VERMONT LAW SCHOOL

GEORGETOWN UNIVERSITY LAW CENTER

BERKELEY LAW

THE 13TH ANNUAL CONFERENCE ON LITIGATING TAKINGS AND OTHER LEGAL CHALLENGES TO LAND USE AND ENVIRONMENTAL REGULATION

NOVEMBER 5, 2010

BERKELEY, CALIFORNIA

PUBLIC TAKINGS OF PRIVATE CONTRACTS

BY

JOHN D. ECHEVERRIA

VERMONT LAW SCHOOL

Public Takings of Private Contracts

Does the government take private property under the Takings Clause when it takes an action destroying or otherwise harming the benefit of a contractual relationship between private parties? While the category of takings claims based on this scenario may be unfamiliar to most scholars and practitioners, the courts have seen a steady stream of such claims. They raise thorny doctrinal challenges and also pose some interesting questions for takings law in general.

Courts addressing this type of case have devoted a good deal of attention to whether the claimants' property has been "taken." In the process, they have developed a distinctive approach to the takings question peculiar to alleged public takings of private contracts. On the other hand, they have devoted little attention to the threshold question of whether the claimants possess "property" based on their contracts within the meaning of the Takings Clause, or to defining the nature and scope of the property interests at stake. The thesis of this article is that judicial energy as reflected in the case law has been largely misdirected. There is no justification in either the text or the history of the Takings Clause, or in principles of modern takings doctrine, for a special standard for analyzing takings claims involving private contracts. On the other hand, there are several grounds for distinguishing asserted property interests based on contracts from other types of property. This strand of takings litigation would stand on a more solid foundation, and judicial decision making would be more coherent and predictable, if the courts recognized that contract interests represent property, but property of a special type.

Almost 90 years ago, in Omnia Commercial Co. v. United States,[1] the Supreme Court rejected a taking claim brought by a company whose contract to receive was upended by the government's requisition of the supplier's annual production to support the nation's mobilization for WW I. The Court ruled that plaintiff's contract interest represented property within the meaning of the Takings Clause, but concluded that it had not suffered a taking because the requisition order had "frustrated" plaintiff's expectations under the contract, but had not "appropriated" the contract. While Omnia's distinctive appropriation vs. frustration test has never been overruled, the validity of the test and the Court's reasoning are open to question.

[1] 261 U.S. 502 (1923).

Modern Supreme Court decisions suggest significant uncertainty about Omnia, and some scholars have severely criticized it. Some lower courts have questioned whether Omnia is consistent with modern takings doctrine and sometimes have developed and applied alternate tests for analyzing asserted public takings of private contacts.

A more logical way of explaining why Omnia-type takings claims deserve different treatment than other takings claims is to recognize that private contracts represent property within the meaning of the Takings Clause, but a special, qualified type of "property." There are two relevant distinguishing features of asserted property rights based on contract, assuming, as I do in this article, that private contract interests qualify as "property" within the meaning of the Takings Clause. First, private contracts create in personam legal relationships establishing rights and responsibilities only between the contracting parties. This is in contrast to other types of property interests protected by the Takings Clause, such as interests in real estate, which establish in rem rights, which, as the saying goes, are good against the world. The other distinctive feature of asserted property rights based contracts is that they arise from and involve a bilateral relationship between the contract obligor and the contract obligee. By contrast, traditional property interests, such as interests in land or equipment, may have grown out of some contractual relationship, but, for the purpose of takings analysis, the property owner generally stands alone vis-a-vis the government.

These distinctive features of property rights grounded in contract point to an appropriate framework for addressing alleged public takings of private contracts. First, the in personam nature of contract rights provides a basis for distinguishing, for takings purposes, between government actions that affect the economic value or practical utility of a private contract, and government actions involving a takeover of one of the party's roles in performing the contract. Because contracts create only in personam rights, government actions indirectly affecting the value or utility of a contract do not affect a legal interest created by the contract and, therefore, do not represent a property interest that will support a taking claims. On the other hand, when the government directly inserts itself into the parties' contractual relationship, by assuming the contract benefits and/or duties, or by transferring them to some new private party, the government does affect a legal interest created by the contract which should be regarded as property for the purpose of the Takings Clause. While this analytic approach leads to results that more or less tracks the results courts achieve using Omnia's distinction between contract frustration and appropriation, it provides a sounder explanation for the courts' decisions and avoids ad hoc redefinition of the term "taking" to fit the category of alleged public takings of private contracts.

Second, the bilateral nature of executory contracts provides another useful basis for thinking about how courts should address this type of taking claim. For one thing, a government action adversely affecting one party to a contract may not adversely affect the other party to the contract, and indeed may benefit the other party. For example, in Omnia, while the Omnia corporation was undoubtedly harmed by its inability to obtain steel at the low, pre-wartime price

specified in its contract, the Allegheny Steel company was presumably benefited by the fact that it could sell the steel to the government at the elevated wartime price. For another, the contractual relationship provides an opportunity for the parties to negotiate between themselves over how the risk of financial loss due to government action (or any other event) should be allocated between themselves, and also address whether one party or another can better anticipate and cope with such disruptions. When a government takeover of a contract results in no net economic loss to the contracting unit as a whole, the courts should deny compensation, and leave it to the parties to allocate the potential burden (and potential windfall) between themselves. On the other hand, when a government takeover of a contract results in a net economic loss to the contracting unit, a finding of taking may well be warranted.

Part I of this Article describes the universe of alleged public takings of private contracts, providing examples and contrasting this type of taking claim with other takings claims. It also describes some of the distinctive features of putative property interests based on contract. One such feature, as mentioned above, is that there are at least two parties to a contract giving rise to the putative property right. Another is that the contractual nature of the interest may blend almost imperceptibly into more traditional property interests. For example, conceptually, a lease can be regarded either as a contract or a traditional interest in land, raising the question whether government interference with a lease should be regarded as a potential taking of a contract interest or of a real property interest? In addition, contractual arrangements can mature over time into more traditional property interests; parties may form a contract to convey some property, and once the contract has been executed the contract generally becomes irrelevant. However, it is sometimes hard to know when the contractual relationship ends and the holding of a more traditional property interest begins.

Part II lays out several alternative ways of addressing whether a government interference with private contracts can produce a taking. First, it can be argued that contracts are something other than property and, therefore, the Takings Clause does not reach government interferences with private contract rights at all. While this view is contrary to longstanding precedent, it has some appeal based on the language of the Takings Clause and other constitutional provisions. Furthermore, the decisions supporting the understanding that private contracts represent property appear, upon examination, both quite thin and relatively narrow. Second, the distinction between frustration and appropriation based on the Omnia line of cases provides another approach for addressing this type of taking claim. The fundamental question raised -- but not answered -- by this line of cases is why, if a contract interest represents property, an Omnia-type taking claim calls for a special takings test? The third approach, supported by some modern case law, is that takings claims involving private contracts are no different than any other type of taking claim and should be analyzed in exactly the same fashion. This Part's analysis of these three alternatives concludes that none is fully satisfactory.

