance against possible personal injury and damage to property arising from the proposed works.[51] In making an access order claim, both the owner and occupier of the servient land must be cited as defendants to the claim.[52]

The NSW Act, enacted in 2001, had a similar intent to the ANLA 1992 in England in that it enabled courts to make access orders 'for the purpose of carrying out work on their own land or carrying out work on utility services on that land.'[53] Utility services, as defined, include sewerage, drainage, water, gas, electricity or telephone services.[54] Under the statute anyone who requires access to 'adjoining or adjacent land' for the 'purpose of carrying out work on land owned' by them may apply to a Local Court for a neighbouring land access order ('NLAO').[55] Additionally, anyone carrying out work on land owned by someone else but needing access to adjoining or adjacent land may also apply for an access order 'with the consent of the person on whose behalf the work is to be carried out.'[56] Contrary to the ANLA 1992 provisions, an access order under the NSW Act does not 'confer on any party to the order any interest in the land ... sufficient to enable any such person to place a caveat on the title to the land under the Real Property Act 1900.'[57] In this sense, the NSW Act is more protective of the affected owner's right to exclude since the interest created under the Act is more ephemeral and personal than that which is created under the terms of its English counterpart.

[50] ANLA 1992, s. 5(5), (as amended by LRA 2002 Sch 11).
[51] *Practice Direction – Landlord and Tenant Claims and Miscellaneous Provisions about Land,* PD 56 [11.2].
[52] *ibid*., [11.3].
[53] Long title of NSW Act.
[54] NSW Act, s. 3.
[55] *ibid.*, s. 7(1).
[56] *ibid*., s. 7(2). Under s. 7(3) the Local court can waive the requirement for consent if appropriate.
[57] *ibid.*, s. 23.

5.3 DISCRETIONARY RIGHT TO ACCESS

Both Acts create a discretionary, rather than automatic, right of access to neighbouring property. According to the English Law Commission, there were arguments against the proposals given that 'people buy houses for privacy and security' and that there was 'no reason why they should be disturbed or have their rights encroached upon simply to save other people trouble and money'. The Law Commission referred to opinions that 'property rights have already been too much eroded ... and that the absence of a right of access ... is indicative of the neighbour's wish to withhold it.'[58] In avoiding a general right of access, the Law Commission sought to allay some of the fears that its proposed Bill would be too favourable to neighbours, rather than upholding the rights of an excluding owner. This approach reflects, it is argued, a tacit hesitation in authorising private takings.

5.4 SCOPE OF WORKS

The concerns raised by respondents to the Law Commission's consultation exercise about the erosion of property rights in England appear to have influenced the scope of works included within the ambit of the ANLA 1992. Access under the statute is expressly limited to such access required to carry out 'preservation works', rather than allowing for development works, or some other blanket permission. The definition of 'preservation' is narrow in that it covers the following types of work on the dominant land: (i) the maintenance, repair or renewal of any part of a building or other structure; (ii) the clearance, repair or renewal of any drain, sewer, pipe or cable; (iii) the treatment, cutting back, felling, removal or replacement of hedges, trees, shrubs or other growing thing which is in danger of becoming damaged, diseased, dangerous, insecurely rooted or dead; and (iv) the filling in, or clearance, of any ditch.

Additionally, the court retains an additional discretion to countenance other works which may be 'reasonably necessary' for the preservation of any land.[59] Where the works incidentally involve making an alteration, adjustment, or improvement to the

[58] *Rights of Access to Neighbouring Land* (LC151) (1985), [3.18].
[59] ANLA 1992, s. 1(4).

land, the works will still be capable of being defined as 'basic preservation works' but only if the court considers this to be 'fair and reasonable in all the circumstances.'[60] The Act does however take a pragmatic approach; it states that 'basic preservation works' will also encompass inspection of the dominant land in order to ascertain whether works are necessary in the first place, as well as to draw up plans or make other preparations to carrying out the works.[61]

Differing from the ANLA 1992 in England, the NSW Act requires that a Local Court should grant a NLAO if 'it is satisfied that, for the purpose of carrying out work on land, access ... is required and it is satisfied that it is appropriate to make the order in the circumstances of the case.'[62] The ambit of the works covered by the NLAO appears to be broad; section 12 of the statute refers to carrying out works of construction, repair, maintenance, improvement, decoration, alteration, adjustment, renewal or demolition of buildings and other structures. As with the ANLA 1992, access may also be granted for the purposes of: carrying out inspections, making plans, ascertaining the course of drains, sewers, pipes or cables, ascertaining whether any vegetation such as hedges, trees or shrubs are dangerous, dead, diseased, damaged or insecurely rooted and so on. The statute expressly states that its terms do not 'limit the kinds of work' for which a NLAO may be sought.[63] The decision to include broader works within the ambit of the legislation has consequences that are more serious for the property rights of the owner of the servient land. The owner's right to exclude others is more vulnerable under the NSW Act than it is under the ANLA 1992 in England, which comprises more circumscribed statutory purposes and is thus more protective of the right to exclude generally.

5.5 Prevention of Erosion of Rights

The Law Commission in England doubted that there would be 'major erosion' of owners' rights resulting from their recommendations, for several reasons. First, there was a public interest factor in 'ensuring that the nation's stock of housing and other

[60] *ibid.*, s. 1(5).
[61] *ibid.*, s. 1(7).
[62] *ibid*., s. 11.
[63] *ibid*., s. 12(2).

accommodation can be maintained and kept available for use.'[64] Secondly, the Report argued that 'reasonable neighbours do not in practice object to access for repairs on the grounds that such access would be a major erosion of their rights.'[65] Under the ANLA 1992 the court may take any reasonable objections into account since when deciding whether to make an access order the court is limited to making an access order 'if, and only if, it is satisfied' that the works are 'reasonably necessary for the preservation of the whole or any part of the dominant land.'[66] Added to which, the court must also determine that the repairs 'cannot be carried out, or would be substantially more difficult to carry out without entry upon the servient land.'[67]

A servient owner who wants to resist a claim for an access order must demonstrate to the court that they would: (i) suffer interference with or disturbance of their 'use or enjoyment' of the servient land; or, (ii) that they or some other occupier of the servient land would 'suffer hardship.' Additionally, the alleged interference, disturbance or hardship will only militate against the granting of an access order where it is of such a degree as to be 'unreasonable' for the court to make the order.[68] Thirdly, the Law Commission observed that 'strong views about access [that] are genuinely held ... are, arguably, so held only so long as they suit the proponent.'[69] Finally, the Law Commission argued that there would not be a 'major erosion' of an owner's rights since the access criteria would be limited to those necessary for carrying out preservation works rather than being available for development, and compensatory payments would be available.[70] The terms of ANLA 1992 reflect this aim in that once an order has been granted it must specify the works to the dominant land that are to be carried out, the area of servient land that can be entered upon in reliance upon the order, and the date or period during which the land can be entered upon.[71]

[64] *Rights of Access to Neighbouring Land* (LC151), [3.23].
[65] *ibid*., [3.24].
[66] ANLA 1992, s. 1(2)(1).
[67] *ibid.*, s. 1(2)(2).
[68] *ibid.*, s. 1(3).
[69] *Rights of Access to Neighbouring Land* (LC151), [3.25].
[70] *ibid*., [3.26].
[71] ANLA 1992, s. 2(1).

5.6 NEIGHBOURLY RELATIONS

By way of contrast, the NSW Act takes a different approach in obliging the Local Court to refuse an order unless: (i) the applicant has 'made a reasonable effort to reach agreement with every person whose consent is required as to the access and carrying out of the work'; *and* (ii) that the requisite notice has been given.[72] The focus of the NSW Act is very much on encouraging neighbours to come to an agreement informally, relying only on the statute as a backstop. As such the Law Reform Commission's proposals referred to the 'importance of attempting to reach agreement'[73] and described this first step as a 'central theme' to their recommendations.[74] In the event that informal negotiations failed, the Report recommended mediation, with litigation being viewed as the final option. Despite these aims, the Commission recognised that given neighbours necessarily 'live in close proximity ... and have a continuing relationship' they 'cannot simply walk away from each other after a dispute has been resolved.' As such, the proposals later enacted in the NSW Act accepted that there are some situations where 'litigation appears to be the only solution' not just because of the complexity of the issues at stake, but also because of the personal element involved.[75]

Sterk has observed that cross-boundary entitlements 'promote and indeed require limited cooperation between neighboring landowners' and in imposing a 'limited duty to cooperate, the doctrinal framework suggests a conception of neighbors that includes continuing mutual dependence rather than a pattern of discrete and unrelated transactions.'[76] The explicit focus on negotiation and the subsequent impact that this might have on relations in the wake of applying for an NLAO reaffirms the importance in NSW of neighbourliness. It is possible to view this approach as an explicit affirmation of a growing emergence of proprietarian property concepts where duties accompany rights.[77] The notion that property is 'a relative phenomenon, moulded by

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[72] *ibid*.
[73] Law Reform Commission (New South Wales) *Right of Access to Neighbouring Land* (Report 71, 1994), [4.20].
[74] *ibid*., [Recommendation 4].
[75] *ibid*., [1.11].
[76] Sterk, 'Neighbors in American Land Law' 87 Colum L Rev 55 (1987), 95.
[77] Alexander, 'Property as Propriety' 77 Neb L Rev 667 (1998); Rose, '"Takings" and the Practices of Property: Property as Wealth, Property as "Propriety"'; GS Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1176-1970*.

collective visions of the social good, poses an inevitable threat to the viability of the common law model of property as raw, untrammelled, individually exercised exclusory power.'[78]

5.7 TERMS OF THE ORDER

Under the ANLA 1992 in England, the court retains a discretion to impose any such other terms or conditions as appear to be 'reasonably necessary' to avoid or restrict loss, damage or injury that might otherwise be caused to the respondent, or any inconvenience or loss of privacy that they might suffer.[79] Furthermore, the access order can be tailored even more specifically to the particular circumstances by requiring that the claimant pay compensation for loss, damage or injury or any substantial loss of privacy or other substantial inconvenience caused by entry onto the servient land. The order can also require that insurance is obtained.

