MAKING SENSE OUT OF NONSENSE: A RESPONSE TO ADVERSE POSSESSION BY GOVERNMENTAL ENTITIES

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I. INTRODUCTION

"In property law, it is a straightforward proposition that, under certain conditions, title to property may, by operation of law, be transferred to another without compensation. In constitutional law, it is a straightforward proposition that the government cannot take private property without just compensation. This court must determine how these two propositions interact with each other. Although the defendant contends that the two areas of law are 'mutually exclusive,' they are not."[1]

During the past five years, the *Pascoag*[2] decisions have ignited controversy surrounding the issue of whether a governmental entity has the ability to acquire privately-held property without just compensation and by means of adverse possession.[3] These decisions have been considered a hot topic in the legal community, as some legal scholars believe that utilizing adverse possession in favor of the government is a new area of the law that could have profound effects on the way the government acquires privately-held property.[4] Others believe that these decisions represent a new and direct attack on the federal and state constitutions that have always prevented governmental bodies from taking privately-held property, unless compensation has been granted.[5] What both groups fail to realize is that adverse possession[6] has been applied in favor of the government sporadically over the past one hundred years, but with-

[1] Judge Ronald R. Lagueux, Pascoag Reservoir & Dam, LLC v. Rhode Island , 217 F. Supp. 2d 206, 209 (D.R.I. 2002).

[2] *See* Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87 (1st Cir. 2003); *Pascoag*, 217 F. Supp. 2d 206; Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826 (R.I. 2001).

[3] *See* Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1 (2003) (arguing that the *Pascoag* district court decision is flawed based on its application of the facts); Kimberly A. Selemba, Comment, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)constitutionally "Takes" Land Dirt Cheap*, 108 PENN. ST. L. REV. 657, 668-77 (2003) (discussing the implications of the *Pascoag* decisions and arguing that any time a governmental entity takes property it is required to pay just compensation); *Feature Case: Adverse Possession as a Taking?*, TAKINGS WATCH (Community Rts. Counsel, Washington D.C.), Aug. 2003, at 1, *available at* http://communityrights.org/PDFs/Newsletters/August2003.pdf (discussing the *Pascoag* decisions and how "bizarre" it is for a government to cause a taking through adverse possession); Joseph William Singer, New Developments in Property Law (June 24, 2005), http://www.law.harvard.edu/faculty/jsinger/developments/singerpropertydev.pdf (discussing implications of the *Pascoag* decisions as a new development in property law).

[4] *See* sources cited *supra* note 3.

[5] *See* Selemba, *supra* note 3, at 658 (arguing that the state is always subject to the Fifth Amendment and thus a taking occurs when a state acquires title through adverse possession); *see also* Resolve Against Property Takings' Organized Resistance (RAPTOR), Fighting Wisconsin Department of Natural Resources Seizure of Private Property for Snowmobile & ATV Trails, http://snow.prohosting.com/rights/index.htm (arguing that the use of adverse possession by a governmental entity is unjust and inconsistent with the constitution) (last visited Apr. 10, 2007).

[6] The decisions cited within this Article have used both adverse possession and prescription. Although the author recognizes that there is a distinction between acquiring rights through adverse possession compared to prescription, the terms may be used interchangeably throughout this Article for convenience. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (2000) (providing an overview of the differences between adverse possession and prescription); William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER

out great recognition.[7] Nevertheless, the concept of governmental adverse possession is hardly clear. For example, most of the existing case law lacks thorough analysis[8] or uniform application[9] of the interplay between adverse possession and the takings doctrine, which makes this area of law unstable, unclear, and incomprehensible.[10] The lack of scholarly or practical materials on this topic has also contributed to the misunderstanding.[11]

To most in the legal community, as Judge Lagueux mentions, adverse possession and the takings doctrine are considered separate legal theories and thus mutually exclusive.[12] It is certainly easy to embrace this school of thought, as it is common legal knowledge that both federal and state constitutions prevent any governmental body from acquiring property without some procedural guidelines for just compensation.[13] Allowing the government to take property through adverse possession, which does not require compensation but rewards a wrongful trespasser with title to property, is unjust and contrary to our system of property rights. This line of reasoning is also supported by the fact that land held by a governmental body has been traditionally immune from claims of adverse possession by private individuals.[14] So the argument goes, why should

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L. REV. 79, 81-91 (1996) (distinguishing prescriptive rights and rights obtained through adverse possession).

[7] *See* Ian H. Hlawati, Comment, *Loko i'a: A Legal Guide to the Restoration of Native Hawaiian Fishponds Within the Western Paradigm*, 24 U. HAW. L. REV. 657 (2002) (discussing how Hawaiian fish pond owners face the threat of adverse possession by the state and by private individuals). *See also* David Casanova, Comment, *The Possibility and Consequences of the Recognition of Prescriptive Avigation Easements by State Courts*, 28 B.C. ENVTL. AFF. L. REV. 399 (2001) (noting the ability of municipal airports to acquire prescriptive easements for flights over private property through adverse use). *See generally* A. M. Vann, Annotation, *Acquisition of Title to Land by Adverse Possession by State or Other Governmental Unit or Agency*, 18 A.L.R. 3d 678 (1968) (providing a comprehensive factual evaluation of how adverse possession has been applied in favor a governmental entity and offering a helpful table of cases from within the fifty states. Note, however, that there are key decisions that have not been updated within this Article.).

[8] *See, e.g.*, Miner v. Yantis, 102 N.E.2d 524, 526 (Ill. 1951) (claiming that there is a general rule allowing governmental entities to possess private property adversely but failing to articulate any rationale for the holding, while relying on a legal encyclopedia as authority).

[9] *See infra* Section IV.

[10] *See* Selemba, *supra* note 3, at 675 ("Currently, courts across the nation disagree over whether a state that acquires property by adverse possession or prescriptive easement must compensate the property owner because it triggers the Takings Clause of the United States Constitution.").

[11] Currently there are few scholarly articles that attempt to address the interplay between adverse possession and the takings doctrine. *See* Martin J. Foncello, Comment, *Adverse Possession and Takings Seldom Compensation for Chance Happenings*, 35 SETON HALL L. REV. 667 (2005); Selemba, *supra* note 3, at 657; Vann, *supra* note 7, at 678. *See also* R.K.G., *Recent Cases*, 26 WASH. L. REV. & ST. BAR. J. 231 (1951) (noting that there is a surprising lack of case law discussing the government's ability to acquire property by adverse possession).

[12] Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206 (D.R.I. 2002).

[13] *See* U.S. CONST. amend. V. *See, e.g.*, COLO. CONST. art. II, § 15 (providing an example of a typical state just compensation clause).

[14] *See* Walter Quentin Impert, Comment, *Whose Land is it Anyway?: It's Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 449 (2001) ("Although the government authorizes adverse possession, it exempts itself from these statutes under the doctrine of sovereign immunity."); Carl C. Risch, Comment, *Encouraging the*

the government be able to possess privately-held land adversely when private individuals are usually prevented from adversely possessing land owned by the government?[15]

Courts addressing the interplay between adverse possession and takings law have applied several legal theories to refute the argument that acquiring property through adverse possession amounts to a taking.[16] Courts were quick to recognize that a municipal corporation has the ability to act in a private capacity, distinct from its state-granted authority, thus avoiding any state action arguments that would trigger constitutional protections.[17] Other courts argue that they have not applied adverse possession in the traditional sense, but they have applied an adverse possession statute of limitations to an inverse condemnation claim when a state has failed to legislate on the issue specifically.[18] Finally, there is an area of case law that has simply applied adverse possession in favor of a governmental body under an equitable theory to avoid injustice in title disputes.[19] Overall, the courts have not been consistent in their application, which has resulted in split decisions[20] and a misunderstanding of the purpose of each doctrine and how they should interact, if at all.[21]

This Article clarifies how the courts have addressed the interplay between adverse possession and the takings doctrine and argues that the use of adverse possession is unnecessary because well-settled takings jurisprudence would

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Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners, 99 DICK. L. REV. 197, 197 (1994) (noting that adverse possession has been historically prohibited against land held by the government).

[15] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 162 n.26 (5th ed. 2002) ("Given that a private party may not be able to get government property by adverse possession, is it fair that the government is nevertheless able to get private property by adverse possession?").

[16] *See infra* Section IV.

[17] *See, e.g.*, McDonald v. Bd. of Miss. Levee Comm'rs, 832 F.2d 901, 906-08 (5th Cir. 1987).

[18] *See* Wadsworth v. Dep't of Transp., 915 P.2d 1, 4 (Idaho 1996) (recognizing that inverse condemnation claims can be limited by applying a state's statute of limitations for acquiring property rights by prescription).

[19] *See, e.g.*, United States v. Stanton, 495 F.2d 515, 515-17 (5th Cir. 1974) (government obtained title from a co-tenant who appeared to have authority to convey the entire interest, but he did not, and the court applied adverse possession as an alternative to the claim of valid title); Ault v. State, 688 P.2d 951, 956 (Alaska 1984) (Adverse possession should be narrowly construed in favor of the state and applied only when the state had and "honest and reasonable belief in the validity of title."); Lincoln Parish Sch. Bd. v. Ruston Coll., 162 So. 2d 419, 426 (La. Ct. App. 1964) ("If public bodies or political corporations were prohibited from acquiring by prescription, such defects as may exist in a title to property acquired by purchase or donation could never be cured . . . ."). *See also infra* Section IV.C.4.