Part III lays out a new, alternative theory, accepting the established precedent holding that private contracts represent property for constitutional takings purposes, but arguing for a

special, relatively narrow definition of property in this context. It begins by describing the limited guidance the Supreme Court has offered for defining what constitutes property under the Takings Clause, emphasizing that the Court has said that property interests are generally created, and their dimensions defined, by reference to state law. It then argues that the in rem versus in personam distinction between traditional property rights and contract interests represents part of the deep architecture of state common law of both property and contract and, therefore, provide a logical basis for defining the scope of property interests based on contract differently than property interests rooted in more traditional property, such as a real property. The result of this analysis is that a government action indirectly affecting the value or utility of a contract interest should not be regarded a affecting a property interest rooted in contract and therefore should not support a taking claim. On the other hand, a government takeover a contractual relationship, because it intrudes upon the protected in personam nature of a contract right, should potentially support a taking claim The second part of the proposal takes into account the bilateral nature of the contracting relationship and calls for a takings analysis that focuses on the effect of the government action on the contracting unit, not the individual parties. If the government action imposes no net loss on the unit, there is not a taking. If it does impose a loss, there is a potential taking. The upshot is a distinctive takings analysis for contracts, but not because contracts deserve a special taking test, but because contract interests represent a distinctive form of property.

The Conclusion offers some final observations. Most importantly, it suggests that the approach in this article, focusing on defining the nature and scope of the property interest, rather than on describing the appropriate test for resolving the claim, might help illuminate and resolve other conundrums in takings law, such as how to resolve takings claims based on government destruction of narrow, commercial interests in particular property, or takings claims arising from regulation of water interests.

I. Takings Claims Based on Government Interference with Private Contracts.

Alleged Public Takings of Public Contracts And . . . The universe of alleged public takings of private contracts includes claims for compensation under the Takings Clause mounted against government at some level (the United States, or a unit of state or local government) based on an action that destroys or otherwise harms the value or utility of a private contractual relationship. A typical private contract giving rise to this type of claim would be an agreement by an individual or firm, in exchange for some payment, to provide a good or service to another individual or firm, as in Omnia. However, this category also includes contracts between a private party and some unit of government, or even between two units of government, so long as the government doing the contracting is different from the government allegedly doing the taking. Thus, this category would include for example, a claim based on a federal action affecting a contract between a private entity and a state government agency.[2] The case law

[2] See, e g., Tulare Lake Basin Water Storage District v. United States, 49 Fed.Cl. 313 (2001).

proceeds on the assumption that these different scenarios all involve the same basic legal problem, and there is no reason to question this assumption.

On the other hand, the universe of alleged takings of private contracts does not include potential public takings of *public* contracts, that is, cases in which the government affecting the contract interest is itself a party to the contract. While there are no doubt commonalities between this type of taking claim and an alleged public taking of a private contract, a fundamental distinction between the two is that an alleged taking of a public contract interest can potentially also be framed as a breach of contract claim against the government. A claim of breach in turn implicates the panoply of so-called sovereign defenses that frequently exonerate the government from liability for what would otherwise be a compensable breach, The potential availability of both takings and breach claims when the government is both a contractor and the party impairing the contract raises complex substantive as well as procedural question, all of which are beyond the scope of this article. As suggested in the conclusion, however, the analysis offered here of relatively straightforward claims of public takings of private contracts may shed some useful light on how to address seemingly more complicated claims of public takings of public contracts.

Finally, when the government defendant is a unit of state or local government an alleged public taking of a private contract might be framed in the alternative as an "impairment" of contract in violation of the Contracts Clause. By general consensus, the Contracts Clause applies only to state and local government, and not the federal government. Thus, in the case of the United States, a claim under the Contracts Clause would not be an alternative to a claim of a public taking of a private contract. Yet, as discussed below, the existence of the Contracts Clause, the constitutional provision that most explicitly addresses protection of expectancies based on contract, must be taken into account in constructing the doctrine of public takings of private contracts,

Examples of Public Takings of Private Contracts. Claims of public takings of private contracts tend to arise in association with major world events (wars, frequently) or as a result of significant developments in public policy, producing a generally colorful array of cases. Government impairment, or even destruction, of a private contract expectancy, even if a source of annoyance to one or both of the contracting parties, presumably does not generally give rise to litigation assuming the disappointed party can find a new contracting partner. The litigated cases apparently arise when the price of the good or service contracted for has changed dramatically between the time of contract formation and the time of the alleged taking, or where there are no ready substitutes. In Omnia, the reason the government's requisition produced a lawsuit was evidently the fact that Omnia had contracted for the steel at a favorable, pre-war price, and it faced a severe economic loss if it was forced to purchase substitute steel from a different supplier at the higher wartime price.

Other prominent and instructive examples of alleged public takings of private contracts include the following:

- In Huntleigh USA Corp. v. United States,[3] the primary private firm responsible for conducting passenger screening at the nation's airports claimed a taking based on Congress' decision, following the 9/11 attack, to reassign passenger screening responsibilities to a newly formed federal security agency. The company claimed that the government's decision to take on this new role, and effectively displace the plaintiff from its prior business, resulted in a taking of its property interests in its contracts with the major airlines to provide screening services. The Federal Circuit affirmed a decision rejecting the claim.

- In Palmyra Pacific Seafoods, L.L.C. v. United States,[4] a company with a contract with the owner of a remote Pacific Island to base a commercial fishing operation on the island claimed that the government took its contract when the government acquired the island for conservation purposes and prohibited commercial fishing in the area surrounding the island, effectively destroying the value of the contract. The Federal Circuit affirmed a decision rejecting the claim.

- In Tulare Lake Basin Water Storage District v. United States,[5] a California irrigation district claimed a taking of its interest in a water supply contract with the Department of Water Resources as a result of a restriction on water deliveries from the California Water Project imposed pursuant to the Endangered Species Act in order to protect imperiled fish. The U.S. Court of Federal Claims found a taking and the Bush Justice Department elected not to appeal.

- In International Paper Co. v. United States,[6] in an echo of Omnia, a paper company claimed a taking of its property interest in a contract with a power company to utilize a the flow of a water canal for hydrogenation when the federal government issued an order directing the power company to divert all of its power production capacity to other companies the U.S. government deemed more important to the nation's preparation for WW I. The U.S. Supreme Court upheld the taking claim.

- In Connolly v. Pension Benefit Guaranty Corp.,[7] a firm seeking to withdraw from a multi-employer pension plan claimed a taking when Congress enacted legislation

---

[3] 525 F3d 1370 (Fed. Cir. 2008).
[4] 561 F.3d 1361 (Fed .Cir. 2009).

[5] 49 Fed.Cl. 313 (2001).

[6] 282 U.S. 399 (1931).

[7] 475 U.S. 211 (1986).

increasing the company's withdrawal liability, contrary to the company's agreement with its employees placing a cap on the company's liability to the pension fund. The U.S. Supreme Court affirmed dismissal of the taking claim.

The Distinctive "Triangular Relationship" in Takings Cases Involving Private Contracts. An important distinguishing feature of alleged public takings of private contracts is that the government action affects a bilateral relationship. Ownership of a fee interest in real property, for example, might well be the product of some prior contractual relationship. But, for the purpose of analyzing an alleged taking based on a government action affecting a real property interest, the contract seller is typically long gone and, for most intents and purposes, the particulars of the prior contractual relationship are irrelevant. By contrast, a government action intruding upon an executory private contract affects both of the parties to the contract, and either or both of the parties might raise a claim against the government, or against each other, based on the government action.