In undertaking its balancing exercise under the NSW Act, the Local Court is to consider 'whether the work cannot be carried out or would be substantially more difficult or expensive to carry out without access' and 'whether the access would cause unreasonable hardship' to a person affected by the order.[80] As with the ANLA 1992 in England, the Local Court may specify various conditions in a NLAO so long as they are 'in its opinion ... reasonably necessary in the circumstances.' These include conditions for the purpose of avoiding or minimising loss, damage and injury as well as conditions relating to insurance and other safeguards.[81] The order must specify: (i) the land to which it relates; (ii) the work that may be carried out; (iii) the date on or from which access is permitted and ceases to be permitted; (iv) any conditions specified by the Local court.[82] The order also authorises the applicant to 'bring on, leave on and remove from the land such materials, plant and equipment as are reasonably necessary for carrying out the work' and to remove any waste arising from the work.[83]

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[78] Gray and Gray, 'Private Property and Public Propriety', 19.
[79] ANLA 1992, s. 2(2).
[80] *ibid*., s. 15.
[81] *ibid*., s. 16.
[82] *ibid*., s. 17.
[83] *ibid*., s. 20.

5.8 COMPENSATION

Notably, where *non-residential* land is involved,[84] an access order under the ANLA 1992 can require the claimant to pay 'such sum by way of consideration for the privilege of entering the servient land' as appears to be 'fair and reasonable' to the court having regard to the circumstances of the case.[85] In assessing the sums payable as compensation, the court will consider the probable financial advantage of the order to the claimant, as well as the probable degree of inconvenience caused to the respondent. The court can also provide for reimbursement by the claimant of any expense reasonably incurred by the respondent, which would not otherwise be recoverable as costs. In its original Report, the Law Commission recommended that 'compensation for mere access should not be payable' because: (i) the question of assessment would be too complex; and, (ii) that a right to compensation for anything other than loss and damage could encourage 'holding out'.[86] This approach differed from the responses received to the original consultation paper where respondents noted that 'since A would be getting from B something of value to A which B did not want to part with, why should A not pay for it?'[87]

Under the NSW Act, the applicant must restore the land accessed to the same condition that it was in before the access and indemnify the owner of the land for any damage caused to the land or personal property resulting from the access.[88] In terms of compensation, the Local Court may order that compensation be paid for 'loss, damage or injury, including damage to personal property, financial loss and personal injury arising from the access.' No compensation is payable however for 'loss of privacy or inconvenience suffered by the owner solely as a result of access authorised by the access order or solely because of the making of the order.'[89] In this sense, the NSW 2000 legislation is less protective of the affected owner's rights than the English

[84] *ibid.*, s. 2(7) defines 'residential land' to include land with (i) a dwelling or part of a dwelling; (ii) a garden, yard, private garage or outbuilding used wholly or mainly as a dwelling.
[85] *ibid.*, s. 2(5)(a). Defined in Section 2(6) as the amount equal to the greater of likely increase in the dominant land which is attributable to the carrying out of the works and exceeds the cost of carrying out the works with the benefit of the access order, or the cost of carrying out the works in the event that an access order was granted or not granted.
[86] *Rights of Access to Neighbouring Land* (LC151), [4.57].
[87] *ibid*., [4.56].
[88] ANLA 1992, s. 21.
[89] *ibid.*, s. 26.

legislation is. This distinction is marginal however, given that the compensatory requirements under ANLA 1992 only apply where the property involved is not residential.

5.9 CONSEQUENCES OF THE ORDER

Once an access order has been made under the English system, it requires the respondent to permit the claimant or associates to do anything that they are authorised to do by virtue of the access order or the Act.[90] Thus, the claimant can enter the servient land to carry out the specified works, and can also bring necessary materials, plant and equipment onto the servient land and leave them there whilst reasonably necessary for the carrying out of the works. Waste arising from the works can also be brought onto the servient land if it is reasonably necessary to do so when removing it from the dominant land.[91]

After the works have finished, the claimant is required to remove any waste from the servient land 'forthwith' as well as to ensure that the servient land is, 'so far as reasonably practicable', made good. The claimant must also indemnify the servient owner against any damage caused to their land or goods 'which would not have been so caused had the order not been made.'[92] The court can also discharge, vary, suspend or revive any term or condition,[93] as well as making an order for damages.[94] Additionally, any agreement or attempt to contract-out of the ANLA 1992 will be void under section 4(4) ANLA 1992.

Many of the provisions of the NSW Act are similar to those contained in the ANLA 1992. The effect of the authorisation is that the owner must permit access to the land.[95] In the event that the order is not complied with then the Local Court may make an order for payment of damages under section 28 NSW Act. Any attempt to contract-out of the statute will be void under section 35. The statute explicitly allows for a NLAO to be

[90] *ibid.*, s. 3(1).
[91] *ibid.*, s. 3(2).
[92] *ibid.*, s. 3(3).
[93] *ibid.*, s. 6(1).
[94] *ibid.*, s. 6(2).
[95] *ibid*., s. 22.

sought in circumstances where an easement might otherwise have been implied under s. 88K Conveyancing Act 1919 (NSW),[96] although if other Acts apply then permission is to be sought under the alternative more appropriate statute.[97] The applicant must give at least 21 days' notice of the application and the terms of the order sought to the owner of the access land and to anyone else who will be affected by the order.[98]

5.10 SECTION 88K CONVEYANCING ACT 1919

The ambit of the NSW Act is supplemented by section 88K of the Conveyancing Act 1919 ('s. 88K').[99] This provision provides that the Supreme Court may make an order imposing an easement over land where this is 'reasonably necessary for the effective use or development of other land that will have the benefit of the easement.'[100] As noted above, Grattan categorises the s. 88K legislation and analogous Australian statutes as 'first-generation access legislation' in that they: (i) authorise the creation of easements, rather than simply temporary rights of access; (ii) the power of the court to impose the easement is not limited to carrying out work on the servient land; (iii) the power is contained in a section of the general property statute; and (iv) the Supreme Court has the power to impose the easement compulsorily.[101] Grattan argues convincingly that despite references to *public policy* and *public interest* in s. 88K and analogous legislation from Queensland and Tasmania,[102] this type of provision 'can be seen as manifesting only an economic, and not a proprietarian, spirit.'[103]

The ability of the court to impose an easement where this is 'reasonably necessary for the effective use or development of other land'[104] is limited by the requirement that the court must be satisfied that use of the dominant land will 'not be inconsistent with the public interest' and that any loss or disadvantage suffered by the servient land should be

[96] Conveyancing Act 1919, s. 88Kis discussed in the following section of the thesis.
[97] ANLA 1992, s. 7(4).
[98] *ibid*., s. 10.
[99] Property Legislation Amendment (Easements) Act 1995. S. 88K entered into force on 15 December 1995.
[100] Conveyancing Act 1919, s. 88K (1).
[101] Grattan, 'Proprietarian Conceptions of Statutory Access Rights', 353-354.
[102] The relevant statutory provisions are: the Property Law Act 1974, s. 180 (Queensland), and the Conveyancing and Law of Property Act 1884, s. 84J which was enacted in 1978 (Tasmania).
[103] Grattan, 'Proprietarian Conceptions of Statutory Access Rights', 356.
[104] Judicial approaches to the test of reasonable necessity are explored in S Grattan, 'Courting Councils and Counselling Courts: Subjectivity and Objectivity in Section 88K Applications' (2005) 12 Australian Property L J 126.

capable of being compensated.[105] As with the NSW Act, the dominant owner must demonstrate that 'all reasonable attempts have been made to obtain the easement' but that these have been unsuccessful.[106] The courts have interpreted the phrase 'reasonably necessary' generously such that it is unnecessary to demonstrate that the easement is *absolutely* necessary, and can be satisfied even when the land dominant land could be effectively used or developed without the easement.[107]

The purpose behind the statutory provision has been described as being to ensure that the owner of the servient land 'receive[s] a just sum ... for what he or she has to give over, rather than being able to demand the earth.'[108] Grattan considers the likely behaviour of various stock types of putative servient owners in s. 88K cases, and argues that in residential cases the reason for failed bargaining is not due to strategic behaviour. Rather, the parties already have a history of hostility between them, or the servient owner is someone who prizes privacy above economic gain. In these circumstances, s. 88K may play a useful role in relation to ameliorating difficulties between hostile neighbours, but its application to the 'peace and quiet loving' servient owner is 'more problematic.'[109]

6 AMERICA AND COMPULSORY ACCESS

As with other aspects of constitutional property, English law has focused on the practicalities of access to neighbouring land rather than looking beneath the surface. The American courts have approached these issues differently. There, debate has centred on attempting to understand, if not answer, the underlying problems raised by partial limitations on property rights. This section reviews the main strands of American law in this area and uses this to demonstrate the complex proprietary impact of access rights existing under the ANLA 1992 in England.

[105] Conveyancing Act 1919, ss. 88K (1)-(2).
[106] *ibid*., s. 2.
[107] *Khattar v Wiese* (2005) 12 BPR 23,235, 23,241-2 (Brereton J). See also *Hanny v Lewis* (1998) 9 BPR 16,205, 16,209 (Young J).
[108] *Wengarin Pty Ltd v Byron Shire Council* (1999) 9 BPR 16,985, 16,987 (Young J).
[109] S Grattan, 'The Name(s) of the Rose: Personality, Preferences and Court-Imposed Easements' 10 Canterbury L Rev 329 [2004].

6.1 REGULATIONS WHICH GO 'TOO FAR'

One of the first issues facing a constitutional property lawyer, when looking at a statute limiting the rights of a property owner, is to consider whether the legislation constitutes a prohibited expropriation or a permitted regulation.[110] As Justice Holmes famously noted in *Pennsylvania Coal Co v Mahon*, '[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'[111] Unfortunately, this practical distinction quickly leads to a morass of doctrine. The touchstone for American courts deciding whether limitations on, or regulations of, property shade into expropriation and deserve compensation is if the regulation has gone 'too far'.[112] Additional factors such as whether the regulation is related to and serves the public interest are also relevant, so that no one could claim compensation for a regulation preventing them from committing a nuisance, for example.[113] *Mahon* appears to suggest that a careful multifactorial analysis should be undertaken in deciding whether a regulation or limitation goes 'too far'.