[20] *Compare* Weidner v. State Dep't of Transp. & Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993), Commonwealth Dep't of Parks v. Stephens, 407 S.W.2d 711, 712-13 (Ky. 1966), *In re* S. Ry. Co. Paving Assessment 147 S.E. 301, 304 (N.C. 1929), *and* State *ex rel.* A.A.A. Invs. v. City of Columbus, 478 N.E.2d 773, 775 (Ohio 1985) *with* Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 96 (1st Cir. 2003), Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 224 (D.R.I. 2002), *and* Johnson v. City of Mt. Pleasant, 713 S.W.2d 659 (Tenn. Ct. App. 1985). *See also* Selemba, *supra* note 3, at 657-58 (recognizing that two prevailing views exist when considering adverse possession by a governmental entity).

[21] *See infra* Section IV.

obtain a similar result for the government and more favorable rulings for private landowners. The use of takings law would assume that any time a government body enters land without permission or creates a burdensome regulation, a potential takings claim accrues and the appropriate time period would apply in order to bring an inverse condemnation claim. At the same time, it would reject any claim that the government can act in a private capacity in an attempt avoid potential takings claims. Traditional takings law is necessary to avoid the inconsistencies that result from the introduction of adverse possession into this area of law and to remove another hurdle standing in the way of private landowners from seeking compensation. Finally, preventing the government from utilizing adverse possession would be consistent with the property rights movement by legitimizing the underlying purpose of the Takings Clause.[22]

Section II.A. of this Article provides a brief overview of adverse possession while Section II.B. provides an overview of the takings doctrine. After discussing the foundations of each, Section III provides an overview of United States Supreme Court decisions that have been relied upon as authority for the government to possess private property adversely. Finally, Section IV provides an overview of how courts have applied adverse possession in favor of a government body and how the author's proposal responds to these decisions. Section V closes with a recommendation that takings analysis be the exclusive method for resolving such property disputes with government entities.

II. BACKGROUND

A. *Understanding Adverse Possession*

1. *Historical Background*

Adverse possession and productive land use have deep roots in early Roman and Feudal law.[23] The most significant development, for purposes of American common law, evolved in England during the feudal period.[24] During this time, property rights were held by the monarchy through a system of heredity.[25] Land was granted by the king to the people, not to own, but to use on the king's behalf.[26] This system of land use was unique because it allowed for a property owner to remove an illegal trespasser by "ousting" him with force, and if the owner failed to exercise his right, he lost the ousting privilege.[27]

The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim rights of "seisin" from his

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[22] The property rights movement can be collectively considered a group of like-minded persons who lobby for the protection of property free from governmental intrusion. *See, e.g.*, MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA 163 (1993) (a good example of the property rights movement can be seen through this source published by the The Pacific Legal Foundation and arguing for a more consistent approach to takings law while rejecting the "ad hoc" approach taken by most courts today).

[23] JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 436 (2000).

[24] *Id.* at 80-81.

[25] *Id.* at 81.

[26] *Id.*

[27] Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 125-26 (1997).

ancestry.[28] Many felt that the original law that relied on "seisin" was difficult to establish, and around 1623 a statute of limitations was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property.[29] This early English doctrine was designed to prevent legal disputes over property rights that were time consuming and costly.[30] The doctrine was also created to prevent the waste of land by forcing owners to monitor their property or suffer the consequence of losing title.[31]

The concept of adverse possession was subsequently adopted in the United States.[32] The doctrine was especially important in early American periods to cure the growing number of title disputes.[33] The American version mirrored the English, which is illustrated by most states' adoption of a twenty-year statute of limitations for adverse possession claims.[34] As America has developed to the present date, property rights have become increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some states to as little as five years, while in others, it has remained as long as forty years.[35] The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity.[36]

2. *Adverse Possession in Modern America*

The elements to prove adverse possession are generally consistent from one state to another; thus a detailed discussion is not necessary for this article. The first element, actual possession, requires some form of physical entry by the squatter onto the land and use of the land as a reasonable owner would use that particular piece of land.[37] The second element, open and notorious possession, requires that the squatter's possession be so obvious that a reasonable owner, when inspecting the property, would be on notice that someone is using his land without permission.[38] The third element, exclusive possession, requires the squatter to use the land while not sharing it with the general public or with the original owner (although most courts do not require absolute exclusivity).[39] The fourth element requires possession to be hostile, adverse, or under a claim of right, but the majority rule among the states only requires the squatter to "use the land as a reasonable owner would use it – without permis-

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[28] *Id.* at 126.

[29] *Id.* at 126-27.

[30] *Id.* at 127.

[31] SPRANKLING, *supra* note 23, at 437.

[32] *Id.*; Gardiner, *supra* note 27, at 129 (suggesting that North Carolina was the first state to adopt an adverse possession statute of limitation around 1715).

[33] SPRANKLING, *supra* note 23, at 437.

[34] Gardiner, *supra* note 27, at 128.

[35] Ackerman, *supra* note 6, at 111-12 (providing a comprehensive list of adverse possession statutes from each of the fifty states).

[36] *See* sources cited *supra* note 14.

[37] SPRANKLING, *supra* note 23, at 438 (providing a basic overview of the elements required to prove a claim).

[38] *Id.* at 440.

[39] *Id.* at 439-40.

sion from the true owner."[40] The fifth element, continuous possession, requires that the squatter make use of the land incessantly without interruption, as a reasonable owner of that tract of land, for the statutory period.[41]

Assuming a party satisfies the elements for a prima facie case, the adverse possessor obtains title in fee, which divests title from the rightful owner and bars him from obtaining any remedy against the trespasser.[42] However, if a trespasser has failed to meet the statutory time requirement, the rightful owner can remove the trespasser by bringing a claim of ejectment.[43]

B. Understanding the Takings Doctrine

1. Historical Background

During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by states from private landowners without compensation.[44] Initially, undeveloped tracts of land were the most common type of property acquired by the government, as they were sought for the installation of public roads.[45] Under the colonial system it was thought that "benefits from the road would, in newly opened country, always exceed the value of unimproved land."[46]

The idea that private property was deserving of protection was not well accepted during the Colonial period.[47] The justification for an *uncompensated* taking was based on Republican ideologies that encompassed several rationales, the first of which was the belief in the common good of society and that a citizen's loss of property was a sacrifice for the greater good of the public.[48] Additionally, possession and the pursuit of property were seen as corruptive influences.[49] As a result of prevailing Republican ideals, state constitutions did not have just compensation clauses because the general public had faith in their legislatures to define individual rights.[50] The legislature was also thought to be an unbiased body that was shielded from influence by the governor.[51]

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[40] *Id.* at 442 (emphasis omitted). *See also id.* at 441-44 (distinguishing the three approaches used in the United States: objective, good faith, and intentional trespass).

[41] *Id.* at 444-45 (therefore, if the property involves a summer beach house that is only used in the summer, possession during each summer would suffice if the other elements are met.).

[42] *See* JOHN R. BARLOW II & DONALD M. VONCANNON, SKELTON ON THE LEGAL ELEMENTS OF BOUNDARIES & ADJACENT PROPERTIES 423 (2d ed. 1997).

[43] *See* Paula R. Latovick, *Adverse Possession of Municipal Land: It's Time to Protect This Valuable Asset*, 31 U. MICH. J.L. REFORM 475, 475 (1998) ("The doctrine of adverse possession provides that an owner of land may lose the title to his land if he fails to eject trespassers promptly.").

[44] *See* William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 694-95 (1985). *But see* WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 10 (1977) (noting that compensation was paid during the colonial period for improved land).

[45] STOEBUCK, *supra* note 44, at 9-10.

[46] *Id* at 10.

[47] *See supra* notes 44-46 and accompanying text.

[48] Treanor, *supra* note 44, at 699-700.

[49] *Id.* at 699.

[50] *Id.* at 700-01.

[51] *Id.*

Around the late 1780s, theories concerning property rights began to evolve from the Republican ideology to a more liberal view where interests in individual property rights emerged.[52] Historians believe that this evolution was caused by a change in perception of the state legislatures from one of trust to distrust.[53] By 1800, several states enacted just compensation clauses, including Vermont, Massachusetts, and Pennsylvania.[54] These new clauses required the state to compensate a landowner for any taking of private property, regardless of whether the land was for the installation of a public roadway.[55]

Another important development in the protection of property rights was the Fifth Amendment. James Madison was the drafter and key supporter for the Fifth Amendment.[56] Madison's justifications for the amendment were derived from his unique understanding of property rights.[57] He believed that the concept of property encompassed not only rights in land, but also a panoply of other personal liberties such as the right of any person to his own opinion and the ability to express that opinion.[58] To this end he believed that rights in property were so broad and essential to mankind that the role of a *just* government was to "protect property of every sort."[59] Madison and the Framers believed the Bill of Rights combined with an effective judiciary were necessary to provide a standard of judicial review for actions by the federal government.[60] Thus "[a] government that provided compensation when it took real or personal property demonstrated its commitment to personal freedom."[61] On the other hand, if the government took property without judicial review, it would dishonor its commitment to personal freedom by violating the land in which citizens enjoy their personal freedom to associate, practice religion, and speak freely.[62]

The passage of the Bill of Rights was considered an Anti-Federalist victory, and by 1820 the just compensation clauses had won general acceptance among the states.[63] The Bill of Rights has forever changed the way that property is transferred within the United States.[64] In fact, Madisonian ideas have had such a profound impact on American property rights that many claim he "championed the interests of property."[65]

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[52] POLLOT, *supra* note 22, at 35-36.

[53] *Id.* at 15-16, 19 (colonists found their legislatures to be untrustworthy due to their constant interference with property rights).

[54] *Id.* at 44-45. "By the late 1780s the philosophy of natural rights was clearly entrenched in America . . . [which included] 'absolute rights of property.'" *Id.* at 35.

[55] *Id.* at 44-45.