This "triangular pattern of relationships," to borrow an apt phrase, makes takings claims arising from alleged interferences with private contracts unusual in several ways. First, the parties have the opportunity, in the course of negotiating the contract, to anticipate the risk of disruptive government action and to allocate the risk of such a disruption between themselves. In this fashion, at least one of the contracting parties could protect itself (presumably at a price) from the effects of some supervening government action. And the parties could take advantage of their negotiations to identify in advance which of them could cope with a government interference with the greatest ease and least cost.

Second, alleged public takings of private contracts can affect the different sides of the contract in very different ways. In Omnia, the plaintiff's pre-war contract to purchase steel at a low price was undoubtedly a valuable corporate asset at the time of the government's intervention. On the other hand, its contracting partner, the Allegheny Steel Company, was saddled with an unfortunate contractual commitment to sell steel at a (then) below market price. Thus, the plaintiff was motivated to sue by the serious economic harm it suffered as a result of losing the opportunity to obtain steel pursuant to the contract. But the government's intervention was presumably correspondingly good news for Allegheny. Since the government presumably paid the elevated war time price for the steel under its requisition order, the government order was a boon to Allegheny, at least assuming it could point to the requisition order to support an impossibility defense in a breach of contract claim brought by Omnia. The net effect of the requisition order was neutral as applied to the parties considered as a single contracting unit, but obviously significantly rearranged the benefits and burdens of the relationship *between* the parties.

Considered in this light, Omnia was, in a sense, an easy case. Omnia could have guarded against the risk of financial loss due to the requisition by negotiating with Allegheny for an indemnity if performance were rendered impossible by government action or some other

intervening event.[8] In other words, Omnia could have negotiated to receive all or some of the windfall profits received by Allegheny as a result of the requisition order. There is no apparent reason to interpret the Takings Clause to offer relief to one party to the contract when the government action confers a boon on the other contracting party, especially when the second party gets to keep the windfall as a direct result of the first party's lack of foresight.

However, this explanation for why the Court arguably achieved a fair result in Omnia does not provide a general solution to the question of how the Takings Clause should apply to private contracts. One way of looking at Omnia is that involved the question of whether the Court should have modified the parties' agreement, presumably made by default, about how to divvy up the compensation award in the event of a government requisition of the steel that was the subject of the contract. In many other cases, however, the government interference with contract is not accompanied by payment. The government sometimes takes action that amounts to a public declaration that continuation of a business venture is public policy.[9] Parties could well decide in advance how to allocate between themselves the risk of such a potential loss, but the net effect of the government action is still to impose a net loss on the contracting parties as a unit. Insofar as the Takings Clause is designed to provide protection for citizens singled out to bear economic burdens to advance public goals, the question remains whether and how that principle should apply to government interferences with property interests rooted in private contracts.

The Obscurity of the Contract/Property Distinction. A final threshold point to make about alleged public takings of private contracts is that it is sometimes difficult to know whether a case involves an asserted property interest based on contract or based, instead, on more traditional type of property. A lease is sometimes treated as a contract, and sometime as a real property interest. A leaseholder who can no longer enjoy her lease due to some intervening government action might be able to avoid the legal debate about whether one can claim a taking of a private contract interest by characterizing her interest as a real property interest.[10] In addition, contractual arrangements often mature over time into more traditional property interests, and it may sometimes be hard to know when the contractual interest turns into a traditional property interest. In Omnia, for example, at some point in the production or delivery process the steel would have unambiguously become the property of Omnia and a requisition order pointed at the steel would have involved a taking of Omnia' s property, not Allegheny's Line drawing problems of this type arise incessantly.

---

[8] Victor p. Goldberg et al, "Bargaining in the Shadow Eminent Domain: Valuing and Apportioning Condemnation Awards Between Landlord and Tenant " 34 UCLA Law Review 1083, 1135 (1987).

[9] See, e g., Huntleigh USA Corp. v. United States, supra; NL Industries, Inc. v. United States, 839 F.2d 1578 (Fed Cir., 1988) .

[10] See e.g., Buckhardt

In view of the difficulties surrounding alleged public takings of private contracts, it is not surprising that courts sometimes characterize takings claims involving impairments of contract interests as instead involving more traditional property interests. The choice of how to frame the case is often outcome determinative. In Tulare Lake, the U.S. Court of Federal Court Claims rejected the government's Omnia defense, reasoning that the plaintiff's contractual right to water had matured to the point that it should not be viewed as a simply a contract right to receive water but a property interest to use the water. In Cienega Gardens v. United States, developers of subsidized housing asserted takings claims based on federal legislation that barred them from prepaying their mortgages in accordance with their private mortgage agreements. The effect of this prohibition was to compel the developers to continue rent units at below-market rates. In one decision, a panel of the Federal Circuit, focusing on certain plaintiffs' property interest in their contractual right to prepay, found a taking.[11] However, a subsequent panel of the Federal Circuit, addressing the claims of a different group of developers, virtually ignored plaintiffs' contractual interests and focused instead on their interest in the rental buildings themselves, and found no taking.[12]

III. Does Government Interferences with Private-Private Contracts Constitute Takings?

Based on the constitutional text, relevant precedent, and arguments of various advocates, there appear to be at least three plausible approaches for addressing takings claims based on government interferences with private contracts. First, it can be contended that the Takings Clause should not apply to alleged interferences with contracts based on the straightforward, if perhaps simplistic, logic that contract interests are rooted in contract, not property, and therefore they are not within the scope of the Takings Clause's protection for "property." Second, Omnia and the line of cases following that precedent suggest that the Takings Clause should apply in a limited way to interferences with contracts, that is, when government appropriates a contract, but not when it merely frustrates contract performance. The third alternative jettisons the limitations of the Omnia test, and applies the regular panoply of modern takings test (Penn Central etc.) to government actions that adversely affect the economic value and/or utility of contract interests. I will briefly describe and analyze each of these approaches.

A. Does the Takings Clause Apply to Private Contracts?

---

[11] 331 F.3d 1319, 1324 (Fed.Cir.2003).

[12] 503 F.3d 1266 (Fed Cir. 2007). See also Acceptance (was the property interest the opportunity to sell the business of under the contract of sale, or the underlying crop insurance policies (intangibles that might well be property); Eastern Enterprises (plurality characterization of contract right/expectation, vs. money)

It is possible to contend that takings claims based on government interference with private contract cannot succeed because the Takings Clause protects property interests, not contract interests. After all the Takings Clause provides that "private property" shall not be taken for public use without just compensation, and makes no reference to contracts. There is ingrained understanding among legal practitioners and scholars, dating back at least to Blackstone, and obviously reflected in law school curricula across the country today, that contracts and property represent distinct legal subjects. When the drafters used the word "property" in the Takings Clause they arguably meant to exclude the separate universe of interests based on "contracts."