In deciding whether or not a regulation has 'gone too far' the American courts therefore assess 'the extent of the diminution'[114] in value of the property – a process which first involves defining the relevant parcel of land. Whilst regulatory takings are generally of great interest, for the purposes of this thesis the more pertinent issue is that described by American authors as the *relevant parcel problem*, which raises universally applicable issues in relation to partial takings and provides useful guidance when examining the effect of compulsory grants of access rights in England.

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[110] The distinction between the two can have significant practical consequences as demonstrated by the different financial consequences of the decisions reached by the Chamber and Grand Chamber in *Pye v United Kingdom*, and discussed in chapter 4 of the thesis.
[111] *Pennsylvania Coal Co v Mahon*, 413. *Mahon* concerned the constitutionality of a regulation preventing subsurface coal mining. The issue arose as to whether the effect of the regulation had so affected the right to mine coal that it was effectively a taking deserving compensation.
[112] *ibid*., 415.
[113] JW Singer, *Introduction to Property* (2nd ed, Aspen Publishers, 2005), 681.
[114] *ibid*., 413.

6.2 THE RELEVANT PARCEL AND DENOMINATOR PROBLEM

Generally, when title to a particular plot of land is compulsorily transferred, it is clear to all concerned that the land has been 'taken' from the owner and redistributed to someone else. The situation becomes far more complex though when full title is not taken, but instead one or more rights normally associated with ownership are transferred or destroyed. For instance, as discussed later in this chapter, an owner's land may benefit from a restrictive freehold covenant over neighbouring property, which may later be modified or discharged against their wishes. The owner retains title to their land and the ability to alienate it, exclude others and so on, but they are likely to feel that they have 'lost' something. The broader issue then becomes one of whether or not the discharge of the covenant should 'count' as a taking, or is viewed by others as merely an unfortunate but acceptable interference with the owner's rights.

In deciding questions of this type the parties concerned will measure, consciously or not, the effect of the action against the property interests at stake from different perspectives. The current owner is thus likely to view the loss of even one stick from their bundle of rights as deserving protection and compensation, whereas the state or new owner may point to the untouched nature of the majority of sticks in order to support their contention that no protection or compensation is merited. In assessing the nature of the loss, Frank Michelman argues that the economic impact of partial regulatory takings should not be viewed in absolute terms, but rather be compared against other quantities and thus represented by a fraction with the 'loss' as the numerator, and the other 'relevant parcel' as the denominator.[115] Courts and commentators have adopted this approach but, as Justice Scalia has noted, the difficulty comes in deciding which 'relevant parcel' *should* be the denominator.[116]

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[115] Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' 1192.

[116] *Lucas v South Carolina Coastal Council* (Justice Scalia), 1016-1017 fn 7: '[r]egrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured.' See also Justice Kennedy's comment in *Palazzolo* that the relevant parcel problem is a 'difficult, persisting question.'

In considering the relevant parcel, Fee suggests that the American courts define the denominator parcel in several different ways: (i) horizontally, such as division into plots or parcels; (ii) vertically, including air rights, surface and subsurface rights;[117] (iii) temporally, to take account of present and future estates;[118] or (iv) functionally, which includes division of property into easements and other similar interests.[119] Despite the forceful libertarian-influenced arguments of Richard Epstein on this point, it seems that the US Supreme Court has been generally resistant to viewing the loss of particular 'sticks' of property as compensable, no matter which denominator definition is used.[120] Following *Mahon* and *Keystone Bituminous* it seems that the courts eschew attempts to compensate for losses of individual 'sticks' or strands, preferring instead to assess the 'whole property' in deciding whether or not the regulation has gone 'too far'.

For instance, in *Penn Central Transportation Co v City of New York* the owner claimed that the refusal to permit construction of a tower block above Grand Central Terminal should be categorised as a compensable taking of its airspace rights. Justice Brennan famously dismissed this argument by stating that American takings jurisprudence:

> [D]oes not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of interference with rights in the parcel as a whole.[121]

Similarly in *Andrus v Allard*[122] the Supreme Court referred to the bundle of rights explicitly confirming that 'where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking because the aggregate must be viewed in its entirety.'[123] Both physical and conceptual severance were again dismissed in the *Keystone Bituminous Coal Assoc v DeBenedictis* case, where the court

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[117] E.g. as in *Penn Central v City of New York*, and *Keystone Bituminous Coal Assoc v DeBenedictis* 480 US 470 (1987) (US Supreme Court).
[118] *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* 535 US 302 (2002) (US Supreme Court).
[119] JE Fee, 'Unearthing the Denominator in Regulatory Taking Claims', 61 U Chi L Rev 1535 (1994), 1537.
[120] See Epstein, *Takings: Private Property and the Power of Eminent Domain*.
[121] *ibid*., 130-131.
[122] 444 US 51 (1979), (US Supreme Court). The case involved a challenge to a ban on selling items made with feathers from federally-protected birds such as bald eagles.
[123] *ibid*., 65-66.

refused to apply 'such legalistic distinctions within a bundle of property rights.'[124] Following *Penn Central* the courts engage with a three-pronged approach assessing the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with 'distinct investment-backed expectations', and the character of the government action.[125]

6.3 CATEGORICAL TAKINGS

However, even within the tangled regulatory takings debate the American courts appear to have distinguished between: (i) regulatory takings; and (ii) those regulations that authorise or involve a physical invasion of property. It is the American attitude towards this latter class of takings that is of most interest in the context of this chapter's examination of statutory rights of access. It is argued that the issues arising from American jurisprudence on categorical takings provides a useful parallel when viewing the implied creation of easements in England as a private taking.

Generally, the American courts do not view regulatory takings *per se* as compensable, unless they have clearly 'gone too far'; however, regulatory takings involving physical invasions of property are treated differently.[126] These takings are known as 'categorical' takings, which will be 'compensable without case-specific inquiry into the public interest advanced in support of the restraint.'[127] Famously in *Loretto v Teleprompter Manhattan CATV Corp*, the US Supreme Court held that a New York law requiring landlords to allow television cable companies to place permanent cable wires and connection boxes on their properties *was* a taking despite the minimal physical interference involved. In his decision, Justice Marshall explained that the 'power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights' such that owners suffer a 'special kind of injury when a stranger directly invades and occupies the owner's property.'[128]

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[124] *ibid*.
[125] (Justice Brennan), 124.
[126] See Singer, *Introduction to Property*, 694-695 provides examples of regulations authorising physical invasions which do not trigger compensation such as non-discriminatory public accommodation and housing laws.
[127] *Lucas v South Carolina Coastal Council.*
[128] *ibid.*, (Justice Marshall), 435.

6.4 ACCESS AND NOLLAN

Similar statements occur in *Kaiser Aetna v United States*. The case centred on a privately owned lagoon in Hawaii, which the owner converted into a marina connected to the Pacific Ocean. After the works had been carried out, the Federal government alleged that the lagoon was subject to a Federal 'navigational servitude' and a public right of access across the privately owned marina. In deciding that the Government's attempt to create a public right of way across the lagoon amounted to a taking requiring just compensation, Justice Rehnquist referred to the loss 'of one of the most essential sticks in the bundle of property rights that are commonly characterized as property – the right to exclude others.'[129] Later he returned to this theme stating that:

> [W]e hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interest that the Government cannot take without compensation. ... [E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation.[130]

The clearest indication that imposing an easement may amount to a compensable taking on the basis that the owner has lost a particularly weighty 'stick' from their bundle of rights is found in the American 'exaction' case of *Nollan v California Coastal Commission.* Here, the Nollans had been granted a permit to replace their beachfront bungalow with a larger house on condition that they allowed a public easement across their 'private' beach. The case focused particularly on whether it was constitutional to condition the Nollans' rebuilding permit upon granting the easement, and held that this would be lawful if the condition substantially furthered governmental purposes related to the granting of the permit. In *Nollan* itself, the exaction was a compensable taking because the reasons given for the imposition of the easement were not sufficiently related to the permit to be deemed a public purpose. Of greater interest in relation to the question of whether implied easements may be takings are Justice Scalia's comments that:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase

[129] *ibid*., 176.
[130] *ibid*., 179-180 .

> public access to the beach ... we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as Justice Brennan contends) "a mere restriction on its use," ... is to use words in a manner that deprives them of all their ordinary meaning. ... Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis ... leads to the same conclusion. ... We think a "permanent physical occupation" has occurred ... where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.[131]

These comments underline the traditional significance of exclusion and judicial respect for the stability of existing property allocations. The American courts have struggled however with situations where the right to exclude others is temporarily, rather than permanently, affected as under the ANLA 1992.

6.5 TEMPORARY TAKINGS

American debates about the imposition of access rights across land are valuable in indicating that, in American law at least, a compensable taking occurs where regulations affect an owner's right to exclude. What is less clear is whether this approach still works when there is not only a taking of one stick, but where the taking is of a temporary rather than permanent nature. The American Supreme Court's approach to this issue has varied. In *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* the Supreme Court refused to accept the claim that a 32-month moratorium on development in the ecologically fragile Lake Tahoe region was a *per se* taking. Despite the fact that the temporary ban prevented any development from taking place and thereby allegedly deprived the owners of all economically viable use of their land for its duration, the Supreme Court preferred to apply the *Penn Central* test. That is, to undertake 'essentially ad hoc, factual inquiries, designed to allow careful examination and weighting of all the relevant circumstances.'[132]

[131] *ibid.*, 831-832.
[132] *ibid*., 322.

This approach does not follow that of *First English Evangelical Lutheran Church v County of Los Angeles*.[133] The case involved a church retreat and campground, 'Lutherglen', which had been destroyed by floods. In response to the floods, Los Angeles County adopted an interim ordinance banning construction in an interim flood area, which included the site of Lutherglen. In the course of his opinion for the majority, Chief Justice Rehnquist noted that '"temporary" takings, which ... deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.'[134] The dissenting justices noted that a 'temporary interference with an owner's use of his property may constitute a taking for which the Constitution requires that compensation be paid. At least with respect to physical takings.'[135]

However, while 'virtually all physical invasions are deemed takings ... a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value.' In assessing regulations, the dissenters pointed to the importance of acknowledging that regulations 'are three dimensional; they have depth, width, and length ... no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence whether a taking has occurred.'[136] In considering the length required, the dissent noted that the restriction 'would not only have to be a substantial one, but it would also have to remain in effect for a significant percentage of the property's useful life.'[137]The implications of an American-style approach to 'temporary takings' are interesting from an English perspective, and their implications for the imposition of ANLA 1992 rights and the discharge of freehold covenants will be discussed below.