[56] *Id.* at 45.

[57] *See* James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 1 THE FOUNDERS CONSTITUTION 598-99 (Philip B. Kurland & Ralph Lerner eds., 1987).

[58] *Id.* at 598.

[59] *Id.*

[60] POLLOT, *supra* note 22, at 27.

[61] Treanor, *supra* note 44, at 712.

[62] *Id.*

[63] POLLOT, *supra* note 22, at 45.

[64] *Id.*

[65] Treanor, *supra* note 44, at 709.

2. Modern Takings Claims

The Fifth Amendment states: "nor shall private property be taken for public use, without just compensation."[66] Today, the main issue in takings jurisprudence is determining when property rights are "taken" so as to require just compensation. There are primarily two situations when a landowner may obtain compensation for land officially transferred to or depreciated by the government.[67]

First, an owner may be entitled to compensation when a governmental entity intentionally acquires private property through a formal condemnation proceeding and without the owner's consent.[68] The state's power to take property is considered inherent through its eminent domain powers as a sovereign.[69] Through the condemnation proceeding, the government obtains the necessary interest in the land, and the Fifth Amendment requires that the property owner be compensated for his loss.[70]

The second situation requiring compensation under Fifth Amendment occurs when the government has not officially acquired private property through a formal condemnation proceeding, but "nonetheless takes property by physically invading or appropriating it."[71] Under this scenario, the property owner, at the point in which a "taking" has occurred, has the option of filing a claim against the government actor to recover just compensation for the loss.[72] When the landowner sues the government seeking compensation for a taking, it is considered an inverse condemnation proceeding, because the landowner and not the government is bringing the cause of action.[73]

So if the government does not formally condemn land, how does a landowner know when his property has been "taken?" Over the years case law has established a means of determining when a taking has occurred through two basic concepts: physical takings and regulatory takings.[74] A physical taking typically involves: "trespass on, invasion of, or occupation by a governmental entity of an owner's private property."[75] On the other hand, a "regulatory taking is the result of government regulating a property's use in a way that unreasonably diminishes its value without physically occupying it."[76]

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[66] U.S. CONST. amend. V.

[67] *See* JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS 8-13 (2006).

[68] *See id.*

[69] STOEBUCK, *supra* note 44, at 4 (discussing the historical implications of eminent domain).

[70] LAITOS, *supra* note 67, at 8-13.

[71] *Id.* at 8-17, 8-18 ("[C]lassic inverse condemnation occurs by physical appropriation . . . .").

[72] *See id.* at 8-16.

[73] *See id.*

[74] *See* BARLOW BURKE, UNDERSTANDING THE LAW OF ZONING AND LAND USE CONTROLS 23-32 (2002).

[75] *Id.* at 23. *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

[76] BURKE, *supra* note 74, at 30. *See also* Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

A landowner must demonstrate several elements to bring a successful inverse condemnation claim against the government.[77] First, the landowner must prove that he owns private property and that his rights are protected under state or federal constitutions.[78] State law usually defines property interests and whether such interests are deserving of constitutional protection.[79] Real property is the most common type of private property deserving protection; however, real property encompasses various interests that are often not deserving of protection.[80]

Second, the landowner must consider timing issues when deciding whether to bring a claim, including ripeness and mootness. If the claim is brought too early, it will be considered not yet ripe and dismissed; on the other hand, if it is brought too late, it will be considered moot and dismissed as well.[81] The most important timing question is whether the statute of limitations has run in order to bring the inverse claim. The statutory time period to bring a claim begins to run when the taking has "accrued."[82] An inverse condemnation claim usually accrues when the property owner has been permanently deprived of the land or when the elements of a physical or regulatory taking are met.[83] Once it is determined when the claim accrued, the appropriate statutory time period should be determined. The time period to bring an inverse claim is established either by a specific statute of limitations for inverse condemnation claims or if none exists, the time period to acquire land by adverse possession.[84] Bringing a timely claim is crucial because the United States Supreme

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[77] *See generally* 2A JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 6.03 (2006) (discussing how procedural issues often prevent a landowner from bringing a successful takings claim).

[78] MICHAEL A. ZIZKA ET AL., STATE & LOCAL GOVERNMENT LAND USE LIABILITY § 12:25 (2004); LAITOS, *supra* note 67, at 9-3 ("When the Takings Clause refers to 'private property,' this phrase most obviously includes physical things, particularly real property.").

[79] See LAITOS, *supra* note 67, at 4-16; ZIZKA ET AL., *supra* note 78.

[80] LAITOS, *supra* note 67, at 9-4, 9-5 ("[T]his 'sticks-in-a-bundle' model of property has resulted in the Supreme Court acknowledgement that some rights of ownership (*e.g.*, the right to exclude, the right of descent and devise, the right to have some economically viable use of property) are more protected by the Takings Clause than others (*e.g.*, the right to make the most profitable use of one's land).").

[81] *Id.* at 10-5.

[82] *Id.* at 10-7.

[83] *Id.* at 10-7 n3. *But see* DUKEMINIER & KRIER, *supra* note 15, at 1230 (suggesting that sometimes it is unclear as to when a regulatory taking claim accrues and that it could be when the regulation is enacted or when the government refuses compensation). *See also* United States v. Dickinson, 331 U.S. 745 (1947) (determining when a takings claim accrues after a property owner's land has been flooded by the government).

[84] *See* 27 AM. JUR. 2D *Eminent Domain* §§ 794-795 (2004). *See generally* Charles C. Marvel, Annotation, *State Statute of Limitations Applicable to Inverse Condemnation or Similar Proceeding by Landowner to Obtain Compensation for Direct Appropriation of Land Without the Institution or Conclusion of Formal Proceedings Against Specific Owner*, 26 A.L.R.4th 68 (1983) (providing an overview of how different states limit the time period to file an inverse condemnation claim, if no statutory period exists, and recognizing that often the time period of adverse possession is used if no period exists). *But see* ZIZKA ET AL., *supra* note 78, at § 12:22 (suggesting that a tort statute of limitations may apply).

Court has held that constitutional rights can be barred by a statute of limitations, thus preventing claims for compensation.[85]

The next step in bringing a successful inverse claim is proving that the taking was caused by an act of the government or its agent and not a third party.[86] Typically this involves a showing that the government "authorized the act that brought about the taking."[87] Assuming the prior requirements can be met, the party seeking compensation must prove that his rights were diminished through either a physical or regulatory taking.[88] Finally, there must be proof that the property was taken for public use.[89]

III. U.S. Supreme Court Decisions Supporting the Use of Adverse Possession by a Governmental Entity?

A diligent researcher will be hard-pressed to find authority by the United States Supreme Court granting either the federal or state governments the ability to use adverse possession as an alternative to eminent domain. However, *Stanley v. Schwalby*[90] and *Texaco, Inc. v. Short*[91] are often cited for this proposition.[92] Reliance on these decisions is misplaced for many reasons. First, neither decision suggests that a governmental entity can use adverse possession to acquire property for any purpose and certainly not as an alternative to eminent domain.[93] Second, neither decision specifically addresses the use of adverse possession by a governmental entity or the interplay between adverse possession and the takings doctrine.[94]

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[85] United States v. Dickinson, 331 U.S. 745 (1947); Wadsworth v. Dep't of Transp., 915 P.2d 1, 3-4 (Idaho 1996) (arguing that *United States v. Dickinson* provides authority to limit the time period to file an inverse condemnation claim); Carol Necole Brown, *Taking the Takings Claim: A Policy and Economic Analysis of the Survival of Takings Claims After Property Transfers*, 36 Conn. L. Rev. 7, 48 (2003) (recognizing that takings claims are subject to statutes of limitation). *See generally* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 Pac. L.J. 453 (1997) (discussing the historical and modern purposes of statute of limitations).

[86] *See* Laitos, *supra* note 67, at 10-48.3, 10-48.6.

[87] *See id.* at 10-48.11.

[88] Zizka et al., *supra* note 78, at § 12:3 (providing a basic overview of physical and regulatory taking claims).

[89] Laitos, *supra* note 67, at 12-3 to 12-20 (the public use requirement is met when the property is made available to the public and for the public's benefit, but noting that there are some difficulties in determining whether a use is for the public). *See also* Kelo v. City of New London, 545 U.S. 469 (2005) (suggesting that "public use" is a broad concept).

[90] 147 U.S. 508 (1893).

[91] 454 U.S. 516 (1982).

[92] *See* cases cited *infra* notes 124, 127.

[93] Foncello, *supra* note 11, at 678-79 ("[C]ourts erroneously rely on *Texaco, Inc. v. Short* for the proposition that land acquired by a governmental entity through adverse possession is not subject to a takings claim . . . . In fact, the case is not even about adverse possession.").

[94] *Id.*

A. *Stanley v. Schwalby*

Stanley involved a dispute between several parties who had received title to the same tract of land from a common grantor.[95] The plaintiff held valid title as the first party to receive the conveyance.[96] The United States received the second conveyance for the same tract several years later as a gift and with notice of the plaintiff's interest in the property.[97] Some time after the United States received title and began using the property as a military base, the plaintiff sued the three officers of the United States military for trespass because they were using the property without permission.[98] The United States was later brought into the suit.[99] As a defense, the United States and its officers argued that any claims against them were time-barred by the appropriate statute of limitations, and in the alternative, that they had adversely possessed the land.[100]

The Court was faced with the issue of whether the government could benefit from the expiration of a statutory time period even though it cannot be sued during that time period.[101] The Court began by stating that the government is not subject to the defense of a statutory time period when asserting rights of the public against individuals.[102] The Court suggested that this rule was established to prevent public interests or rights from being "prejudiced by the negligence of the officers or agents to whose care they are confided . . . ."[103] With this in mind, the Court held that there was no reason why the government should not be able to rely on a relevant statute of limitations as a defense when claims are brought *against it* in order to protect those same rights for the public.[104] The Court reasoned that the government is in a unique position to protect the public interest, which allows it not only to avoid being barred from a statutory time period when it brings suit, but to also benefit from the same time period when it is being sued.[105]

Finally, the Court rejected arguments by the plaintiff that the government should not be able to possess property adversely, unless an exception to sovereign immunity was created to allow a suit for recovery of such property.[106]

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[95] *Stanley*, 147 U.S. at 508-10. *See also* Stanley v. Schwalby, 19 S.W. 264 (Tex. 1892) (providing a comprehensive overview of the history and facts of the case).