This reading of the Takings Clause draws support from the Contracts Clause, which provides in relevant part that, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts**."** The drafters of the Takings Clause were obviously working against the backdrop of this provision because the Contracts Clause, included in Article I of the Constitution, had been in place for some time when the Takings Clause (and the rest of the Bill of Rights) was being drafted. Because the drafters of the Takings Clause knew that the Constitution already protects contract interests, their failure to include the term contract in the Takings Clause suggests that they intended the Takings Clause to apply to something different – property interests, not contract interests It is also possible, of course, that the drafters of the later-adopted Takings Clause intended the term property to signify, not something different from contracts, but something more all-encompassing, which would include contract interests as well as traditional property interests. While not wholly implausible, this alternate reading has to fight an uphill battle against the fact that the drafters of the Takings Clause used the term "property" knowing full well that the different term "contract' already appeared elsewhere in the document.

This alternate reading appears especially implausible when considered in light of the fact that the Contracts Clause, by its terms, and according to longstanding Supreme Court precedent, applies only to the states, not to the federal government. By contrast, the Takings Clause, when it was drafted, and for the first half of its history, was understood to apply exclusively to the federal government. Given the distinct levels of government to which each provision originally applied, it is difficult to imagine that, following adoption of a Contracts Clause solely applicable to the states, the drafters of the Bill of Rights reversed course in the Takings Clause and -- without explicitly saying so -- established a broad restraint on government impairments of contract specifically applicable to the federal government. While the modern tests for violations of the Takings and Contracts Clause are far from perfectly overlapping, both provisions were intended, in a general sense, to police government actions upsetting private expectations. In light of the Contracts Clause and its focus on the states, it is awkward to suggest that the Takings Clause was drafted to protect contract interests as well as property interests.

Despite the appeal of this argument, numerous Supreme Court decisions, tracing back to at least to the early part of the 20th century, confidently assert that private contractual interests constitute property for the purpose of the Takings Clause. In Omnia, the Court stated, at the

beginning of its analysis, without hesitation or qualification, that "The contract in question was property within the meaning of the Fifth Amendment, and if taken for public use the government would be liable." A few years later, in Lynch v. United States,[13] perhaps the mostly widely cited decision on whether a contract right constitutes property, the Court stated:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States."

Decisions of the U.S. Court of Appeals for Federal Circuit, which exercises virtually exclusive appellate jurisdiction over takings cases involving the United States, cite the statement in Lynch quoted above as a virtual proposition of black letter law.

Not surprisingly, given the text of the Constitution, there is some room to question the authority of these assertions. To support its statement that private contracts were "property" within the meaning of the Takings Clause, the Omnia Court cited Long Island Water-Supply Co. v. Brooklyn.[14] That case arose from the newly formed City of Brooklyn's condemnation of a private water company's equipment and its government-issued franchise to supply water to a portion of the city. The Court rejected the plaintiff's primary argument that the exercise of eminent domain violated the Contracts Clause by impairing the company's franchise agreement to supply water. In the course of resolving that issue, however, the Court addressed whether the water company's franchise was subject to condemnation, to which the Court supplied an affirmative action, relying on Blackstone's categorization of a royal franchise as a type of "incorporeal hereditament."[15] Other 19th century Supreme Court decisions similarly relied on Blackstone to support the conclusion that government-issued franchises to construct infrastructure developments were subject to condemnation.[16] Assuming a franchise can properly be characterized as a type of property interest, it hardly follows that an interest in any type of contract, including purely private contracts, should be treated as property. Certainly nothing in Blackstone's discussion of why royal franchises and other types of incorporeal hereditaments should be regarded as property supports the conclusion that all interests in contracts should be regarded as property for takings purposes. [more, deeper research needed here.] Nonetheless, this line of cases has given rise to a firm understanding that contract rights, generally speaking, are property within the meaning of the Takings Clause.

---

[13] 292 U.S. 571 (1934).

[14] 166 U. S. 685 (1897).

[15] Id. at 721 ("We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more. It is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume (chapter 3, p. 20), of the Rights of Things.').

[16] West River Bridge Co. v. Dix, 47 U.S. 507, 534 (1848).

While there is definite appeal to this argument, it appears very late in the day to revisit the fundamental issue of whether contract interests constitute "property" within the meaning of the Takings Clause. Furthermore, other Supreme Court decisions state that contract interests can constitute property for the purpose of the Due Process Clause; while these decisions do not necessarily support the idea that contract interests are property within the meaning of the Takings Clause, they do contradict the idea that the Contracts Clause can be viewed as the sole source of constitutional protection for the contract interests. Absent a revolution, then, it seems sensible to proceed on the assumption that at least some contracts can constitute some type of property within the meaning of the Takings Clause.

B. The Omnia Test

Operating on the assumption that a contract interest does represent property within the meaning of the Takings Clause, the courts have focused virtually all of the their attention on how to evaluate whether a government action destroying, frustrating or otherwise adversely affecting a property interest rooted in contract constitutes a "taking."

As mentioned, the leading precedent is Omnia Commercial Co. v. United States.[17] The case arose from the U.S. government's requisition, following the United States' entry into World War I, of an entire year's production of the Allegheny Steel Company, and its order to Allegheny not to comply with its prior contract to deliver steel to the Omnia Commercial Company. Under its contract, Omnia was entitled to receive the steel at well below the (war-elevated) market price. Omnia sued for a taking of its alleged property interest based on its contract. The Supreme Court rejected the claim in a succinct, unanimous opinion. After quickly affirming that Omnia's contract interest was indeed "property," and that a taking of a property interest based on a contract right is compensable under the Takings Clause, the Court focused on whether there was a taking of the property. The Court pursued two different lines of analysis. First, invoking decisions describing the wide breadth of the police power to address threats to public health, safety and welfare, the Court stated that, so long as the government is pursuing "a permitted purpose," the Takings Clause is not implicated even if the action "results in serious depreciation of property values." Strikingly, the Court's opinion in Omnia followed by only a few months the Court's decision in Pennsylvania Coal Company v. Mahon,[18] widely viewed as the foundation of the modern regulatory takings doctrine. The Omnia Court cited Mahon in passing but without any suggestion that the decision represented a notable change in takings law. Second, in the more frequently quoted portion of the opinion, the Court justified rejecting the taking claim by stating that the government had not "appropriated" the contract – that is, it had

[17] 261 U.S. 502 (1923).

[18] 260 U.S. 393 (1922).

not acquired "the obligation or the right to enforce" it – but instead had merely "frustrated" performance. The Court said plaintiff's takings theory improperly "confound[ed]" the "subject matter" of the contract, the steel, with the contract itself, consisting of "the agreement and the obligation to perform."

In subsequent cases, the Supreme Court has frequently (but not consistently) relied on the distinction drawn in Omnia. For example, in Brooks-Scanlon v. United States,[19] another wartime requisition case, in this instance involving a contract for the constructions of boats, the Court ruled that the government had not merely frustrated the contract but actually appropriated it. Unlike in Omnia, the Court said, the government "put itself in the shoes of claimant and took from claimant and appropriated to the use of the United States all the rights and advantages that an assignee of the contract would have had." Similarly, in International Paper Co. v. United States,[20] the Court upheld a taking claim based on the U.S. government appropriation of the power production of the Niagara Falls Power Company and its order that the power be directed to companies important to the war effort, to the detriment of the International Paper Co. which had a contract with the power company to a receive a certain volume of water to operate its mill. The Court concluded that the government "took the property" that International Paper owned, distinguishing Omnia on the ground that that case involved, not an appropriation, but a government action that made it "practically impossible" for a party to carry out a "collateral contract."