6.6 THE ANLA 1992 REASSESSED

Examining the American cases in this area highlights once more the centrality of exclusion to notions of property and ownership. The ANLA 1992 goes some way

[133] 482 US 304 (1987) (US Supreme Court).
[134] *ibid*., 318. Chief Justice Rehnquist was joined in the majority by Justices Brennan, White, Marshall, Powell and Scalia.
[135] *ibid.*, 329. Justice Stevens dissenting, with Justices Blackmun and O'Connor partially dissenting.
[136] *ibid*., 330.
[137] *ibid.*

towards recognising this explicitly by providing for payment of 'fair and reasonable' compensation for the 'privilege of entering the servient land.'[138] Surprisingly though, the compensatory requirements for this 'privilege' only apply to non-residential land. Following on from the discussion in chapter 2 about the personal significance of 'home' it appears to be unwarranted for such a distinction to be drawn. Indeed, it could be argued that forcing an owner to grant access rights over land residential land is an even greater infringement of their property rights, and as such an even more valuable privilege worthy of compensation, than access over non-residential properties. This is to ignore however the pragmatic approach taken by the English courts to concepts of the 'home', and suggests that the legislature intends neighbours to be neighbourly (or at least to accept that they might not be able to refuse access rights), rather than mercenary.

It is harder to apply the American jurisprudence on partial takings to the discharge of freehold covenants which will be discussed below, given that these property rights are not connected with the right to exclude others from one's own property. Instead these covenants allow individuals to circumscribe and control the land use of *others*. Nevertheless, in assessing the English law on this subject, it is argued that the legislature and courts tend to be jealous guardians of these interests, once they have succeeded in being created. It is argued that the statutory provision for compensation on their modification or discharge reveals that these acts are viewed as analogous to compensable takings, even if such a label is lacking. Intriguingly, it cannot be claimed that the dominant motivating factor behind compensation is the total extinguishment of the freehold covenant, since some compensation may also be available where the covenant remains, but is modified.

The provision of compensation for interferences with specific property interests is evidence of compensation for partial takings and conceptual severance in practice in English property law. This is not the first occasion on which conceptual severance has been recognised judicially in England. A well-known example relates to the terms of

[138] Section 2(5)(a) ANLA 1992. Defined in Section 2(6) as the amount equal to the greater of likely increase in the dominant land which is attributable to the carrying out of the works and exceeds the cost of carrying out the works with the benefit of the access order, or the cost of carrying out the works in the event that an access order was granted or not granted.

the Bradford Waterworks Act 1842, which was at issue in the infamous *Pickles* case.[139] Here the authorising Act allowed for interference with property rights, but recognised that the appropriation of water (or use that diminished the flow of water), was 'akin to a taking of property. As a consequence, such taking or diminishment must be clearly authorized by the incorporating Act and, by necessary implication, compensated for.'[140] In the course of the litigation in that case, Lord Macnaghten's commented that '[a]ccording to the ordinary course of legislation in this country, a clause of that sort is intended to protect property, rights and interests which have been acquired by purchase'. As such it was not intended 'to transfer arbitrarily from one person to another property and rights for which nothing has been paid, and for which no compensation is provided.'[141]

As noted above, a further situation where English law acknowledges that taking specific proprietary interests from the full bundle of property rights deserves some compensation may be seen in relation to the statutory discharge and modification of restrictive covenants under s. 84 LPA 1925. Before describing the operation of this statutory mechanism, the chapter first provides an overview of the role played by these proprietary interests.

7 RESTRICTIVE FREEHOLD COVENANTS

A restrictive covenant affecting freehold land is an agreement by one party that they will restrict the use of their land in some way for the benefit of another person's land. In addition to being contractually binding between the original parties, covenants also have a proprietary aspect in equity and are capable of binding successors in title following the case of *Tulk v Moxhay*.[142] These rights must be conferred expressly,[143] and as such, the courts appear to take a more relaxed approach to the content of covenants than exists in relation to the content of easements. The covenantor may

[139] *Bradford Corp v Pickles* [1895] AC 587.
[140] Taggart, *Private Property and Abuse of Rights in Victorian England*, 81.
[141] *ibid.*, 104-105 citing Lord Macnaghten in *Pickles* [1895] AC 58, 602.
[142] *Tulk v Moxhay* (1848) 2 Ph 774.
[143] Writing will be required for the creation of an easement under s. 53(1)(a) LPA 1925. Restrictive covenants should be registered under s. 34 LRA 2002 in order to bind third parties.

undertake the obligation on the basis that they are prepared to restrict the use of their retained land in exchange for the ability to charge a premium for land transferred to the covenantee. Alternatively, the covenantor may be willing to accept the burden on the basis that they will pay a lower price for the property. Most frequently, covenants arise on an *ad hoc* basis and again money will normally change hands.[144]

The doctrine in this area of the law developed predominantly in the 19th century, and was driven by a desire to create lasting and pleasant oases in the midst of burgeoning industrial cities. It has been calculated that some 79 per cent. of registered freehold titles in England and Wales are subject to a restrictive covenant.[145] The 'puzzle that a free and rational nation permits these arrangements at all',[146] can be explained by their appeal to a 'particularly human desire to control ... uses of land' and they are 'prized for their ability to impose ... individualistic and localised fetters over the use of land.'[147] These proprietary interests can thus resemble a form of 'private planning control' and prove to be 'indispensable' particularly 'where public planning controls are supine, anachronistic or occasionally perverse.' Furthermore, they are valued for their ability to be enforced 'by the "beneficiary" in and at his own discretion, whereas the enforcement of planning control is in the hands of another, namely the Local Planning Authority, exercisable, or not as the case may be, at its discretion and by its choice.'[148]

7.1 THE NUMERUS CLAUSUS PRINCIPLE

Despite their great practical and financial importance, restrictive covenants carry with them an innate ability to affect and hamper a future owner's ability to utilize their land as they see best.[149] This may not be a significant problem for the original servient owner since they will have frequently agreed expressly to the content of the burden imposed

[144] Gardner, *An Introduction to Land Law*, 185-186.
[145] Law Commission Consultation Paper No 186, *Easements, Covenants and Profits à Prendre* (2008, Appendix A, 284-285). The statistics were based on figures from the period 2003-2004, and 2004-2005.
[146] CM Rose, 'Servitudes, Security, and Assent: Some Comments on Professors French and Reichman', 55 S Cal L Rev 1403 (1982).
[147] EJL Waring, 'Modification and Discharge of Restrictive Covenants: The Housing Act 1985' (case note on *Lawntown Ltd v Camenzuli*), [2008] CLJ 249, 250.
[148] DL Sabey and A Everton, *The Restrictive Covenant in the Control of Land Use* (Ashgate Publishing, Aldershot, 1999), 177.
[149] Parallels may be drawn with alienability. It is important for the marketability of title that owners can alienate land freely, however this power has to be exercised within certain confines otherwise it would be open to owners to tie the hands of future generations in such a way that marketability would be hindered.

on their land. However, as time passes, later owners may find that they possess land that is so burdened by an accretion of peculiar restrictions that it becomes practically unusable or worthless.[150] This realisation has played a significant part in the evolution of restrictive freehold covenants from contractual rights to fully-fledged equitable proprietary rights. It does much to explain the complex rules and limitations governing the passing of the burden and benefit of restrictive covenants, the equitable rather than legal nature of covenants which affects the remedies available, and the inability of positive covenants to burden successors in title, except in rare situations of mutual benefit and burden.[151]

English law has traditionally viewed the distinction between contract and property with caution on the basis that if there 'were no frontier ... there would be no limit to the new incidents of property which could be invented … rights which can bind third parties ought to be of a limited and familiar kind.'[152] Similarly, contractual rights (such as those enshrined in freehold covenants) are said to be different from proprietary rights since these are 'built to endure' and thus inherently static, as opposed to contracts which are 'born to die' and therefore better suited to 'fancies' since they can then be 'negotiated afresh with successive owners of the burdened land.'[153]

As Rudden notes there are many possible justifications for a *numerus clausus*, or closed list, approach towards property rights including:[154] (i) an absence of demand for additional or alternative property rights; (ii) an absence of notice; (iii) an absence of consent; (iv) 'pyramiding' where later owners become burdened with land encrusted with obligations; (v) doctrinaire objections to a multiplicity of rights on the basis that these become contentious; (vi) philosophical reasons; (vii) economic reasons based on marketability of title, standardization and information costs. There are however counter-arguments for these possible justifications, and as Gray and Gray note the fixed nature of proprietary rights dictated by the *numerus clausus* 'suddenly looks rather more shaky

[150] Simpson, *A History of the Land Law*, 257 contends that the effect of restrictive covenants is to 'sterilize the use of a parcel of land permanently'. Whilst this overstates the case, he is right to question whether a 'private landowner ought to be able to do this without public control of his activities.'
[151] *Halsall v Brizell* [1957] Ch 169.
[152] HWR Wade, 'Licences and Third Parties' (1952) 68 LQR 337, 347.
[153] B Rudden, 'Economic Theory v Property Law: The *Numerus Clausus* Problem' in J Eekelaar and J Bell (eds) *Oxford Essays in Jurisprudence: Third Series* (Clarendon Press, Oxford, 1987), 243. ibid., 259.
[154] Rudden, 'Economic Theory v Property Law: The *Numerus Clausus* Problem', 243-256.

than before.'[155] The economic arguments for limited proprietary rights no longer hold as much sway in an era of electronic conveyancing as they may have previously.