[96] *Stanley*, 147 U.S. at 508-11. The facts, as indicated in the procedural history, state that while the plaintiff was the first party to receive title, she failed to record title until after the defendants; however, the Court noted that the defendants took title with notice of the plaintiff's claims, did not pay for the property, and thus they were not innocent purchasers. The Supreme Court did not appear to address the title dispute claims. *Id. See also* SPRANKLING, *supra* note 23, at 378-91 (explaining rules regarding title disputes including the first in time rule and the exception to that rule, the subsequent bona fide purchaser doctrine).

[97] *Stanley*, 147 U.S. at 510.

[98] *Id.* at 508-09.

[99] *Id.* at 508 (Initially, only the military officers were sued, but "[t]he United States District Attorney appeared for the United States, acting, as he alleged, 'by and through instructions from the Attorney General of the United States' . . . in the pleas of the other defendants.").

[100] *Id.* at 508-09.

[101] *Id.* at 517.

[102] *Id.* at 514-15.

[103] *Id.* at 514.

[104] *Id.* at 517.

[105] *Id.* at 515-18.

[106] *Id.* at 519.

Addressing this issue, the Court stated: "[i]t by no means follows that because an action could not be brought in a court of justice, therefore possession might not be regarded as adverse so as to ripen into title."[107] The remedy suggested by the Court was for the landowner to protest the government's occupancy in order to destroy the presumption of adverse use or to bring suit against the agents of the government in their individual capacity.[108]

Stanley is the first of several decisions that recognize the distinction between government action and that of government agents who are acting in their individual capacity.[109] The Court bolsters this distinction by suggesting that an aggrieved landowner in a similar situation bring a claim against the government agents who are trespassing on his property, as opposed to bringing suit against the governmental entity itself.[110] Then the Court stated:

> [t]he alleged trespass was committed by the [officers], as the servants of the United States and by their command, yet if they showed the requisite possession in themselves as individuals, though in fact for the United States, under whose authority they were acting, the defence [sic] [of statute of limitations] was made out.[111]

The problem with the distinction in *Stanley* is that it allowed the government to avoid liability for actions by its agents even though they were acting within the scope of their authority.[112] This type of reasoning is also troubling because the Court failed to recognize the inherent difficulty in distinguishing between actions by the government and those of its agents who are acting in their private capacity.[113] The ability of a governmental entity to act in a private capacity or in a governmental capacity is critical and will be addressed later in this article.[114]

Several issues arise when attempting to apply *Stanley* as authority for the government to possess privately-held property adversely. First, the Court was not specifically addressing whether adverse possession was a means for the federal government to acquire property, but whether sovereign immunity was applicable to a case of trespass and whether the military officers were seen as individuals or agents of the United States.[115] The decision is also inapplicable

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[107] *Id.* at 517.

[108] *Id.* at 517-18. *See also* R.K.G., *supra* note 11, at 231 (discussing the holding of *Stanley* by stating: "the [C]ourt indicated that it is not necessary that the government be amenable to suit as a prerequisite to taking title by adverse possession. The [C]ourt said, 'protest against the occupancy and application for redress in the proper quarter would seem to be quite as potential in destroying the presumption of right to possession . . . when the action cannot be brought, as the action itself when it can.'").

[109] While *Stanley* does make the distinction, it does not necessarily rely on the governmental/proprietary distinction that is discussed later in this article. *See infra* Section IV.C.3. *See also* BARLOW II & VONCANNON, *supra* note 42, at 402 (citing *Stanley v. Schwalby* for the authority that: "[t]he United States when holding through its officers and agents who are subject to action for its recovery may acquire title by adverse possession.").

[110] 147 U.S. at 517-18.

[111] *Id.* at 519.

[112] *Id.*

[113] *See infra* Section IV.C.3 (discussing how municipal corporations have the ability to act in a dual-status capacity).

[114] *See infra* Section IV.C.3.

[115] *Stanley*, 147 U.S. at 517-19.

because it fails to address the issue of how takings jurisprudence interacts with the government's ability to possess privately-held land adversely.

Stanley was decided in the late nineteenth century, which probably explains the result. During that time, case law in the area of adverse possession was well established, but takings jurisprudence was not.[116] It also appears that the plaintiff pled only trespass and not a taking under the federal or state constitution.[117] If the same facts arose today, the Court would likely reach a different result and have different theories on which to rest its decision. For example, the facts in *Stanley* indicate that the government's use of the plaintiff's land was sufficient to bring a takings claim.[118] Present-day authority also suggests that sovereign immunity does not apply when private property rights are in question.[119] The current state of the law allows a landowner to utilize various state and federal remedies to sue the government without obtaining consent or by challenging sovereign immunity for potential takings or tortious trespass claims.[120] This is most evident through the enactment of the Tucker Act,[121] which allows suits against the federal government for potential takings claims.[122]

Stanley makes a bold claim that governmental bodies can adversely possess private property, but it fails to address the core issue of whether this type of land acquisition amounts to a taking requiring compensation. The Court's holding creates a number of inconsistencies that cannot be reconciled without a more careful analysis.[123] It is also troubling that many state courts have relied on *Stanley* as authority for the government to possess private property adversely without questioning the Court's reasoning.[124] The effect of *Stanley*'s convoluted reasoning has slowly trickled down through the state courts, and its limited holding has grown into a general rule that governmental entities can adversely possess private property.[125] Finally, the unpredictability created within takings jurisprudence also supports the proposition that the *Stanley* deci-

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[116] This is not to say that takings law was nonexistent, but to suggest that the bright-line rule established for determining when a physical taking occurrs was nonexistent during the late nineteenth century. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (establishing the general rule that any physical occupation by the government is a physical taking).

[117] *Stanley*, 147 U.S. at 508.

[118] Under current law, any physical invasion on private land by a governmental entity is considered a physical taking. *See* sources cited *supra* note 75 and accompanying text.

[119] One commonly used remedy is the Tucker Act, which allows jurisdiction for claims against the federal government, including potential takings claims. *See* 28 U.S.C. § 1491 (2000); DUKEMINIER & KRIER, *supra* note 15, at 1231.

[120] *See* sources cited *supra* note 119.

[121] 28 U.S.C. § 1491 (2000).

[122] DUKEMINIER & KRIER, *supra* note 15, at 1231.

[123] *See infra* Section IV (discussing the problems that arise when adverse possession is utilized by governmental entities).

[124] *See, e.g.*, Commonwealth v. Stephens, 407 S.W.2d 711, 712 (Ky. 1966); State *ex rel.* A.A.A. Invs. v. City of Columbus, 478 N.E.2d 773, 775 (Ohio 1985); Johnson v. State, 418 P.2d 509, 510 (Or. 1966).

[125] *See infra* Section IV.B.

sion, and those relying on it, should be rejected as authority for the government to possess privately-held property adversely.[126]

B. *Texaco, Inc. v. Short*

A more recent decision often cited as authority for a state to possess private property adversely without compensation is *Texaco, Inc. v. Short*.[127] However, the *Texaco* decision did not involve a governmental entity attempting to acquire privately-held property through adverse possession; it involved Indiana's Dormant Mineral Act.[128] Under the Act, a mineral interest in property that was not used for at least twenty years would automatically lapse and therefore revert to the current surface owner of the property.[129] To prevent the reversion, the Act requires an owner to file a statement of intent to retain the interest with the county recorder.[130]

Several parties who lost their mineral interest by failing to meet the Act's requirements brought suit and claimed that the application of the statute resulted in a taking of property without just compensation.[131] Justice Stevens, writing for the Court, declared that the states define property rights, not the Constitution, and therefore a "[s]tate has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest."[132] He reaffirmed that "[s]tates have the power to permit unused or abandoned interest in property to revert to another after the passage of time."[133] These laws really amount to a "withdrawal of a remedy rather than a destruction of a right."[134] Because the slight burden on the owner to use his interest or file a written statement is so minute, the Court declared that "[i]t is the owner's failure to make any use of the property – and not the action of the State – that causes the lapse of the property right . . . ."[135] Finally, Justice Stevens emphasized that "this Court has never required the State to compensate the owner for the consequences of his own neglect."[136] Therefore, because the former owners had abandoned their

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[126] *See infra* Section IV.

[127] 454 U.S. 516 (1982). The *Texaco* decision has been frequently cited as authority for a governmental entity to possess privately-held property adversely. *See, e.g.*, Bd. of County Comm'rs of Saguache v. Flickinger, 687 P.2d 975, 983 (Colo. 1984); *A.A.A. Invs.*, 478 N.E.2d at 775; Reitsma v. Pascoag Reservoir & Dam, LLC, 774 A.2d 826, 838 (R.I. 2001). *But see* Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 224 (D.R.I. 2002) (rejecting *Texaco* as authority for states to possess property adversely without just compensation); Selemba, *supra* note 3, at 673 (rejecting *Texaco* as authority for States to use adverse possession because it fails to encompass the concept of adverse possession).