While Omnia continues to be cited by the Supreme Court and lower federal courts, its continuing authority is in some doubt. Professor Richard Epstein has criticized the distinction between frustration and appropriation as "irrelevant."[21] A judge of the U.S. Court of Federal Claims, while faithfully applying Omnia, cited "certain curious features of that decision," in particular the Court's citation of precedents suggesting that the government has virtually unlimited regulates potential harms to the public without incurring takings liability. The Court questioned whether subsequent Supreme Court takings decisions eclipsed the reasoning of Omnia, stating

> If, as the Supreme Court declared in *Omnia,* contracts are property like any other form of property, it might now be questioned whether indeed the government could, by regulatory action or the exercise of its police power, so extensively "frustrate" the purposes of a contract (or a party's right to perform thereunder) as to go beyond regulation and become a taking.

---

[19] 265 U.S. 106 (1924).

[20] 282 U.S. 399 (1931).

[21] Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 92 (1985)

A subsequent Federal Circuit decision reprised the same theme by referring to a party's argument "that the decision[] in Omnia . . .[is] contrary to more recent case authority".[22] Despite these questions about the continuing validity of the decision, Omnia remains the leading precedent in the Federal Circuit.[23]

The fundamental problem with the Omnia line of cases is that it does not explain why, if a contract interest represents property within the meaning of the Takings Clause, the takings analysis applicable to this type of claim should not be identical to the normal analysis that applies to claims under the Takings Clause. The distinction between an "appropriation" and a "frustration" does not track with the rest of takings law. A direct takeover of a contracting party's rights and responsibilities can plausibly be equated to a traditional physical appropriation of land or some other property. But Omnia's non-taking "frustration" category does not fit with the rest of takings doctrine. In any of number of recent regulatory takings cases, the Supreme Court has addressed government rules that can fairly be described as "frustrating" the claimants' planned uses of the property. However, the Court did not say that these claims should fail as a matter of law. While regulatory takings cases succeed only in rare cases, the kind of frustrations regulations inflict are not treated as being as outside the bounds of takings law, as Omnia says is the case with contract frustrations. The Omnia line of case quite clearly establish a special, more parsimonious takings doctrine for property based on contract, but it does not explain why.

C. Applying Standard Takings Analysis

As the foregoing criticisms of Omnia imply, a third approach to alleged public takings of private contracts is to use the same takings analysis that applies to any other taking claim, jettisoning the appropriation vs. frustration distinction. Under this approach, a contract right is regarded as property within the meaning of the Takings Clause, and a government action affecting such a property interest is analyzed under the Takings Clause in the same fashion as any government action affecting a traditional property interest. According to this view, the basic purpose of takings doctrine – to prevent government from singling out particular citizens to bear serious burdens that should be borne by society as a whole – is just as applicable to property interests based on contract as it is to more traditional property interests.

Consistent with this alternate approach, a number of courts have applied, at least in the alternative, a traditional Penn Central analysis to takings claims based on alleged government interferences with private contracts. Most notably, in the two most Supreme Court recent cases involving this type of claim, Concrete Pipe & Products of Cal., Inc. v. Construction Laborers

[22] 767 Third Avenue Associates v. United States, 48 F.3d 1575, 1582 (Fed. Cir. 1995)

[23] See e.g., Huntleigh USA Corp. v. United States, supra; Palmyra Pacific Seafoods, L.L.C. v. United States, supra

Pension Trust for Southern Cal.,[24] and Connolly v. Pension Benefit Guaranty Corporation,[25] the Court rejected the takings claims after subjecting them to a relatively exhaustive review using the familiar Penn Central factors, the economic impact of the government action, the degree of interference with investment-backed expectations, and the character of the government action. In Cienega Gardens v. United States,[26] in one of the rare instances in which the Federal Circuit has upheld a claim of a taking of a private contract right, the Court also applied a Penn Central-type analysis, with particular emphasis on the degree to which the claimant's contract interest had been "targeted" by the government. The logic of this alternative is straightforward. If a contract interest represents property, why should a taking claim arising from government interference with a private contract be analyzed any differently than any other taking claim?

Apart from the fact that this line of analysis conflicts with Omnia, applying a traditional taking analysis to all government actions adversely affecting the value or utility of private contractual arrangements would be problematic, for several reasons. First, given the extraordinary numbers and varieties of private contracts potentially affected by government policy decisions and other actions, expanding takings law in this fashion would impose enormous liabilities on the government and impose a significant new drag on government decision-making.[27] Furthermore, the effects of new government policies on traditional property, land in particular, are relatively easy to predict, making it possible for policy makers to make reasonably sensible predictions about the potential takings liability associated with particular proposed actions. By contrast, because private contractual arrangements are far more varied and less visible, the impacts of government actions on private contractual arrangements are far more unpredictable. As a result, there is less risk that government officials will (at least consciously) singe out particular contract interests to bear special burdens, and takings law is less effective as a constraint on government decision-making to avoid such singling out.

Lastly, and perhaps most importantly, this line of argument fails to grapple with the intuition that seems to be at the heart of the Omnia line of cases, that contracts creating legal rights and responsibilities between or among the parties are in some sense different from rights based on traditional property interests.

---

[24] 508 U.S. 602 (1993).

[25] 475 U.S. 211 (1986).

[26] 331 F.3d 1319 (Fed.Cir.2003).

[27] See Omnia, 261 U.S. at 513 ("The government took over during the war railroads, steel mills, shipyards, telephone and telegraph lines, the capacity output of factories and other producing activities. If appellant's contention is sound the government thereby took and became liable to pay for an appalling number of existing contracts for future services or delivery, the performance of which its action made impossible.")

*   *   *

The depth of the confusion created by this range of plausible alternative approaches to this type of claim is illustrated by the way courts, in the course of addressing particular claims, struggle to discern the relevant legal sideboards. For example, in Connolly v. Pension Ben. Guar. Corp., the Court rejected a takings challenge to federal legislation increasing the contribution liability of a company choosing to withdraw from a multi-employer pension plan. The legislation had the effect of overriding the contractual protection the employer had with its employees against liability above an agreed upon cap. The Court began its discussion of the takings issue by stating that the company's takings claim gained "nothing" from the company's contractual agreement with its employees. "Contracts, however express," the Court said, "cannot fetter the constitutional authority of Congress." The Court acknowledged that contracts "may create rights of property," but stated, in seemingly sweeping terms, that when "contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."[28] Then, in seeming contradiction of the foregoing, the Court cited Omnia for the proposition that "the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking." Reinforcing this guarded perspective, the Court also said, "This is not to say that contractual rights are never property rights or that the Government may always take them for its own benefit without compensation." This discussion seems to ignore the Omnia Court's distinction between appropriations and frustration, potentially opening the door to potential future takings claims based on a wide variety of government actions affecting contract interests. In this case, however, the Court said, the taking claim failed because "the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose."