Despite their late arrival in the English pantheon of property rights, restrictive covenants have proved to be popular. At heart they represent the tension, yet again, between stability and change. In the late 19th century courts were faced with the task of keeping land unencumbered, and the growing need for private controls of use due to increasing industrialization and urbanization. Lord Brougham in *Keppell v Bailey* famously refused to enforce the burden of a covenant against a successor in title on the basis that 'great detriment would arise … if parties were allowed to invent new modes of holding and enjoying real property' such that they could 'impress upon their lands … a peculiar character, which should follow them into all hands, however remote.'[156]

For centuries the common law had allowed the benefit of freehold covenants to run with the land, and both burden and benefit to run in relation to leasehold covenants. However, until the mid 19th century, the utility of freehold covenants were greatly hampered since the rules of privity of contract meant that successors in title could not be bound by the burden of freehold covenants. All of this was to change with the seminal case of *Tulk v Moxhay*.[157] In the case itself, Lord Cottenham accepted that the burden of freehold covenants did not run at law, but decided that the courts of equity could grant an injunction with the result that the successor in title would effectively be bound by the burden of the freehold covenant. The decision was premised not so much on the advantages of allowing for the effective running of freehold covenants, but rather on the equitable doctrine of notice. Lord Cottenham enforced the covenant on the grounds that it would otherwise have been inequitable for a purchaser of land who had express notice of the covenant to attempt later to avoid the burden. Additionally, such a landowner could otherwise 'by selling his land convert it from burdened land to unburdened land' and thereby 'transfer something he had never himself owned.'[158]

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[155] KJ Gray and S F Gray, 'The Rhetoric of Realty' in J Getzler (ed) *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Butterworths, London, 2003), 222.
[156] At 535.
[157] (1848) 2 Ph 774.
[158] Simpson, *A History of the Land Law*, 258.

7.2 CHARACTERISTICS OF COVENANTS

A negative or restrictive covenant, as the name suggests, restricts the use and enjoyment of the land, for example by limiting the use of the land for residential purposes only, or prohibiting particular trades or business from operating on the land. Successors in title to the original contracting parties must satisfy various conditions before they will be able to take the benefit of the covenant or be bound by it. The benefit of a restrictive covenant will pass where the covenant 'touches and concerns' the land owned by the person seeking to enforce the covenant. As such, the covenant must affect land rather than merely being of personal benefit to the covenantee, it must affect the nature, quality, mode of user or value of the land, and must not be expressed to be personal to the covenantee.[159] The benefit of the covenant must have passed to the person seeking to enforce it, either by annexation,[160] express assignment, or via a building scheme.[161]

Whilst the benefit of a freehold restrictive covenant may pass at common law, the burden cannot do so.[162] Since the decision in *Tulk v Moxhay* the burden of a restrictive covenant may bind successors in title in equity. Before this can happen it must be shown that the covenant is: (i) restrictive in nature;[163] (ii) at the date of the covenant, the covenantee owned land that benefited from the covenant; and (iii) the original

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[159] *P & A Swift Investments v Combined English Stores Group plc* (1989) AC 632 (HL), 642 (Lord Oliver), in relation to leasehold land, but the same principles apply in the freehold context in determining whether a covenant 'touches and concerns' land.

[160] Most post-1925 covenants are likely to be statutorily annexed to the land by virtue of s. 78 LPA 1925 which states that a covenant 'relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title and the persons deriving title under him or them, and shall have effect as if such successors and other persons were expressed.' See also *Federated Homes v Mill Lodge Properties* (1980) 1 WLR 594 (CA) and *Crest Nicholson Residential v McAllister* [2004] 1 WLR 2409 (CA). The *Federated Homes* approach has been criticized, see for example G Newsom, 'Universal Annexation?' (1981) 97 LQR 32.

[161] *Re Dolphin's Conveyance* [1970] Ch 654.

[162] *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 and *Rhone v Stephens*.

[163] *Rhone v Stephens*, 321 (Lord Templeman): 'For over 100 years it has been clear and accepted law that equity will enforce negative covenants against freehold land but has no power to enforce positive covenants … [to do so] would be to enforce a personal obligation against a person who has not covenanted. To enforce negative covenants is only to treat the land as subject to a restriction.' Where there are reciprocal burdens and benefits, such as the ability to use a right of way in return for a contribution to maintenance costs, the courts may enforce the positive covenant relating to upkeep as in *Halsall v Brizell* [1957] Ch 169. In respect of vehicular rights of way, s. 126B Property Law Act 1952 in New Zealand states that Sch 9 to the Act will apply and by clause 2(c) of this schedule the dominant owner has a right to a 'reasonable contribution from other occupiers towards the cost of establishment, maintenance, upkeep and repair of the driveway to an appropriate standard.'

parties intended the burden should bind successors rather than being merely personal.[164] The burden of positive covenants, which generally involve the expenditure of money or effort such as the pruning of trees, cannot run to successors in title either in law or equity. These highly technical rules have been much criticised both by courts and commentators, and yet few changes have been made.[165] It is argued that despite the inherent problems caused by increasing numbers of restrictive covenants, the courts are reluctant to remove them from titles because this would effectively be a private taking.

7.3 COVENANTS AND TAKINGS

The classic English approach to the modification and discharge of freehold covenants under s. 84 LPA 1925 is set out in the judgment of Farwell J in the case of *In re Henderson's Conveyance*.[166] Here the court stated that the language of s. 84 was not designed to 'enable a person to expropriate the private rights of another purely for his own profit', a sentiment which has since been approved of in *Truman, Hanbury, Buxton & Co Ltd's Application*[167] and again in the case of *In re Ghey and Galton's Application* by Lord Evershed MR.[168] There have been very few instances of challenges to the discharge of covenants on the basis that this mechanism offends against Article 1, and those that there have been do not appear to have presented very clear facts for discussion of deeper principles.

In the Northern Irish case of *S v United Kingdom*,[169] considered by the European Commission of Human Rights, the applicant Mrs Scott, complained that she had been deprived of part of her interest in land in Belfast and alleged a violation of Article 1. She had the benefit of a covenant preventing development of land occupied by a nursery. When negotiations for a waiver failed, the nursery sought the extinguishment of Mrs Scott's covenant. The Lands Tribunal for Northern Ireland found for the nursery and awarded Mrs Scott £350 in compensation. Before the European Commission of

[164] The burden of a restrictive covenant is assumed to be intended to run with the land under s. 79 LPA 1925 unless a contrary intention can be shown.
[165] N Gravells, 'Enforcement of Positive Covenants Affecting Freehold Land' (1994) 110 LQR 346, 350; *Rhone v Stephens* [1994] 2 AC 310, 321.
[166] See page 65 of the thesis.
[167] [1956] 1 QB 261, 270 (Romer J).
[168] [1957] 2 QB 650, 659.
[169] App No 10741/84 (Decision of 13 December 1984).

Human Rights, she alleged that the extinguishment of the restrictive covenants was a wrongful deprivation of her possessions under Article 1.

The Commission held that whilst the Lands Tribunal extinguished the restrictive covenants and 'reduced the applicant's interest in the land' the 'remainder of [her] ... interest remains unaffected by the decision.' As such, the Commission appeared to reject a conceptual severance approach to the issue and held that Mrs Scott had not been deprived of her possessions under the first rule in Article 1. In considering the discharge under the second paragraph of Article 1, the Commission held that the control of property exercised by the Lands Tribunal was 'in accordance with the general interest' and that the extinction of the restrictive covenants upon payment of compensation was not disproportionate to the legitimate aim of ensuring the most efficient use of land for the benefit of the community.[170]

However, in a Scots case involving a covenant preventing the sale of a property to anyone not in the police force, the Tribunal hearing the application to discharge the covenant did separate out the value of the interest from the rest of the dominant owner's title. The applicant argued that the right to extract a fee for waiving the covenant was a 'possession' within Article 1, and that the loss of that right by the extinguishment of the interest was a compensable deprivation. Whilst the Lands Tribunal in Scotland was not prepared to hold that the covenant was a right to extract money, they agreed that it did have a cash value. As such its removal under the Conveyancing and Feudal Reform (Scotland) Act 1970,[171] could amount to a deprivation of a possession under Article 1. However, the discharge of the burden in this case did not have a significant effect on the dominant owner because it allowed the property to be used for general residential purposes rather than residential purposes for police officers, and was justified as serving a legitimate aim in the public interest that was proportionate response to the needs of the situation.[172] The conclusion reached in the case has been described as 'a sensible one' given the need for 'a mechanism by which obsolete or oppressive title conditions can be judicially varied.'[173]

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[170] *ibid*., 232-233.
[171] Section 1 (3)(c).
[172] *Strathclyde Joint Police Board v The Elderslie Estates Ltd* 2002 SLT (Lands Tr) 2.
[173] AJM Steven, 'The Progress of Article 1 Protocol 1 in Scotland', 6 Edin L Rev 396 (2002), 400.

Restrictive freehold covenants are valuable property rights. At common law, the remedy for their breach is damages; normally however, someone with the benefit of a covenant will prefer to seek equitable relief such as an injunction to stop the breach. Where actions are brought against successors in title, only equitable remedies will be available since the burden of a restrictive covenant does not run in law but only in equity. The court does possess a valuable discretion to award damages instead of an injunction. Damages in these circumstances are calculated on the basis of the sum that would have been arrived at in negotiations between the parties had each been making reasonable use of their respective bargaining positions without holding out for unreasonable amounts.[174] The covenantee's claim is for his actual loss, rather than the profit that the covenantor will make because of the breach;[175] and in many cases these damages may be low.[176] This is particularly so under various subsections of s. 84 LPA 1925 which are discussed below, and which allow for the discharge of covenants which no longer serve a useful purpose. Here, the covenant itself will have little value, and so the ensuing compensation will often be little more than minimal.

Whilst arguably the discharge of a restrictive covenant does not transfer anything from the dominant owner, but merely allows the servient owner to make more extensive use of their property,[177] it is contended that this scenario does involve a taking under the definition used in the thesis. The result of a successful application for the discharge of a covenant is the extinction of a resource, a proprietary right, by a person other than the officially designated owner, against the owner's wishes, accompanied by the intention permanently to deprive the official designated owner of the resource.