[128] IND. CODE § 32-5-11-1 (1982) *repealed by* IND. CODE § 32-23-10-2 (2004); *Texaco*, 454 U.S. at 518.

[129] *Texaco*, 454 U.S. at 518.

[130] *Id.*

[131] *Id.* at 522.

[132] *Id.* at 526.

[133] *Id.*

[134] *Id.* at 528.

[135] *Id.* at 530.

[136] *Id.*

interest in the mineral rights, there was no "taking" that required compensation.[137]

The *Texaco* decision is important for several reasons. It recognizes that property rights can be extinguished by state action if a landowner negligently fails to enforce his rights.[138] The key ingredient in the *Texaco* decision is the form of "state action."[139] The *Texaco* Court recognized that the State of Indiana merely created a law that had the *possibility* of divesting mineral rights from one party and transferring them to the original landowner. Therefore, the State was not actually acquiring any rights through any affirmative actions of its own but merely establishing a time period during which rights can be extinguished.

However, when courts use *Texaco* as authority for states to possess private property adversely, several problems arise. First, these decisions fail to recognize that any time a government actor enters land or creates a regulation affecting privately-held property, he is subject to constitutional constraints – namely the Takings Clause.[140] Second, courts fail to recognize that the statute in *Texaco* merely allowed rights to be transferred from one party to the original landowner.[141] The State did not acquire any rights through this transfer but merely allowed the right of reversion to take place.[142] Finally, in *Texaco*, the State did not enter private land without permission or cause the rights to be divested from the holder by prescriptive means. Therefore, using *Texaco* as authority for a governmental entity to possess private property adversely is inconsistent with the entire scheme of takings jurisprudence.

A more workable proposition under current takings law and the *Texaco* decision is the notion that any time a governmental entity enters privately-held land or creates a burdensome land-use regulation, it is subject to a takings claim by the property owner.[143] If the potential claim is not enforced through an appropriate inverse condemnation proceeding within the appropriate time period, the *Texaco* decision suggests that the right to pursue that claim can be extinguished like any other legal claim.[144] The notion that a takings claim can be extinguished through the running of a statute of limitations is consistent with other authorities.[145]

The *Texaco* decision is the most recent Supreme Court holding that has been relied on as a state's authority to possess private property adversely.[146] While it does not embody the concept of adverse possession, it does stand for

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[137] *Id.*

[138] *Id.* at 525-30.

[139] *See* Foncello, *supra* note 11, at 679-80 ("In *Texaco*, the state is not a trespasser. The often-neglected language in *Texaco* is that the transfer of the property right under the Mineral Lapse Act is not due to an 'action of the State.'").

[140] *Contra* Selemba, *supra* note 3, at 674-77 (erroneously suggesting that a taking only occurs after the adverse possession statute of limitations runs and failing to recognize that any time a governmental entity enters land a potential takings claim arises).

[141] *Texaco*, 454 U.S. at 518.

[142] *Id.*

[143] *See supra* Section II.B.1.

[144] *Texaco,* 454 U.S. at 528-30.

[145] *See* sources cited *supra* note 85 and accompanying text.

[146] *See* State *ex rel.* A.A.A. Invs. v. City of Columbus, 478 N.E.2d 773, 775 (Ohio 1985).

the authority that property rights can be divested from an owner who has failed to take precautionary measures to protect his rights.[147]

IV. A Categorical Response for Change: How State and Federal Courts Apply Adverse Possession When Raised by a Governmental Entity

Over the past one hundred years, courts have struggled to find a uniform application of adverse possession when utilized by a governmental entity.[148] Surveying the case law from all fifty states could lead to complete confusion and quick frustration. This section argues that the use of takings jurisprudence is better suited to handle property disputes involving a governmental entity and is superior to relying on ill-reasoned adverse possession decisions. This section also provides a historical analysis of how the use of adverse possession by governmental entities evolved from mere inconsistencies in case law into the established rule that many states follow today. Finally, this section will describe how adverse possession has been applied over the past century and will group the applications into uniform categories to show the inconsistencies and poor reasoning produced by these decisions.[149]

A. *The Basic Proposal for Change*

The use of adverse possession should not be applied in favor of the governmental entity when well-settled takings jurisprudence would obtain a similar result for the government and more favorable rulings for private landowners.[150] The rationales for adverse possession are nearly identical to those used for traditional statutes of limitation, including those used for inverse condemnation claims.[151] In either instance, at the expiration of the statutory time period for adverse possession or an inverse condemnation claim, the government will hold

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[147] *See* Selemba, *supra* note 3, at 673 (arguing that *Texaco* has been inaccurately applied as authority to adversely possess private property because it was not addressing the use of adverse possession by a governmental entity).

[148] *See infra* Section IV.B.

[149] In preparing this article, the author surveyed over one hundred cases involving the use of adverse possession by governmental entities and grouped the decisions by the date of the decision, factual distinctions, how adverse possession was applied in favor of the government and the type of legal authority, if any, relied upon for the use of adverse possession by the government. A majority of the case law reviewed by the author was found within two articles. *See generally* Selemba, *supra* note 3 (discussing recent developments in the area of adverse possession by governmental entities); Vann, *supra* note 7, at 686 (providing a fifty state listing of decisions involving governmental adverse possession).

[150] The first category, Section IV.C.1, is the only occasion in this Article where adverse possession is appropriately applied due to the fact that it is not being applied in favor of a governmental entity but on behalf of the public who acquired the rights in the first place.

[151] *Compare* Herbert Hovenkamp & Sheldon F. Kurtz, Principles of Property Law 57 (6th ed. 2005) ("The purposes of such statutes of limitation [for adverse possession] are to suppress dormant claims, to quiet titles, to require diligence on the part of the owner and penalize those who sit on their rights too long, and to reward the economic activities of a possessor who is utilizing land more efficiently than the true owner is."), *with* 1 Calvin W. Corman, Limitation of Actions 11-17 (1991) (stating that the purpose of statutes of limitation are to eliminate stale claims, penalize those who sit on rights, and reward those who pursue their claims).

an interest in the property.[152] For example, under takings law, if a governmental entity entered private property without permission and the requisite takings elements were satisfied, it would be subject to a potential inverse condemnation claim.[153] However, if the landowner fails to pursue the claim within the statutory time period, the claim would be time-barred and the government would have acquired an interest in the property by default, which would avoid the need for adverse possession.[154] Some critics argue that adverse possession is necessary to transfer title to the government,[155] but this is not entirely true.[156] A party who successfully adversely possesses property only obtains an interest in the property and must perfect that interest to obtain "marketable title"[157] by bringing a successful quiet title[158] action.[159] The same is true if the government obtains an interest in the property after the landowner fails to bring an inverse condemnation claim within the requisite time period.[160] Thus, when all factors are taken into account, the use of adverse possession is not required for a valid transfer of title. More importantly, the use of takings law would be consistent with procedures established under the Fifth Amendment by allowing non-negligent landowners the opportunity to file an inverse claim during the time when the government has misappropriated their land.

Takings law is also more predictable and a more developed area of law capable of resolving more disputes when compared to governmental adverse possession.[161] Having predictable procedures in place would benefit landowners attempting to enforce takings claims by eliminating the need to litigate the defense of adverse possession on behalf of the government.[162] What many

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[152] The governmental entity will hold an interest in the property, but in either case, a quiet title action is probably necessary in order to obtain marketable title. *See infra* Section IV.C.2.

[153] The requisite elements of a takings claim are mentioned above. *See supra* Section II.B.2.

[154] *See* POWELL ON REAL PROPERTY § 79E.03[2] (Michael A. Wolf ed., 2005) (suggesting that once the statute of limitations expires for an inverse condemnation claim, no claim for compensation exists).

[155] Foncello, *supra* note 11, at 687-88 (arguing that the use of adverse possession by governmental entities is necessary to quiet title, but nevertheless compensation must be granted).

[156] In fact, adverse possession only quiets title in a limited number of circumstances. POWELL, *supra* note 154, at § 81.03[6][d]. In most cases, a party who obtains title by adverse possession or who receives title from an adverse possessor must bring a quiet title action in court to obtain marketable title. *Id.* Title may also be marketable if the jurisdiction has adopted the Marketable Record Title Act and any potential claims exceed a specific number of years after the root of title. *See* THOMPSON ON REAL PROPERTY § 91.09(b)(1) (David A. Thomas ed., 1994).

[157] Title is marketable if "a reasonable person – knowing the facts about seller's title including its chain of title, encumbrances against it and any opposing claims of ownership – would accept the title without hesitation . . . ." POWELL, *supra* note 154, at § 81.03[6][a].

[158] A quiet title suit is an action brought in a court of law to resolve a title dispute for a piece of real property. *See* POWELL, *supra* note 154, at § 81.03[6][d][ii].

[159] *See supra* notes 154 and 156.

[160] *See supra* note 154.

[161] *See supra* notes 6-11 and accompanying text.