After seemingly concluding its taking analysis, the Connolloy Court said that its conclusion that there was no taking was "not inconsistent" with the Court's prior cases, in particular the Penn Central decision and its three-part analysis. The Court then proceeded to perform a separate, comprehensive analysis of the taking claim based on each of the Penn Central factors. By the end of the Court's opinion in Connolly it is simply impossible to know whether takings claims based on interferences with private contractual arrangements are subject to a distinctive takings analysis or not. The Court's subsequent decision in Concrete Pipe, which hewed closely to Connolly's confused analysis, as well as lower court decisions, exhibits the same uncertainty.[29]

---

[28] Quoting Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 307-308 (1935).

[29] See 767 Third Ave. Associates v. United States, 48 F.3d 1575 (Fed Cir. 1995)

In light of the doctrinal confusion, it is hardly surprising that courts, in addressing claims of this type, strive mightily to find some alternative basis for disposing of the claims and avoid the need to address the takings claim squarely. For example, the Federal Circuit recently rejected a takings claim based on the U.S. Department of Agriculture's veto of the claimant's planned sale of a portfolio of crop insurance policies, reasoning that the claimant relinquished its right to sell the policies free of government supervision when it entered into the heavily regulated and subsidized crop insurance business. This conclusion, the Court noted, obviated the need to address the parties' "arguments about whether the Court of Federal Claims correctly dismissed . . . [the claim] based on the Omnia Commercial line of cases."[30] In a similar vein, the Federal Circuit rejected a taking claim based on a government shut-down of private helicopter operations in Washington D.C. following 9/11, concluding that the claimant could not assert a taking of its lease for the site of its helicopter operations because it lacked a protected property interest is using the navigable air space in any event.[31] Or, finally, some courts have avoided figuring out how to apply Omnia by concluding that a contractual relationship has matured to the point that the claimant can point to a taking of a more traditional interest in property that was the fruit of the contract, and not merely allege the defeating of a contractual promise.[32]

In sum, this area of the law is seriously in need of better theory. The Omnia line of precedent reflects a judgment that takings claims based on interferences with private contracts require distinctive analysis under the Takings Clause. Under Omnia, takings claimants pursuing claims based on alleged interferences with private contract interests clearly and repeatedly fare worse than they would if they could claim a taking by pointing to a traditional interest in real or personal property. On the other hand, if contract interests are unambiguously property, as the courts also repeatedly assert, it is difficult to understand why a traditional takings analysis should not apply. While the application of takings doctrine obviously produces different results in different factual contexts, the Supreme Court has not suggested in other contexts, so far as I know, that, once the hurdle of identifying a protected property interest has been overcome, the nature and scope of the takings analysis should vary based on the factual setting in which the claim arises. A new and better approach is called for.

IV. Towards a New Takings Jurisprudence Applicable to Contracts

The courts' unwillingness to apply, and their uncertainty about applying, a conventional takings analysis to private contracts suggests that the analysis should focus instead the nature of the property interest in contracts. Perhaps, notwithstanding the longstanding judicial consensus that contracts represent property for the purpose of takings analysis, it will be useful to examine

---

[30] Acceptance Insurance Corp. v. United States, 583 F.3d 849, 855 n. 4 (Fed.Cir. 2009).

[31] Air Pegasus of D.C., Inc. v. United States, 424 F.3d 1206 (Fed Cir. 2005)

[32] Tulare Lake Irrigation District v. United States, supra.

that premise. Assuming contract interests represent, in some general sense, property, perhaps they represent a special, qualified type of property. Perhaps the special nature of property rights based on contracts, rather than some special takings test, should drive the analysis and outcomes of alleged public takings of private contracts.

Merrill's Take on the Constitutional Property

Before delving into this issue, it is useful to first address one prominent scholarly comment on whether and to what extent contracts should be treated as property for constitutional purposes, by Professor Thomas Merrill, in his article The Landscape of Constitutional Property. He suggests that the presence of the Contracts Clause in the Constitution supports the conclusion that the term "property" in the Takings Clause "cannot be construed in such abroad fashion that it automatically includes all contract rights." He offers two reasons for this conclusion, both of which start from the premise that takings doctrine is "almost certainly more protective" than the Contracts Clause doctrine: First, if the Takings Clause applied to all contract interests, were more protective that the Contracts Clause, and applied (at least now) to both state and local government actions, then takings claims based on contract impairments would make the Contracts Clause superfluous. Second, if the Takings Clause supported challenges to contract impairments by both the federal and state government, then the distinction between federal and state impairments of contracts drawn by the Contracts Clause would be "erased."

One difficulty with Professor Merrill's analysis is that modern Supreme Court precedent, especially taking into account takings decisions issued since the publication of his article, suggest that the Takings and Contracts Clauses do not so much offer different levels of protection as they call for different types of constitutional analyses. The Court has recently eschewed any inquiry under the Takings Clause into the legitimacy of government's goals or the reasonableness of the means selected to achieve the goals, emphasizing that a proper taking claim presupposes the legitimacy of the government action.[33] Starting from that premise, the modern takings inquiry focuses largely if not exclusively on the economic burden imposed by the government action and whether the burden is so great that it is the "functional equivalent" of a classic exercise of eminent domain. By contrast, the Court's modern Contracts Clause jurisprudence, while it incorporates consideration of the burden imposed by the government action, primarily focuses on issues modern takings doctrine avoids: the significance and legitimacy of the government's objectives and whether the action is "appropriate" to achieve the goals.[34] Because the Takings and Contract Clauses now point in such different directions, a government action might well survive a takings challenge, yet be an unconstitutional impairment under the Contracts Clause. By the same token, an action might survive scrutiny under the Contracts Clause yet be held to be a taking.

---

[33] See Lingle v. Chevron USA, Inc, 544 U.S. 528 (2005).

[34] [add cites]

The different normative thrusts of takings doctrine and Contracts Clause doctrine reduce if they do not necessarily eliminate the need to the construe the term property narrowly in order to avoiding undermining the Contracts Clause. Insofar as the Takings Clause is designed to advance different constitutional interests and values than the Contracts Clause, there is no particular problem if a government action affecting a contract interest can give rise to takings liability even if the action does not violate the Contracts Clause. After all, the equal protection principle read into the Fifth Amendment unquestionably constrains government contracting, but this constraint cannot plausibly be regarded as somehow undermining the Contracts Clause. On the other hand, to the extent the Contracts Clause is properly viewed as an affirmative authorization to the federal government to engage in impairments prohibited to the states, and the Takings Clause might serve as a basis for challenging such impairments, the Contracts Clause could be said to be undermined, at least to some degree. The narrow scope of the Contracts Clause certainly suggests that an impairment by a state that survives challenge under the Contracts Clause should necessarily be constitutional when undertaken by the federal government. The more broadly the term "property" is construed, and the more frequently takings claims can be mounted based on contract impairments, the larger the undercutting problem. In sum, even if there is reason to question Merrill's strong argument for construing the term property narrowly, the narrower the range of contract interests to which the Takings Clause applies, the greater the overall coherence of a Constitution that includes both a Contracts Clause and explicit property-protecting provisions such as the Takings Clause.

In Personam vs In Rem Rights

While the Contracts Clause provides some modest interpretive guidance for determining whether contracts should constitute property for the purpose of the Takings Clause, it hardly provides a complete answer. A more decisive standard is needed to determine whether and when contracts constitute property for the purpose of the Takings Clause.