8 DISCHARGE OF COVENANTS

Covenants are yet another example of the paradoxical 'core' of absolute dominion since the 'freedom to do anything one likes with property implies the freedom to create restraints on it, and thus to bind one's own hands or the hands of one's transferees.'[178] It

[174] *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd* (2000) All ER 1866.
[175] *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361.
[176] *Small v Oliver & Saunders (Developments) Ltd* [2006] 3 EGLR 141.
[177] C Rotherham, 'The Conceptual Structure of Restitution for Wrongs' [2007] CLJ 172, 177.
[178] Gordon, 'Paradoxical Property', 102.

is obviously possible to negotiate an express release or variation of a freehold covenant, normally for payment, and also to obtain indemnity insurance to protect against the risk that a person with the benefit of the covenant may seek to enforce it at a later date. Insurance is particularly useful where it is impossible to determine who has the benefit of the covenant which is to be breached. Where however an owner wishes to exert their rights in the face of requests for its modification or discharge, the affected party may apply to the Upper Tribunal (previously the Lands Tribunal) under s. 84 LPA 1925 for relief. [179]

8.1 COMPENSATION

The Upper Tribunal, under s. 84(1) LPA 1925, has the power to order the applicant to pay compensation to the person entitled to the benefit of the covenant either for: (i) any loss or disadvantage suffered as a result of the discharge or modification of the covenant; or, (ii) to make up for any reduction in the price received for the land due to the covenant having been imposed upon it.[180] There is no statutory basis for the payment of compensation calculated on a development basis,[181] but the Tribunal may assess compensation by reference to how the parties might have shared the increase in value of the applicant's land, if the other party suffers loss due to the modification of the covenant.

In *Re SJC Construction Co Ltd's Application*,[182] the Tribunal held that whilst the restriction involved secured practical benefits of substantial advantage, the restriction ought to be modified since the benefits were contrary to the public use in impeding the proposed use of the land. The Tribunal referred to the 'most likely outcome of friendly negotiations' which it argued would have been an 'agreement to split the development value equally'. This decision was challenged in the Court of Appeal, where the appeal was dismissed on the basis that the Tribunal had adopted a fair and reasonable approach in determining the level of compensation, which was an intangible matter incapable of

[179] As amended by the Law of Property Act 1969, s 28, Sch 3. See Transfer of Tribunal Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009 (SI 2009/1307, commenced 1 June 2009) which transferred the functions of the Lands Tribunal to the newly established Lands Chamber of the Upper Tribunal.
[180] LPA 1925, ss. 84(1)(i)-(ii).
[181] *Stockport MBC v Alwiyah Developments* (1986) 52 P & CR 278.
[182] (1974) 28 P & CR 200.

exact calculation.[183] The approach taken to the calculation of compensation refers not solely to the loss suffered by the dominant owner (as would be normal in the common law), but also reflects the market cost to secure a release of the covenant.[184] This approach is justified by the equitable nature of restrictive covenants, and the availability of equitable damages under Lord Cairns Act 1858 where the dominant owner continues to live with the effects of the breach of covenant. Rotherham has argued that a 'benefit-focused remedy is certainly appropriate in cases where, by refusing to award an injunction, the court effectively expropriates the owners of dominant tenements of their rights (here an analogy with the law of eminent domain is inescapable).'[185]

Many of the cases discussed below, and those referred to from Scotland and Northern Ireland, appear to involve 'holdout' situations where one party seeks an arguably exorbitant fee for their waiver. The monopolistic relationship between the parties does not lend itself to efficient bargaining practices. However, it is important to consider that the right to 'hold out' is an important one in a legal system which places a high value on voluntary transfers of property rights. As Carol Rose observes, the right to resist a waiver 'for whatever idiotic reasons, is an aspect of the right to hold property ... If we are to take servitudes seriously as property rights, then the neighbors' holdout is perfectly legitimate.' Instead of treating the holdout as 'a rascal', she argues that the law should respect the fact that sometimes the 'purported holdout has a genuine interest in his property right, however irrationally inflated that interest may seem to the world at large.'[186]

8.2 APPROACH OF THE LANDS TRIBUNAL TO S. 84 LPA POWERS

The approach of the Upper Tribunal towards the modification and discharge of restrictive covenants has not been uniform. Until 1950 the jurisdiction to modify covenants was exercised by the Official Arbitrator, and it appears that a pragmatic approach was taken particularly during the inter-war period allowing for the 'buying

[183] *SJC Construction Co Ltd v Sutton London BC* (1975) 29 P & CR 222.
[184] *Wrotham Park Estate Co Ltd v Parkside Home Ltd* [1974] 1 WLR 798; *Jaggard v Sawyer* [1995] 1 WLR 269. *Gafford v Graham* (1999) 77 P & CR 73.
[185] Rotherham, 'The Conceptual Structure of Restitution for Wrongs', 196.
[186] Rose, 'Servitudes, Security, and Assent: Some Comments on Professors French and Reichman', 1412. She points to the ability of covenants to confer 'long term benefits' that may not be obvious at the time, such as environmental or aesthetic protections.

out' of restrictive covenants.[187] During the period leading up to the amendments made to s. 84(1) LPA 1925 by the Law of Property Act 1969, it has been argued that the Tribunal was reluctant to modify restrictive covenants such that even those with little remaining value 'were in danger of frustrating the development or use of land in the wider public interest.'[188]

The Upper Tribunal is under a statutory duty to take account of 'the development plan and any declared or ascertainable pattern for the grant or refusal of planning permission' in the relevant areas.[189] Nevertheless, the planning regime and that of control by restrictive covenants are separate. As such, while the 'two regimes impinge upon each other to some extent, they constitute different systems of control and each has, and retains, an independent existence.'[190] The Tribunal does not consider the same question as the planning authority in deciding whether to grant permission, but instead is concerned with whether the objectors' property rights should be taken away. The Law Commission's Consultation Paper recommends that s. 84 LPA 1925 should be reformed on the grounds that the provisions are 'unnecessarily complex and difficult to interpret', and notes that the approach taken by the Upper Tribunal 'which has developed from years of practical operation, is not readily discernible from the statute itself.' As such the Tribunal's approach is to give effect to the 'purpose' of the restrictive covenant, and in doing so it exercises a 'discretion based on the reasonableness or otherwise of the application being made.'[191]

8.3 THE COVENANT IS OBSOLETE

The focus here is on whether the covenant still achieves its original purpose, rather than another purpose which was not originally envisaged. Obsoleteness may be based on the grounds that there have been changes in the character of the burdened land, or a cessation of the original use of the property.[192] Similarly, there may have been changes

[187] Sabey and Everton *The Restrictive Covenant in the Control of Land Use*, 141.
[188] *ibid.*
[189] Section 84 (1)(B) LPA 1925.
[190] *Re Martin* (1988) 57 P & CR 119 (CA), 124-125 (Fox LJ).
[191] *Easements, Covenants and Profits à Prendre* (LCCP186), [14.44]- [14.45].
[192] Section 84(1)(a) LPA 1925: 'that by the reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the Lands Tribunal may deem material, the restriction ought to be deemed obsolete'.

in the character of the neighbourhood itself such that the original purpose of the restriction can no longer be fulfilled. It can be difficult to demonstrate that a covenant is obsolete and the age of the covenant will not be determinative. In *Re Afzar's Application*[193] a 120-year-old covenant was still deemed to be worthy of protection.

In *Gilbert v Spoor*, Eveleigh LJ noted that the phrase '"any practical benefits of substantial value or advantage to them" is wide ... [and] does not speak of a restriction for the benefit or protection of land ... but rather to a restriction which secures any practical benefits.' As such he cautioned that when 'one remembers that Parliament is authorising the Lands Tribunal to take away from a person a vested right ... it is not surprising that the tribunal is required to consider the adverse effects on a broad basis.'[194] Similarly, in *Stockport MBC* it was noted that 'the benefit envisaged [by the observation of the covenant] must be a practical one as opposed to a pecuniary one.'[195] The Law Commission has recommended that this ground be conflated with s. 84(1)(c) LPA 1925, discussed below, on the grounds that if an obsolete interest is discharged or modified it will cause little or no injury to the party entitled to the benefit, and that the application of the 'purpose test' means that the ground of obsoleteness is 'effectively redundant.'[196]

8.4 COVENANT OBSTRUCTS SOME REASONABLE USE OF THE LAND

This section entitles the Tribunal to balance benefits derived from the covenant against the public interest.[197] As such, a claim under this subsection must satisfy the Tribunal that the covenant impedes some reasonable use of the land and that in doing so, the restriction either: (i) does not secure any practical benefit of substantial value or advantage; or (ii) is contrary to the public interest *and* money would not be adequate

[193] [2002] 1 P & CR 17.
[194] [1983] Ch 27, 32.
[195] *Stockport MBC v Alwiyah Developments*, 281, (Eveleigh LJ).
[196] *Easements, Covenants and Profits à Prendre* (LCCP186), [14.50]-[14.52].
[197] LPA 1925, s. 84(1)(aa): 'that (in a case falling within subsection (1A) below) the continued existence thereof would impede some reasonable user of the land for public or private purposes or, as the case may be, would unless modified so impede such user'. Subsection (1A) provides that the Upper Chamber must be satisfied that the restriction, in impeding some reasonable user of land, either (a) does not secure to persons entitled to the benefit of it any practical benefits of substantial value or advantage to them; or (b) is contrary to the public interest; and that money will be adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the discharge or modification'.

compensation to anyone suffering loss or disadvantage from the discharge or modification of the restriction. The Tribunal can consider not only the original purpose served by the covenant but also any present benefits as well.