[162] The government has a number of procedural defenses that can be utilized against takings claims and adding adverse possession to the list only complicates things. *See generally* ZIZKA ET AL., *supra* note 78 (providing a comprehensive guide to avoiding takings claims specifically designed for state and municipal governments).

courts fail to recognize is that determining when a takings claim has accrued can be difficult, even when adverse possession does not come into play.[163] However, case law makes apparent that when adverse possession is added to the mix, litigants and courts spend even more time struggling with procedural issues concerning when a taking accrues or if a claim is present at all.[164] When the astronomical cost of litigating a takings claim is factored into this equation, removing the adverse possession hurdle appears to be a logical solution in favor of landowners when it could mean the difference in bringing a successful claim or having their claim dismissed and sent through an endless appellate process.[165]

Takings law would also prevent the government from claiming that it did not *cause* the taking because it was acting in a *private* capacity.[166] This proposal would assume that any time a government body enters land without permission or creates a burdensome regulation, it is acting in a *public* capacity; therefore, a potential takings claim would accrue, and the appropriate time period would apply to bring an inverse condemnation claim.[167] The reintroduction of traditional takings law would reduce the inconsistencies that have resulted from the introduction of adverse possession into this area of law.[168] Preventing the government from utilizing adverse possession would be consistent with the property rights movement while also encouraging proper condemnation procedures on behalf of the government.[169] Finally, relying on takings law would dismiss arguments by landowners who often claim that the government gets the best of either situation when adverse possession is asserted. Their argument is a rational one, recognizing that that most property held by the government is not subject to adverse possession, so why should the government be able to possess private property adversely?[170]

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[163] *See id.* at § 10.7; *infra* note 165.

[164] *See* cases cited *supra* note 20.

[165] The scales of justice are unfairly tipped in favor of the government when citizens are faced with the threat of losing their property due to regulatory burdens. Not only are the laws drafted to ease the litigation burden of the government, but the costs of takings litigation can range in the hundreds or thousands of dollars – too high for the average citizen to bear. Consequently, many citizens, when faced with a government takings claim, cannot pursue their rights under the Fifth Amendment. The government, on the other hand, does not face a similar shortage of resources (at least in comparison to the individual property owner) and can often pursue a vigorous defense of the case without constraint. Adding to the hardship, procedural hurdles often bar litigation on the merits of takings claims for anywhere from five to ten years.

NANCIE G. MARZULLA & ROGER J. MARZULLA, PROPERTY RIGHTS: UNDERSTANDING GOVERNMENT TAKING AND ENVIRONMENTAL REGULATION 143 (1997).

[166] *See infra* Section IV.C.3.

[167] *Id.*

[168] *See* sources cited *supra* note 20.

[169] "States have been very active in the pursuit of legislative solutions to the taking of property rights." MARZULLA & MARZULLA, *supra* note 165, at 171. Some call it the "The Property Rights' Revolt." *Id.* at 173.

[170] DUKEMINIER & KRIER, *supra* note 15, at 162.

B. The Use of Adverse Possession by Governmental Entities Has Evolved in Questionable Ways

In the late nineteenth century, courts were quick to apply theories of prescription and adverse possession in favor of the government without justification or meaningful analysis of how the doctrine interacted with takings law.[171] This type of analysis began the Implied Justification[172] period because courts were impliedly justifying the use of adverse possession by governmental entities without any analysis or explanation. A prime example of the Implied Justification analysis is the *Stanley* decision discussed earlier in this article.[173] Decisions under this category of Implied Justification are most likely the result of difficult factual situations where "hard cases make bad law."[174] As with many of the decisions applying adverse possession in favor of a state entity, the courts appear to be struggling to find an equitable solution in favor of the government when legal theories would lead to unjust results.[175]

Implied justification has also been used in recent decisions involving municipal corporations.[176] Courts using this analysis have granted municipalities the ability to use adverse possession either without citing authority at all, or based on the notion that there is no authority preventing them from using the doctrine in favor of the government.[177] One Florida court illustrated this type of application when it held that the government's ability to use adverse possession was so well established that it was "unnecessary to burden th[e] opinion with any discussion of that proposition."[178] The lack of case law leading up to the 1950s probably explains why courts struggled to find authority for governmental adverse possession and were left to rely on the myth that an adverse possession analysis could be used without affecting the takings doctrine.[179] Nevertheless, this type of reasoning can leave practitioners bumbling to find any justification within this area of law or any consistent application thereof.

As case law has developed, the Express Justification[180] period began a new line of decision making where courts expressly set precedent that allowed

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[171] *See, e.g.*, Stanley v. Schwalby, 147 U.S. 508, 517 (1893); Quindaro Twp. v. Squier, 51 F. 152 (8th Cir. 1892); Collett v. Bd. Comm'rs, 21 N.E. 329 (Ind. 1889); Stephens v. Murray, 34 S.W. 56, 57 (Mo. 1896). *See also supra* Section III.A.

[172] This term is the author's creation.

[173] *See supra* Section III.A.

[174] *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting) ("[H]ard cases make bad law" is a quote often used in situations where the court fails to find an appropriate solution.). *See also infra* Section IV.C.4 (discussing the equitable application of adverse possession in favor of a governmental entity).

[175] *See infra* Section IV.C.4.

[176] *See, e.g.*, United States v. Stubbs, 776 F.2d 1472, 1475 (10th Cir. 1985); United States v. McCulley, 100 F. Supp. 379 (E.D. Tenn. 1951); Drainage Dist. #1 v. Village of Green Valley, 387 N.E.2d 422, 426 (Ill. App. Ct. 1979). *See also* Lincoln Parish Sch. Bd. v. Ruston Coll., 162 So. 2d 419, 426 (La. Ct. App. 1964) ("There is no prohibition in the organic law prohibiting the running of prescription in favor of the state . . . .").

[177] *See id.*

[178] *See* Levering v. City of Tarpon Springs, 92 So. 2d 638, 639 (Fla. 1957).

[179] R.K.G., *supra* note 11, at 231 (noting that even during the 1950s there was "a surprising lack of cases on this precise point . . . .").

[180] This term is the author's creation.

states to utilize adverse possession as a means of obtaining private property.[181] A majority of these decisions relied upon real property treatises,[182] legal encyclopedias[183] and case law[184] that were not exactly on point.[185] For example, a number of courts were quick to cite legal encyclopedias as authority to allow *any* state entity to possess private property adversely, but they failed to recognize the applications cited within the encyclopedia articles were either inaccurate or limited in their holdings.[186] This misplaced reliance is most evident in early decisions that allowed municipal corporations to utilize adverse possession.[187] These early decisions were limited in their holdings to the special status of municipal corporations,[188] but other courts used these decisions to apply adverse possession in a myriad of non-municipal scenarios. The primary result of this misapplication resulted in the fundamental misunderstanding of how adverse possession relates to the takings doctrine and how it should be applied to governmental entities, whether a municipal corporation or not.[189] The questionable evolution of authorities suggesting that governmental entities can adversely possess private property is yet another reason to rely on takings law.

C. *Areas of Application Suggest a Need for Change*

Within the vast line of cases allowing adverse possession to be used in favor of a governmental body, there are several major areas in which it has been applied with some uniformity.[190] The author has attempted to categorize the case law in an effort to make a uniform response. These areas can be divided into several groups: (1) state's ability to acquire roadways on behalf of the public; (2) applying an adverse possession statute of limitation to limit inverse condemnation claims; (3) allowing municipal corporations to acquire

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[181] *See, e.g.*, Hollywood, Inc. v. Zinkil, 403 So. 2d 528, 535 (Fla. Dist. Ct. App. 1981); Miner v. Yantis, 102 N.E.2d 524, 526 (Ill. 1951); State *ex rel.* A.A.A. Invs. v. City of Columbus, 478 N.E.2d 773, 775 (Ohio 1985); Johnson v. State, 418 P.2d 509, 510 (Or. 1966).

[182] *See, e.g.*, *Johnson*, 418 P.2d at 510 (relying on various treatises including TIFFANY, REAL PROPERTY 4 (3d ed. 1939), for the rule that a state can acquire property by adverse possession, but the treatise relies on the confused theories of *Stanley v. Schwalby*, 147 U.S. 508 (1893)).

[183] *See, e.g.*, *Miner*, 102 N.E.2d at 526 (citing 1 AM. JUR 801, which states: "[t]itle of this nature may be acquired [through adverse possession] by the Crown, the United States, states, municipal corporations, and other governmental entities." Nonetheless, a closer look at the case law cited by the encyclopedia includes *Attorney Gen. ex rel. Bd. of Harbor and Land Comm'rs v. Ellis*, 84 N.E. 430 (Mass. 1908), which involves the *public* acquiring rights through adverse possession and not a governmental entity. The article also cites *City of Raleigh v. Durfey*, 79 S.E. 434 (N.C. 1913), which deals specifically with municipal corporations and does not grant authority to all governmental bodies.).

[184] *See, e.g.*, Commonwealth v. Stephens, 407 S.W.2d 711, 712 (Ky. 1966) (relying on *Stanley v. Schwalby*, 147 U.S. 508 (1893) as authority for the United States to adversely possess private property without considering its confused analysis).

[185] *See* cases cited *supra* note 176.

[186] *Id.*

[187] *See* Wyalusing Twp. Sch. Dist. v. Babcock, 11 Pa. D. & C. 536, 540 (Ct. Com. Pl. 1928).

[188] *See id.*

[189] *See supra* Section IV.

[190] *See supra* note 149.

property through adverse possession; (4) use of adverse possession to cure defective condemnation or title disputes.