The identification and characterization of the property interest at stake is at least an implicit part of every takings case. But the Supreme Court has given remarkably little attention to what does and does not count as property. The Court's most familiar formulation of the issue is that property interests are "not created by the Constitution, " bur rather they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[35] Taken at face value, this language can be read to suggest that the federal Constitution completely delegates the task of defining (and redefining) property interests to the states, whether through legislative measures or judicial common-law law-making, and that the restraint on takings (without compensation) only operates once state institutions have defined the relevant property interest. Clearly, this is not the law. A legislative redefinition of private

[35] Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980), quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

property is routinely subject to challenge as a taking, and following Stop the Beach Renourishment decision it remains at least debatable whether even judicial modifications of common law property rules can constitute takings.

In addition, the Court has indicated, if somewhat obliquely, that the Constitution places federal sideboards on what state-created interests qualify for protection as property in a constitutional sense, and how property will be characterized for the purpose of the takings analysis. In particular, the Court has established that an asserted property interest must be "specific and identifiable" to qualify as property under the Takings Clause.[36] As a result, government actions imposing an undifferentiated financial liability on a firm or individual, or subtracting from the revenues or profitability of a firm does not affect "property" within the meaning of the Takings Clause. In addition, for the purpose of regulatory takings analysis, the Supreme Court has adopted a principle of agglomeration, the so-called "parcel as a whole rule," which requires the courts to assess the economic impact of a government action in relation, not to the specific property interest affected by a regulation, but the physical or practical totality of the claimants' holding. While the Court has never provided an in depth explanation for this rule, or how it should be applied, in the familiar case of real estate, this rule means that economic impact must be measured in relation to, at a minimum, the claimants' entire contiguous land holding. The obvious effects of the rule are to limit regulatory liability to the rare case, and to impose at least a modest redistributionist cast to the doctrine by making it harder for holders of larger tracts to succeed under the Takings clause than holders of small tracts.

Relying on this guidance, and assuming that contract interests constitute property for at least some purposes, the distinction between the in rem nature of interests in property and the in personam nature of contract rights provides a useful way of distinguishing between these two types of "property" within the meaning of the Takings Clause. Insofar as property interests are created and their dimensions are defined by state law, the distinction between the in rem and in personam nature of property and contract interests is part of the deep architecture of the common law, and therefore an appropriate touchstone for construing the term "property" in the Takings clause. In rem property interests establish rights and obligations that are good against the world; for instance, a landowner's right to protect her property against trespass is enforceable against the entire world, including government officials. By contrast, in personam contract interests establish rights and obligations that are largely if not entirely confined to the parties to the contract.

Of course, the notion that property within the meaning of the Takings Clause encompasses contract interests means that the constitutional definition of "property" does not track the ordinary distinction between contract and property. As discussed above, it is possible to read the constitutional protection for property as excluding contract interests entirely.

---

[36] Eastern Enterprises, supra.

However, as also discussed, the Supreme Court appears to have left that option far behind and this paper does not attempt to revive it. At least as a linguistic matter, there is no obvious bar to defining constitutional "property," as used in the Takings Clause, to include what are commonly viewed as contract interests in a non-constitutional sense.

Finally, the definition of property as including in personam rights based on contract appears to conform to the barebones federal constitutional sideboards for property interests. In particular, interests based on contract are "specific and identifiable" in the Eastern Enterprises sense. In addition, the parcel as a whole rule can plausibly be applied for the purpose of assessing the economic burden of a government action on a contract interest.

The difference between traditional property interests and interests established by contract provides a basis for explaining how both types of interests represent property for constitutional purposes, but a property of a different nature and scope. This understanding, in turn, provides a basis for explicating the different outcomes in takings cases involving these two types of interests. Regulatory takings jurisprudence recognizes that a government action directly affecting the utility and/or value of a traditional property interest can affect a taking. The right at issue is good against the world, and a government interference with that interest impinges upon the claimant's property protected interest. By contrast, a government action that directly affects a contractual interest, but merely frustrates the interest, is generally understood not to affect a taking. This result is consistent with the in personam nature of contract interests. Because contract interests are in personam, a government action that affects the value or utility of a contract does not impinge on any entitlement created by the contract. By contrast, when the government steps into the shoes of contracting parties, and takes over the rights and responsibilities of one of the parties, or mandates the transfer of those rights and responsibilities to some third part, the courts generally hold that the taking may have occurred. This result is consistent with the in personam nature of contract rights because the government has impinged upon the bilateral legal relationship established by the contracting parties.

Under this understanding, takings claims involving private contract interests are different from takings claims involving traditional property interests. But not, as the case law has long suggested, because a different takings analysis should apply, based on a distinction between the frustration and appropriation. Rather, the difference is based on the fact that these different types of cases, even as they both involve "property" within the meaning of the Takings Clause, involve property that is different in nature and scope.

Defining the Appropriate Takings Analysis

Under the foregoing analysis, the distinctive outcomes in takings cases arising from government interferences with private contracts should be explained by the nature of the property interests at stake, rather than by resorting to a special type of takings analysis. This implies that this type of claim should be analyzed using the traditional takings standards,

including the Penn Central multi-factor analysis, the Lucas per se rule for denials of all economically viable, and/or the Loretto line of cases involving physical invasions of private property. Assuming a "normal" takings test applies in this special context, what specific test or tests, would, in practice, apply in this type of case.

Background principles of federal and/or state law might render a contract illegal, meaning that a contract right holder p could not assert a protected property entitlement, regardless of how the government affected the interest. For example, contracts to create a condition of enslavement are obviously unenforceable in the United States under the 13th Amendment. If the government, for some far-fetched reason, appropriated such a contract right, it would not support a taking claim because no one can claim an entitlement to enforce a condition of enslavement. A similar analysis would presumably apply to a wide a variety of illegal contracts.

The more consequential question is what test should apply when the government appropriates an enforceable private contract. In Connolly and Concrete Pipe, operating on the assumption that private contractual arrangements disrupted by government regulation could amount to takings, the Court applies a conventional Penn Central analysis. But, under the foregoing analysis, an interference of this kind would not raise a viable takings claim because the government did not substitute itself for one of the contracting parties. A viable taking claim involving a private contract can only arise when the government takes over the contract rights and responsibilities of one of the contracting rights, or mandates the transfer of such rights and responsibilities to a third party. This type of government intrusion into contractual relationship appears akin to a direct appropriation of property for public use, triggering a per se type analysis. To the extent a contract interest represent property, and the government has taken the rights of a private contract holder and claimed them for itself, the government has taken the property in the same fashion that it takes private property when it seizes it through an exercise of eminent domain. There is no room for the kind of nuanced Penn Central analysis when the government condemns real property, and the same should hold true for an appropriation of contract rights.

Addressing the Bilateral Nature of the Contract Interest.