In determining what the 'public interest' may mean in this context it appears that the Lands Tribunal has not always taken a clear line on this point. Early consideration of s. 84(1)(aa) LPA 1925 may be seen in *Re Davies' Application*[198] where the grant of planning permission was relevant to public interest but in no way decisive, such that the grant of planning permission did not support the view that it would be contrary to the public interest if the development did not go ahead. Similarly in *Re Beardsley's Application*[199] the Tribunal did not agree that an acute shortage of building land automatically meant that a covenant prohibiting development was contrary to the public interest. In assessing applications under s. 84(1)(aa) LPA 1925 the Upper Tribunal will consider several questions: (i) whether the proposed user was reasonable; (ii) whether the restriction impedes that user; (iii) if so, in impeding that user, does the restriction secure practical benefits to the objectors; (iv) if so, are those benefits of substantial value to the objectors; (v) is impeding the reasonable user contrary to the public interest; and (vi) if the answer to (iv) is negative, or the answer to (v) is positive, would money be adequate compensation.[200] Additionally, the Upper Tribunal will consider whether there would be any injury to the objectors if the discharge or modification were to be granted.[201]

The test for the discharge or modification of a covenant on public interest grounds was considered in *Re Mansfield District Council's Application*,[202] in relation to an application for the discharge of a restrictive covenant over the site of Mansfield's cattle market. Here, the Tribunal considered whether discharging the covenant over the cattle market would enable the land to be put to a use in the public interest, that could not reasonably be accommodated on some other site, and whether financial compensation would be adequate recompense for the dominant owner.[203] Some types of interest are

[198] (1971) 25 P & CR 115.
[199] (1972) 25 P & CR 233.
[200] *Re Bass Ltd* (1973) 26 P & CR 156.
[201] LPA 1925, s. 84(1)(c).
[202] (1977) 33 P & CR 141.
[203] *ibid.*, 146 (D Frank QC).

not capable of being adequately compensated in monetary terms as in *Re Sheehy*, which involved the development of houses on back gardens contrary to restrictive covenants over the St Aubyn Estate in Devonport. Here, the Tribunal acknowledged that were the covenants to be modified or discharged it would lead to a 'departure from the standards so far maintained by the trustees' and would 'weaken the confidence of residents on the estate ... in the ability of the trustees to protect their interest.'[204]

8.5 AGREEMENT

The Upper Tribunal also has the power to discharge or modify a restrictive covenant if those benefiting from the covenant have given their agreement expressly or impliedly, by acts or omissions, to the discharge or modification.[205] An example may be seen in *Re Marcello Developments* where the Tribunal found that the use of land as flats for over 50 years implied an acceptance of a breach of covenant only to use the land for private dwelling houses, and that the ground in s. 84(1)(b) LPA 1925 had therefore been satisfied.[206] Each of the eight objecting local residents received compensation of £2,500, but the local authority (which had also objected to the scheme) was not awarded any compensation by the Tribunal because the authority's rights under the covenants did not allegedly confer any practical benefit of substantial value or advantage.

8.6 NO INJURY WILL BE CAUSED

Where the proposed discharge or modification will not cause any injury to those benefiting from the covenant, the Upper Tribunal may make an order under this head.[207] It seems that this category is viewed as a 'long-stop against vexatious objections'[208] and may be used where the restrictive covenant is being used purely as a means of obtaining payments in return for modifications to the covenant rather than for any other purpose.

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[204] (1992) 63 P & CR 95, 107 (Marder HHJ).
[205] LPA 1925, s. 84(1)(b) LPA 1925: 'that the persons of full age and capacity for the time being or from time to time entitled to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in property to which the benefit of the restriction is annexed, have agreed, either expressly or by implication, by their acts or omissions, to the same being discharged or modified'.
[206] [2002] RVR 146
[207] LPA 1925, s. 84(1)(c): 'that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction.'
[208] *Ridley v Taylor* [1965] 1 WLR 611.

As Lord Bingham noted, 'restrictive covenants cannot be regarded as absolute and inviolable for all time.'[209]

8.7 SECTION 610 HOUSING ACT 1985

It is also possible for a local housing authority or other interested person to apply to the county court under s. 610 of the Housing Act 1985 (the 'HA 1985') for the discharge or variation of a covenant which requires property to be kept as a *single* dwelling. For s. 610 HA 1985 to apply it must be shown that either: (i) owing to changes in the character of the neighbourhood the premises cannot be readily let as a single dwelling-house, but could be let if converted into two or more dwellings;[210] or (ii) planning permission has been granted under Part III of the Town and Country Planning Act 1990 for the use of the premises as converted into two or more separate dwelling-houses rather than as a single dwelling.[211] The court may vary the terms of the lease or other instrument imposing the prohibition or restriction, subject to such conditions and upon such terms as the court may think just.[212]

8.8 REFORM PROPOSALS

The Law Commission's latest Consultation Paper on easements and freehold covenants[213] suggests the creation of a new 'Land Obligation' and an expansion of the s. 84 LPA 1925 power to modify and discharge covenants to cover easements, profits, positive covenants and Land Obligations.[214] The Consultation suggests that it should no longer be possible to create restrictive covenants over registered land, and existing ones should be gradually phased out. Instead, a new category of proprietary interest, the Land Obligation, would be created which could be negative or positive and would thereby remove some of the defects of the current law. Additionally, these interests

[209] *Jaggard v Sawyer*, 283.
[210] HA 1985, s. 610(1)(a).
[211] *ibid.*, s. 610(1)(b).
[212] *ibid.*, s. 610(2).
[213] The Law Commission, *Easements, Covenants and Profits à Prendre* (LCCP186) (2008).
[214] *ibid*., [14.24]-[14.42].

would need to be created by deed and completed by registration so would be legal rather than equitable interests in land.

The Law Commission notes that its proposals for the automatic extinguishment of restrictive covenants would be likely to be considered a deprivation of possessions under Article 1, whilst options allowing for the renewal of restrictive covenants (unless obsolete) would be classified as a control of use. Despite this, it remains 'confident that all the options for reform ... are potentially compatible with the jurisprudence on human rights' given the wide margin of appreciation enjoyed by the State.[215] Carol Rose has similarly argued that servitudes, such as restrictive covenants, should be 'geared to the expected life of the development they serve' since this is the 'chief reason why we put up with [them] ... in the first place' and should be renegotiated afterwards if they still prove to have some merit.[216]

9 CONCLUSION

This chapter has described two instances of private takings which occur, often hidden from view, in property regimes. As noted in the introduction to the chapter, these regulatory or housekeeping rights disruptions are paradoxically necessary for the continued stability of the property regime as a whole. In the event that individuals cannot gain reasonable temporary access to neighbouring land, it is possible that their own land will suffer. Additionally, the gradual accretion of restrictions on the use of land may no longer be warranted and may hamper its marketability. In these situations, English law has built-in various pragmatic statutory mechanisms in order to ensure that land does not become economically sterile, and to prevent owners brandishing their rights in the face of others without recognising any sense of connection or responsibility.

Whilst there are many sensible reasons for these minor, and sometimes temporary, rights disruptions, it is argued that the legislature and courts remain wary. The terms of the ANLA 1992 which were described in detail, are heavily circumscribed. There is no automatic or general right of access to the property of a neighbour, but rather a carefully balanced, temporary, and restricted court-exercised discretion. Additionally, in

[215] *ibid.* [13.81]-[13.82].
[216] Rose, 'Servitudes, Security, and Assent: Some Comments on Professors French and Reichman', 1414.

recognition of the importance of the servient landowner's interests, some provision for compensation is made in non-residential circumstances. Here, private takings are used cautiously to shape not only the economic use of property, but also its proprietarian use. Likewise, with the discharge and modification of restrictive freehold covenants, the statutory regime and its operation by the Upper Tribunal reflect a cautious approach to private takings. The operation of s. 84 LPA 1925 and its reference to the public interest is opaque; the highly-fact specific nature of the inquiries undertaken by the Upper Tribunal also allows for a careful balancing of individual interests and rights.

The thesis argues that the operation of the complex minutiae of both the ANLA 1992 and s. 84 LPA 1925 regimes reflects an unspoken awareness that whilst any workable property regime must contain adjustments and housekeeping rules, these are nonetheless functional private takings of particular sticks from an owner's bundle of rights. As Rose notes, these changes rouse suspicion and dislike not so much because of what they are themselves, but because of what they represent. Striking at a sense of personhood, even these minor readjustments 'can raise the prospect that some persons are treated as strangers to the community … it is not simply that owners perceive the loss of a valuable asset, but also that they sense that others are saying, in effect, we can take your things and we don't care, because you are not one of us.'[217]

[217] Rose, 'Property and Expropriation: Themes and Variations in American Law', 37.

CHAPTER 6
CONCLUSIONS

> *The idea of property is rather like an iceberg. It is more complicated than it looks, and much of its significance is submerged.*[1]

This thesis has explored the ambit of constitutional property protection in England. It has done so by making the first steps in mapping out the significance of the shadowy boundary between permissible public and unacceptable private takings of property. The approach taken has differed from previous work in focusing specifically on overlooked private takings, and considering whether there are meaningful justifications for the existence of this dichotomy, and in doing so against a primarily English backdrop.

At the outset, three main objectives were identified: (i) to review objections to private takings and their merits; (ii) to scrutinize three different and non-exhaustive categories of private takings to assess the attitudes of legislators and courts to private takings; and (iii) to comment on the broader impact of private takings on property doctrines and concepts. In drawing upon property theory, case law and statutes from both England and America, it has proved possible to cast light on the main strands of debate, and to lay valuable foundations for further research in this area. The conclusions drawn from this work are stated below.

1 OBJECTIONS TO PRIVATE TAKINGS

Following an examination of the terms and extent of constitutional property protection in England and America it is clear that both jurisdictions subscribe to a number of competing visions of property. It is a testament to the elasticity of the concept of property that it is able to represent all things to all people, and to accommodate so many

[1] KR Minogue, 'The Concept of Property and Its Significance' in JR Pennock and JW Chapman (eds), *Nomos XXII, Property* (New York University Press, 1980), 10.

conflicting calls. Despite this elasticity highlighting the arguable inherent emptiness of the concept, it continues mirage-like to present a façade of solidity to the ordinary person. One of the results of property's stable appearance has been to place it at the heart of the constitutional ordering of many countries, including England and America. At the same time, the will-o'-the-wisp nature of this 'phantom figure'[2] means that it is peculiarly resistant to offering unambiguous protection to those seeking to shelter within its ambit.

This dilemma is clearly to be seen in attempts to define the circumstances in which it is constitutionally permissible to take property rights allocated to individuals and rearrange them for the benefit of either the State or other private actors. The constitutional limitations on takings attempt to control tyrannical exercises of State power, and both Article 1 of the ECHR and the American Takings Clause imply that private takings are anathema. In fact, as the discussion in chapters 3 to 5 confirms, these takings have long existed in both England and America.

1.1 Lockean Objections

In examining private takings closely, it is possible to see why they might appear to undermine property rights. Private takings have a real capacity to destabilize a number of external and internal justifications for particular allocations of property in a given property regime. In Lockean terms, the identity of the acquiring party (whether State or individual) has the same impact – both serve to undermine the 'great and chief end' of preserving property. If anything, it is argued that a State taking is more offensive in a Lockean world than a private taking, since it is a more blatant and active refusal to honour the supposed social contract; a private taking can be dismissed as an unfortunate result of State passivity in enforcing property protection.