1. State's Ability to Acquire Roadways on Behalf of the Public

The first category involves a state's ability to acquire private land on behalf of the public for rights-of-way that were established *exclusively* by the public.[191] These decisions can be quickly dismissed as authority for a governmental entity to possess privately-held property adversely or as means of skirting the Just Compensation Clause. Therefore, this category is not in need of reform according to the author's proposal; nevertheless, it is an important topic worthy of discussion because these decisions are often cited as authority for the government to use adverse possession.[192]

While these decisions are often confusing at first blush because the State appears to claim title to the land through adverse or prescriptive use, this is not the case.[193] In most of these situations, the general public has established the right-of-way by using private land adversely for the requisite period and the "appropriate corporate governmental unit . . . holds title for the benefit of the public."[194] The primary argument raised by the government, and rightfully so,

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[191] *See* COLO. REV. STAT. § 43-2-201 (2004) (public highways can be established by adverse use for twenty consecutive years); Zakutansky v. Kanzler, 634 N.E.2d 75 (Ind. Ct. App. 1994); Dunnick v. Stockgrowers Bank of Marmouth, 215 N.W.2d 93 (Neb. 1974); David G. Thatcher, *Tenth Circuit Survey: Real Property Survey*, 71 DENV. U. L. REV. 1041, 1057-59 (1994) (discussing the application of Colorado statutory law that allows the public to adversely possess roads over private property). *See also* Lori Potter et al., *Legal Underpinnings of the Right to Float Through Private Property in Colorado: A Reply to John Hill*, 51 U. DENV. WATER L. REV. 457, 496-98 (2002) (noting that some states have "treated rivers as public highways or as subject to adverse possession by public use" under prescription statutes). *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 (2000) (providing a list of state statutes that allow the public to acquire public roadways by prescription).

[192] *See* James M. Kehoe, *The Next Wave in Public Beach Access: Removal of States as Trustees of Public Trust Properties*, 63 FORDHAM L. REV. 1913, 1949-50 (1995) (misunderstanding the distinction between the public acquiring prescriptive rights that are held by the state and when the state itself actually attempts to acquire rights by prescription); Stewart E. Sterk, *Publicly Held Servitudes in the New Restatement*, 27 CONN. L. REV. 157, 158-59 (1994) (recognizing that the Restatement drafters were uncertain as to the consequences of the public acquiring prescriptive rights compared to the government actually acquiring the rights). *See also* Ackerman & Johnson, *supra* note 6, at 99-100 (arguing that a taking occurs when the public acquires prescriptive rights over privately-held land because the public in general obtains the benefit of the prescriptive rights).

[193] *See* sources cited *supra* notes 124 and 127.

[194] *See Dunnick*, 215 N.W.2d at 96; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.18 cmt. b (2000) ("Use and control rights are not ordinarily separated in servitudes held for private benefit, but they are necessarily separate when the servitude is created to benefit the public at large. The control rights must be located in an entity capable of exercising them. Under the rule stated in this section, . . . control rights are lodged in the state."). *See also* Ackerman & Johnson, *supra* note 6, at 98-99 ("Many courts have realized that the grant of a prescription to the public is a difficult idea . . . . When granted, who exactly receives the right? Some courts have held that municipalities may hold prescriptive rights. Other courts have awarded prescriptive easements to the public, which appears to be the modern legal trend.") (citations omitted); Sterk, *supra* note 192, at 157 ("[I]t would be impossible to create servitudes for public benefit if each citizen were required to be a party to all transactions

is that it has not acquired title to the land, but that the general public has acquired the land like any other private citizen.[195] To be more direct, members of the public, not the state or an agent of the state, have either intentionally or unintentionally used private land as a public roadway on their own and without influence from the state.[196] As it is well known, the general public does not have the ability to use eminent domain and is not subject to constitutional limitations, namely the Takings Clause.[197]

However, many questions have been raised about the government's ability to hold title for the public, although most authorities hold that once the land has been dedicated as a "public way by prescription, then the City cannot use the public way for any purpose foreign to the public way."[198] Limiting a state's ability to transform the land into another use prevents claims alleging that the government has acquired title in fee, not the general public. It is also important to realize that the general public usually does not acquire title in fee like an individual but generally obtains a perpetual easement.[199] The only state action in these cases is that of the government representing the general public to officially establish the prescriptive rights. Thus, the governmental act did not cause the property rights to be taken for constitutional purposes. Similarly, if a state creates a statute that allows the public to acquire prescriptive rights, it should not trigger state liability for a taking. The enactment of legislation that allows the public to acquire property by prescriptive means is no different than enacting a statute for adverse possession to be used by private individuals. In either case, the actions of private individuals, and not the state, have caused property rights to be lost. On its face, neither the government's representation of the public nor the enactment of the statute would be sufficient to trigger a takings claim.

Several courts have addressed the issue of whether a state statute that allows the public to acquire rights-of-way by adverse possession is a taking requiring just compensation.[200] One court relied on *Texaco, Inc. v. Short*[201] and held that states have the ability to "condition the ownership of an interest in property upon compliance with conditions that impose such a slight burden on the owner."[202] The slight burden mentioned by the Court required the owner to

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creating such servitudes. Governmental bodies, therefore, represent the public in negotiations to create servitudes for public benefit.").

[195] *See Dunnick*, 215 N.W.2d at 96; GRANT S. NELSON ET AL., CONTEMPORARY PROPERTY 736 (1996) ("[T]o establish the requisite public prescriptive easement, *the public* must show that the use and enjoyment of the land was exclusive, adverse, continuous, uninterrupted, open and notorious, and under a claim of right for the full prescriptive period.") (emphasis added) (quoting Leu v. Littell, 513 N.W.2d 24, 32 (Neb. Ct.App. 1993).

[196] *See* NELSON, *supra* note 195, at 736.

[197] *See Dunnick*, 215 N.W.2d at 96.

[198] *See* City of Ft. Smith v. Mikel, 335 S.W.2d 307, 310 (Ark. 1960). *See also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 (2000) (prescriptive rights only allow the holder to use the land for the established use).

[199] *See* Hollywood, Inc. v. Zinkil, 403 So. 2d 528, 540 (Fla. Dist. Ct. App. 1981).

[200] *See* Gotland v. Town of Cave Creek, 837 P.2d 1132 (Ariz. Ct. App. 1991); Bd. of County Comm'rs of Saguache v. Flickinger, 687 P.2d 975, 983 (Colo. 1984).

[201] 454 U.S. 516 (1982). *See also supra* Section III.B (discussing the relevance of the *Texaco* decision to this issue).

[202] *Flickinger*, 687 P.2d at 984.

object to the public's use of his land prior to the running of the statute of limitations, but the owner failed to do so, which caused the owner to lose all rights in the property.[203] Another court followed a similar analysis and held that any rights that existed in the property were lost after the statute of limitations had run, and "[o]nce lost or extinguished, the owner's 'rights' cannot be 'taken'; therefore no compensation is required."[204]

The problem with these decisions is that they assume that the government is establishing the prescriptive rights, although this is not the case. As previously mentioned, the general public, not the state, has met the prescription requirements; thus any claim that a taking occurred should be rejected. This category is not subject to the proposal set forth earlier in this article.

2. *Applying an Adverse Possession Statute of Limitation to Limit Inverse Condemnation Claims*

Over the past five years, the primary source of controversy within this area of law surrounds the *Pascoag*[205] decisions and the issue of whether a governmental body, *in its official capacity*,[206] can adversely possess privately-held property. These decisions struggle with the uncertainty of when a taking has "accrued," thus triggering the time period to file an inverse condemnation claim.[207] Courts addressing this issue have been split between two different applications, both of which are illustrated in Figure 1.[208] The first line of decisions follows the Takings Analysis,[209] as the courts under this theory are essentially following traditional takings jurisprudence, but with a twist of adverse possession.[210] On the other hand, there is a second line of decisions that follows the Adverse Possession Analysis,[211] due to the application of substantive[212] adverse possession in favor of the governmental entity.[213] The difference between the two applications can have harsh ramifications for a property owner attempting to establish when a taking has accrued. So the criti-

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[203] *Id.*

[204] *Gotland*, 837 P.2d at 1136.

[205] *See* cases cited *supra* note 2.

[206] These decisions are not questioning whether or not the governmental entity was acting in a governmental capacity or whether it was acting within a private capacity, the distinction is mentioned in this article. *See infra* Section IV.C.3.

[207] *See supra* notes 82-83 and accompanying text.

[208] *See* cases cited *supra* note 20.

[209] This term is the author's creation and refers to cases where traditional takings law is applied, so that a potential taking claim accrues once a government official enters a private citizen's property or creates a burdensome regulation.

[210] *See* cases cited *infra* note 214.

[211] This term is also the author's creation, referring to cases where a takings claim accrues once the government has acquired title to land through adverse possession.

[212] The author is referring to the application of adverse possession where courts actually apply the elements of a prima facie case, as opposed to applying the adverse possession statute of limitations to limit the time period to file an inverse condemnation claim. *See infra* Section IV.C.3.

[213] *See* Pascoag Reservoir & Dam, LLC v. Rhode Island, 337 F.3d 87, 96 (1st Cir. 2003); Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 224 (D.R.I. 2002); Johnson v. City of Mt. Pleasant, 713 S.W.2d 659 (Tenn. Ct. App. 1985).

cal question remains: which application makes the most sense based on reasonable interpretations of adverse possession and takings law?

FIGURE 1. COMPARISON BETWEEN THE TAKINGS ANALYSIS AND THE ADVERSE POSSESSION ANALYSIS

	1 GOVERNMENT ENTERS LAND WITHOUT PERMISSION OR CREATES A BURDENSOME REGULATION	2 STATUTORY TIME PERIOD THAT IS RUNNING DURING THIS TIME PERIOD	3 RESULT OF TIME PERIOD EXPIRING	4 STATUTORY TIME PERIOD THAT IS RUNNING DURING THIS TIME PERIOD	5 RESULT OF TIME PERIOD EXPIRING
Takings Analysis	Takings Claim Accrues	Inverse Condemnation	Land owner can no longer challenge the taking	None	None
Adverse Possession Analysis	No Takings Claim Accrues	Adverse Possession	Government acquires an interest in the property and a Takings Claim Accrues	Inverse Condemnation	Land owner can no longer challenge the Taking

The Takings Analysis is the most consistent and logical application according to current takings law. Under the Takings Analysis, courts essentially follow the *Texaco* rationale by stating that once private property has been adversely possessed, no taking can occur because the state actually owns title to the property at that point.[214] At first glance, the Takings Analysis appears to allow the government to utilize substantive adverse possession,[215] but this is not the case, as several courts expressly note that the landowner has the option of filing for inverse condemnation during the adverse possession statutory period.[216] The courts are assuming that any time a governmental body enters privately-held land or creates a burdensome regulation, a possible takings claim arises. For example, in *Weidner v. Department of Transportation & Public Facilities*,[217] the court held that during the government's adverse use, the landowner is required to bring an inverse condemnation claim, and if he fails to do

[214] *See* Weidner v. Dep't of Transp. & Pub. Facilities, 860 P.2d 1205, 1212 (Alaska 1993); State *ex rel.* A.A.A. Invs. v. City of Columbus, 478 N.E.2d 773, 775 (Ohio 1985).