The foregoing discussion lays out the basis for the conclusion that government actions affecting property rights based on contract, but not directly intruding into the contract relationship, should not be viewed as taking of the property within the meaning of the Takings Clause. But there remains for consideration how the bilateral nature of the contract relationship should affect the analysis. As discussed above, even if the government directly intrudes into the contract relationship, it should not necessarily be viewed as having inflicted a compensable harm, given that the effect of the government action on the contrasting parties as unit may be neutral, and any apparent injury to the claimant may simply reflect the outcome of the parties;' negotiations as to which party would bear the risk of loss in the event of a government intervention. If a government intervention confers a windfall on one party and a loss on the

other party, the public should not be required to compensate the losing party simply because it failed to protect itself from such a loss   The Armstrong fairness principle, which the Supreme Court has long described as the animating theme of takings jurisprudence, does not call for compensation as a matter of fairness in this circumstance. On the other hand, when a government takeover of a contract results in a net economic loss to the contracting unit, a finding of taking may well be warranted.

Testing the Theory

Under this understanding of how the Takings Clause applies to private contracts, the cases generally come out the same way, but based on different reasoning.   The courts have generally ruled that the government will be held to have taken a contract interest only when it has legally assumed the precise contract rights and responsibilities of the party being displaced, much as if the government had literally been assigned the contract rights. These decisions appear to take too narrow a view of the government's takings liability. If the government takes over the private party's contracting role in the sense that the government receives the goods or services promised, or takes over the responsibility to provide the goods and services, then it should be liable, regardless of whether it has assumed all the precise legal rights and responsibilities of the contracting party.   On this understanding, the Federal Circuit erred in denying compensation in the Huntleigh case where the government took over airport screening from the private firm that previously provided this service. The federal legislation authorizing the new federal role gave the government the option of either literally taking over the existing contracts (and paying just compensation for the taking), or simply declaring that it would take over the function (without paying compensation). This analysis elevates form over compensation.   The government should have been liable under both scenarios because, in substance it was taking over the contract in either event.

Under this analysis, Omnia was correctly decided as well, but for a different reason.   The United States should be regarded as having taken Omnia's contract rights because the government, in substance, took over the company's right to received the steel.   But the United States should not have been held liable because, under the second part of the proposed test, the government's requisition order, accompanied by compensation, did not impose a net loss on the contracting parties.   The government imposed an apparent harm on Omnia, but it simultaneously conferred a windfall on Allegheny.   The government should not have been compelled to indemnify Omnia from loss when it could have done so itself through contract negotiations. On the other hand, International Paper, in which the United States was held liable, was incorrectly decided, because International Paper could have protected itself from the loss by demanding indemnification in the event the government issued a requisition order that conferred a windfall on the power company.

On the other hand, the proposed test suggests that other cases were incorrectly decided as well.   For example, in Cienega Gardens the Federal Circuit concluded that the United States

effected a taking by enacting legislation overriding a private mortgage agreement allowing the lender to prepay the loan after 15 years. Because the agreement did not substitute the United States for one of the parties, the legislation did not affect a protected property interest.

The proposed theory of public takings of private contracts appears more satisfactory than the Omnia appropriation/frustration distinction from a theoretical perspective. First, it builds on the longstanding distinction between in rem property rights and in personam contract rights to produce distinctive legal outcomes in takings cases involving private contracts without the need for an ad hoc mangling of takings doctrine. It addresses the potentially enormous scope, and unforeseeability, of takings claims based on governments interferences with public contracts by limiting the scope of the claims that can be brought. The instances in which the government directly inserts itself into a pre-existing contractual relationship are a small subset of the universe of government actions directly and indirectly affecting contract interest. In addition, government officials can and should foresee the potential takings liability that might arise when they directly assume the rights and responsibilities under a pre-existing contract.

The proposed test also offers a reasonable reconciliation of the Contracts Clause with the Takings Clause. If property based on contract is defined by reference to the in personam nature of contract rights, takings claims will only lie based on government actions that directly intrudes into the legal relationship between the contracting parties. By contrast, "impairments" of contract should sweep up a broader range of government actions, including legislation and regulation that severely and unreasonably "frustrates" contract expectancies. On this understanding, the Contracts Clause has a broader scope than the Takings Clause. This outcome permits the conclusion that the Takings Clause applies (in a limited way) to private contracts to rest reasonably comfortably alongside the fact that the Contracts Clause imposes a constraint applicable to the states and not the federal government

Finally, Professor Kaplow has questioned whether compensation represents an efficient constraint on government action and the extent to which it undermines private incentives to anticipate and account for the risk of disruptive government action. Insofar as private contracts represent highly variable and nuanced efforts to anticipate numerous potential disruptions, natural and unnatural, private and governmental, Kaplow's argument appears to apply with special force to private contract interests. In addition, private contract negotiations are suited to identify which of several parties is well suited to anticipate and accommodate disruptive government policies.

Conclusion

This analysis raises a larger issue about the substance of takings doctrine and one interesting procedural challenge for litigants. First, the basic thesis of this article is that judicial analysis of takings claims involving private contracts has focused too much on how the alleged "taking" should be analyzed instead of on the nature of the property interest at stake. It is worth

considering whether a similar approach might be productive in addressing other types of takings claims. Typically, analysis of a taking claim proceeds by asking whether the claimant can point to a protected property interest, and if that question is answered in the affirmative, to the takings issue. Normally, the existence of property interest can be and is answered in a yes/no fashion. As explored in the context of this article, while private contractual interests may, in some general sense, represent property protected by the Takings Clause, the analysis presented indicates that a more nuanced inquiry into the nature and scope of asserted property interest is appropriate for resolving claims of public takings of private contracts. Perhaps the same approach could and should be deployed in other types of takings cases, such as those involving the peculiar property interest created in water.

For example, a recurring debate in takings law is whether the categorical takings rule announced in Lucas v. South Carolina Coastal Council applies exclusively to full fee interests in land, of the kind at issue in that case, or whether the logic of the opinion extends to the destruction of any property interest, no matter how narrow. Much of the analysis of this question has addressed whether the so-called Lucas per se takings rule can and should be broadly applied. But the question might profitably be addressed from the other direction, by asking whether the distinctive scope and character of less than fee interests call for a different outcome.

The analysis in this paper also raises the question of how the courts should address alleged takings based on government impairments of contracts to which the government itself is a party. These types of public–private contracts are outside the scope of this paper, which has focused on alleged takings of private contracts. A key difference between public-private contracts and private-private contracts is that government impairments with the former raise possibility of a suit based on breach of contract alongside or perhaps in lieu of a takings suit. Setting aside that important complexity, which raises a host of difficult issues, there is no immediately apparent reason why an alleged taking of a property interest based on a public-private contract should be analyzed any differently than an alleged taking of a property interest based on a private-private contract. If the personam character of contract rights is the relevant feature of the property in the latter type of litigation, why not the former as well.

Finally, it is noteworthy that property within the meaning of the Due Process Clause has generally been defined broadly than for the purposes of the Takings Clause. Thus, if a government impairment of a contract interest would not fall within the scope of the Takings Clause it is possible that a suit could be mounted under the Due Process Clause. As a practical matter, however, it would not necessarily be easy for litigants to pursue these alternative claims, because the U.S. Court of Federal Claims has virtually exclusive jurisdiction over takings claims against the United States, but lacks jurisdiction over claim brought under the Due Process Clause. In this as in other ways, the gradual transformation of the condemnation power from an affirmative tool of economic development into a negative constrain on government overreaching has created collateral complexities for the unwary.