1.2 Personal Nexus and Personhood

More convincingly, private takings will be objectionable in property regimes that value the personal connections engendered by ownership. English law reflects some confusion on this issue. Parallels from other areas of the English property regime

[2] Gray, 'Property in Thin Air', 252.

demonstrate some governmental and judicial acknowledgement of the significance of a personal nexus with land. Both specific performance in relation to land contracts and the politically driven Crichel Down rules, indicate that personal links to land are not easily obliterated.[3] Confusingly though, despite frequent references to the centrality of the 'home' to human identity and security in English law, this concept has not been accorded consistently high levels of protection.

Typically, the English courts appear to take a robust and uncompromising approach when faced with arguments relating to the personal links and memories bound up in property, such as the home.[4] As a financial asset, the home may be worthy of protection but applying and protecting more diffuse and legally unquantifiable notions of 'personhood' appears to be too challenging for the common law. Parallels can be drawn here with the similar inability of the common law to comprehend and sufficiently protect *sui generis* native title rights in Australia, which again are bound up with notions of self and collective memory. It is argued that even if personhood often remains unacknowledged by the courts, it provides one of the more compelling explanations for the wider public reaction to private takings as exemplified by *Kelo v New London*, and the courts' unease in the *Pye* litigation. The instinctive concern aroused by private takings may be engendered by a realisation that personal comparisons are drawn between competing users of land, and the fear of realising that it is possible to move from being someone who belongs within the system, to someone 'other' whose rights and interests are no longer deemed to be worthy of protection.

1.3 SECURITY AND PRIVATE TAKINGS

Most property regimes place a high value on security of entitlements since otherwise it is feared that industry would wane, and society would degenerate to jealously guarding entitlements. Whilst takings *per se* are objectionable in systems that value stability and threaten to undermine the security of property rights generally, they are a frequent fact of daily life in many jurisdictions including England and America. The stability of property is weakened no matter who benefits from the taking – in this sense arguably, it

[3] See pages 82-84 above.
[4] See pages 84-91 above.

does not matter whether the State or a private party benefits since the supposedly stable property rights have nonetheless been taken. However, it is contended that private takings are capable of striking at stability due to their unpredictability, and the difficulties of challenging or reviewing the need for their existence.

Property regimes struggle constantly with the conundrum of ensuring the coexistence of sufficiently stable property rights with the promise of flexible rewards for entrepreneurship, and proprietarian concerns. The historical difficulty in maintaining this balance has been discussed in relation to the Mill Acts and the English railway mania, as well as the imposition of temporary access rights and discharge of covenants. In both cases, liability rule protection replaced property rule protection for a time, before settling down again once the wider gains had been achieved. The thesis contends that modern statutory private takings have a particularly pointed effect on the security of property rights and deserve to be scrutinized more carefully than currently appears to happen.

1.4 TYRANNY AND SCRUTINY OF PRIVATE TAKINGS

Past American experiences of segregation and the effects of urban clearances on minority groups have demonstrated the inherent capacity of takings to affect systematic discrimination. Additionally, private takings offer opportunities to see clear comparisons between those individuals who are deemed worthy of protection as 'insiders' and those 'outsiders' who are not. Here, as elsewhere, the ambiguity of the takings label rears its head. Constitutional property clauses generally protect existing property allocations rather than giving individuals a right *to* property, or making judgments about the moral deserts of property holders. However, if constitutional motivations alter, then the transfers once condemned as a taking may become an acceptable readjustment to the rest of society, including the courts. The proprietary upheaval brought about by the abolition of the slave trade, and reallocations of property following constitutional changes in South Africa, are examples of the impact that changing social norms may have on property allocations and labels. Analogous effects may also result from a growing recognition of the relativity of property and increased environmental concerns.

In this context, the courts play a valuable role in policing the exercise of takings powers. They act as the mediums through which changing societal norms may influence property rights. Whilst the English courts are greatly constrained by the limitations of parliamentary sovereignty, and their inability to subject private entities to judicial review or HRA 1998 review, the thesis argues that they exhibit a cautious approach towards private takings. Greater transparency in balancing the competing property values at play in private takings would act as a valuable source of information for individuals.

2 LEGISLATIVE AND JUDICIAL ATTITUDES TO PRIVATE TAKINGS

The thesis concludes that private takings have been misunderstood. Despite the rhetoric denouncing them, they have in fact played a long and significant role in Anglo-American property regimes and society, and continue to generate complex and equivocal reactions in both the judiciary and legislatures. A closer examination reveals that private takings do not form a monolithic category. Instead, with the imposition of a loose and somewhat porous taxonomy, they can be divided into different types. This approach allows for a more nuanced appreciation of their breadth and ubiquity. Private takings appear to occur: (i) against an explicit legislative backdrop; (ii) as an in-built part of common law property regimes, albeit against a statutory background; and (iii) as housekeeping or regulatory rules authorising *partial* takings, again supported by legislation.

The examination undertaken in the thesis of these categories of private taking reveals not only that judicial and legislative reactions vary according to the type of transfer involved, but that there are also temporal variations within categories. One of the clearest examples of this can be seen in chapter 4 with its focus on adverse possession. This well-established doctrine has waxed and waned in significance. More recently, particularly following the enactment of the LRA 2002 and the HRA 1998, squatters have fallen out of favour with the legislature. From activist limitation statutes and statutory extinction of title to the explicit repeal of the common-law doctrine of implied licence, the courts have promoted private takings under adverse possession. This

approach has altered dramatically with the momentous changes introduced by the LRA 2002, which now actively protects the paper owner's title against the majority of intrusions. It is argued that this change in attitude has been influenced by the introduction of explicit property protection to England via the HRA 1998. Suddenly, the 'windfall' benefits gained in contested trespassory adverse possession scenarios no longer seem to be an acceptable *quid pro quo* for the advantages accruing under other instances of the doctrine.

The other private takings considered in the thesis also reveal changing judicial and legislative perspectives. Historically, as noted in chapter 3, English and American governments have actively encouraged private takings that serve a broadly entrepreneurial function. The Mill Acts and the railway boom are merely two examples of this strategy. Whilst the judiciary in America have been able, when desirous, to take a more interventionist approach to this type of legislation, the English courts have been relatively hamstrung. Parliamentary sovereignty and deferential standards of judicial review have combined to make the English courts reluctant to interfere in statutory private takings. The thesis argues that this position has changed little in England under the HRA 1998 given the problems with reviewing non-public authorities, and the deferential Strasbourg approach to policy decisions. There are few indications that a modern 'pro-entrepreneurial discourse' is underway; if anything, legislatures appear to have taken a more bullish approach to the protection of established property rights. Large-scale *Kelo*-type development schemes, broad subjectively worded powers, and increasingly streamlined objection procedures appear to favour private takings. It remains to be seen whether, as in previous centuries, the tide of opinion will turn once more.

Similarly, chapter 5 observes that judicial and legislative attitudes are hesitant towards private takings in the context of creating access rights and discharging covenants. Despite acknowledging the utility of housekeeping and regulatory rules of this type, the legislature has made provision for compensation to be paid in certain circumstances. This appears to be in recognition that the owner has 'lost' at the behest of another party, even if in the process the particular interest itself has undergone a metamorphosis or vanished. One owner loses the right to use their property as they see fit and to exclude

others, whilst the benefiting party gains a right of access. Similarly, with covenants the dominant owner loses their right to limit or control someone else's use of property, with the servient owner gaining an expanded and unencumbered title. Despite the economic, and potentially relational, benefits resulting from these takings, the legislature has set significant restrictions on their availability. There is only a partial, restricted right to access, and covenants can only be removed or modified where various complex requirements are satisfied. In this instance, it seems that the legislature is wary of private takings, perhaps due to the traditionally central significance of an owner's right of exclusion. In relation to covenants, the restrictions may be based on an acknowledgment that the parties affected are already likely to have engaged in some financial bargaining on purchasing the property.

3 IMPACT OF PRIVATE TAKINGS ON PROPERTY

The case studies indicate that judicial and legislative attitudes to private takings vacillate due to manifold shifting social and political pressures. The individualistic and exclusive conception of property, which continues to hold so much sway in the general population, is incompatible with the government's need to encourage entrepreneurship and facilitate the economically efficient use of land. Were these issues to be openly debated it is likely that, as in the wake of *Kelo v New London*, there would be public outcry. Nonetheless, acknowledging the value choices implicit in private takings would facilitate a more open dialogue about what property regimes and constitutional safeguards are there to protect and why.

The thesis maintains that it is significant that there is little overt discussion by either the legislature or judiciary of the issues raised by private takings. Whilst the contours of public use (and public interest) limitations are subject to great debate, there has been little meaningful analysis of *why* the public-private dichotomy exists. The thesis concludes that this divide is significant if only to the extent that private takings present different hazards from public takings, in particular their effect on property rights in regimes that value personhood and security.

Despite being low-key, scattered, and unacknowledged, private takings cast just as much light on property as extraordinary rights disruptions stemming from major

societal upheaval. The sheer number and frequency of private takings means that they act as a valuable barometer of change. Private takings present clear clashes between differing property values: between personhood and economic efficiency; between insiders and outsiders; between relational interests and individualistic whims; between environmental concerns and development; between access and exclusion; and between stability and change. The twists and turns of private takings, outlined in this thesis, mirror the intricacies and riddles inherent in property itself. Whilst property arguably is nothing more than a figment, it continues to offer a compelling dream of being all things to all people.

In this sense, the impact of private takings on property may well be significant to the extent that they threaten to undermine the beguiling appeal of property. As with Janus, the Roman god of beginnings and endings, property reveals two very different faces to the world: to the property lawyer it already appears to be an empty concept in a state of constant metamorphosis, riven with internal and external tensions. Yet, to the ordinary person, property continues to present a facade of ageless significance and solidity. It is this latter conception of property which is most at danger from the realisation that private takings are ubiquitous. However, this writer believes that the inherent flexibility of the property concept may, paradoxically, be its best protection.

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