[215] As one author erroneously stated:

> [T]he owner of the land may not claim a constitutional right against the government after the adverse use reaches prescription. This leads to a constitutional right of inverse condemnation being quashed by common law. The denial of a constitutional right by the workings of a rule based in common law is in direct violation of rudimentary public policy.

Ackerman & Johnson, *supra* note 6, at 100 (citations omitted).

[216] *See, e.g.*, *Weidner*, 860 P.2d at 1212 ("The theory of prescriptive easement does not grant the State affirmative authority to take property without just compensation. Rather, the prescriptive period – as with any statute of limitations – requires a private landowner to bring an inverse condemnation action for public use of private property within a specified period of time. At the expiration of the prescriptive period, the landowner's right to bring suit is extinguished, effectively vesting property rights in the adverse user.") (citations omitted).

[217] 860 P.2d 1205 (Alaska 1993).

so, his claim is time-barred.[218] In actuality, whether recognized by the courts or not, courts are applying an adverse or prescriptive statute of limitations to limit the time period in which an inverse condemnation claim can be filed when no express statutory period exists.[219] Applying an adverse possession statutory period to limit an inverse condemnation claim appears to be nothing new in the realm of civil procedure.[220] In fact, litigants for some time have attempted to argue that constitutional claims cannot be extinguished by statutes of limitations, but these arguments have been quickly rejected as public policy favors the expedition of claims.[221]

The Takings Analysis also achieves the same result that is sought after by the use of substantive adverse possession. Courts and legal scholars alike appear to prefer the use of the Adverse Possession analysis over the use of the Takings Analysis because it allows the government to acquire title to the property once it has been successfully adversely possessed.[222] However, once property is adversely possessed, the successful party only holds an interest in the property that must be perfected by a quiet title action in order for it to be marketable and transferable.[223] The same is true if the government acquires an interest in property by a landowner's failure to bring an inverse condemnation claim within the statutory time period. In either case, in order to have marketable title, the government would be required to bring a quiet title action to perfect its interest. Therefore, the use of adverse possession is not a necessary element for the government to perfect an interest in property.

Conversely, the Adverse Possession Analysis is more troubling and inconsistent with current takings law. Using the Adverse Possession Analysis, several courts assert that the government has the ability to use adverse possession, which allows it to utilize the privately-held property during the statutory period.[224] These courts hold that the government only obtains an interest in the land after it has exceeded the adverse possession statutory period, thus acquiring title.[225] Following this reasoning, the courts claim that a taking only

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[218] *Id.* at 1212.

[219] *See* La Cholla Curtis Ltd. P'ship v. Pima County, No. 93-16186, 1995 U.S. App. LEXIS 15104, at *6 (9th Cir. June 16, 1995); *Weidner*, 860 P.2d at 1212. *See also* Wadsworth v. Dep't of Transp., 915 P.2d 1, 4 (Idaho 1996) (discussing how inverse condemnation claims can be limited by using the statute of limitations for prescription).

[220] *See generally* Marvel, *supra* note 84 (providing a overview of how different states limit the time period to file an inverse condemnation claim, if no statutory period exists, and recognizing that often the time period for adverse possession is used if no period exists); 27 AM. JUR. 2D *Eminent Domain* § 795 (2004) (when no time period exists to bring an action to recover property from a governmental body who has failed to use proper condemnation proceedings, no time period short of the time period provided for by adverse possession should be utilized).

[221] *See* sources cited *supra* note 85.

[222] *See* Foncello, *supra* note 11, at 687-88 (arguing that the use of adverse possession by governmental entities is necessary to quiet title, but nevertheless compensation must be granted). *See also infra* Section IV.C.4.

[223] *See* sources cited *supra* note 156 and accompanying text.

[224] *See* cases cited *supra* note 213.

[225] *Id.*

accrues after the adverse possession statutory period runs.[226] For example, in *Pascoag Reservoir & Dam v. Rhode Island*,[227] the court held that a takings claim only accrues after the government has successfully adversely possessed the property, and no claim exists while it utilizes the property during the statutory period.[228] Under this application, the courts not only assume that a governmental body can use substantive adverse possession, but they also claim that governmental bodies are not subject to a takings claim until they have obtained title through adverse possession.[229]

The Adverse Possession Analysis is flawed for several reasons. First, for the government to be able to possess land adversely without being subject to a potential takings claim, courts must assume that the government is acting in a non-governmental capacity[230] or that it is not subject to any relevant just compensation clauses while using the private property.[231] Both of these implications can easily be rejected. The notion that a governmental body can act in a private or non-governmental capacity has been criticized by many scholars due to its inherent complications and is thoroughly discussed in Section IV.C.3 of this Article. It is also common legal knowledge that any governmental body acting in a governmental capacity is subject to state or federal constitutional provisions.

The Adverse Possession decisions also assume that a governmental entity is only subject to a potential takings claim after it has acquired title through adverse possession.[232] Under this reasoning, the court implies that the entity is acting in a governmental capacity when it acquires title, which makes it subject to a potential takings claim. This change in identity upon acquiring title is puzzling to say the least. These courts are essentially holding that once the governmental actor enters land or creates a burdensome regulation, it is *not* acting in its official governmental capacity subject to constitutional provisions, but once title is acquired, it *is* acting as a governmental body subject to constitutional constraints. The only assumption that can be made is that the government is presumed to be a private trespasser during this time. By accepting this reasoning, the courts are allowing the government to have it both ways by using smoke and mirrors to avoid constitutional limitations that were enacted to prevent such inconsistent and overreaching results.[233] At the very least, the landowner should be able to claim a temporary taking when the government is loitering on its property.[234]

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[226] *Id.* *See also* Selemba, *supra* note 3, at 676 (arguing in support of the decisions that suggest a taking only accrues after the adverse possession statute of limitations has run).

[227] 217 F. Supp. 2d 206 (D.R.I. 2002).

[228] *Id.* at 224.

[229] *See* cases cited *supra* note 2.

[230] *See infra* Section IV.C.3.

[231] *See, e.g.*, U.S. CONST. amend. V; COLO. CONST. art. II, § 15 (providing an example of a typical state just compensation clause).

[232] *See, e.g.*, Pascoag Reservoir & Dam, LLC v. Rhode Island, 217 F. Supp. 2d 206, 224 (D.R.I. 2002) ("A plaintiff could not bring a takings claim until the possession or prescription period had been completed because, until that time, the government had not taken a property interest.").

[233] *See supra* Section II.B.1.

[234] SACKMAN, *supra* note 77, § 6.01[16].

Similarly, from a landowner's perspective, the Adverse Possession decisions are confusing and raise pleading complications for landowners seeking recourse against a governmental entity or its agent entering privately-held property without permission. The problem is determining in what capacity the entity is acting in order to determine who should be sued and what claims should be brought.[235] If the landowner assumes that the parties are acting in a governmental capacity, a takings or tortious trespass claim would be appropriate. On the other hand, if landowner assumes that they are acting in a private capacity, a suit against the individual actors for trespass and ejectment would be appropriate. Determining which party is liable and the claims to bring can be complex. The process may lead to unnecessary amendments to pleadings, may cause a huge waste of time, and can cause a plaintiff to incur unnecessary legal fees.[236] This could also cause a plaintiff to miss a filing deadline based on the running of a statute of limitations or lead to constant dismissals, while the government uses its dual status to avoid constitutional liability. These procedural issues are not merely hypothetical; a survey of federal and state court decisions illustrate how private landowners suffer harsh penalties when governmental entities hide under the cloak of their dual status.[237]

The theory of adverse possession is also perceived by the general public as a dishonest way to obtain title to property.[238] Property rights advocates argue that mistakes by landowners or negligence on their part should never transfer property rights to a wrongdoer who never paid valuable consideration for such an interest.[239] Legal scholars have also raised the question: "[g]iven that a private party may not be able to get government property by adverse possession, is it fair that the government is nevertheless able to get private property by adverse possession?"[240] At least to the public, it would appear that there is a double standard in which government property is given special protection, while an all-powerful governmental entity has the right to acquire wrongly private property.

The reasoning behind the Adverse Possession Analysis is inconsistent with current takings law and should be rejected. On the other hand, the Takings Analysis, after being untangled, appears to be consistent with modern takings law and the more logical approach. This application assumes that when a governmental body enters land or creates a regulation, it is subject to a potential takings claim, while impliedly rejecting the use of adverse possession by a governmental body. However, the concept needs to be clarified within the judiciary by expressly stating that the court is merely applying a statutory time period from adverse possession in place of a nonexistent time period for inverse condemnation claims.[241] Another possibility would be to create specific legis-

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[235] *See generally* Stanley v. Schwalby, 147 U.S. 508 (1893) (discussing actions of the government versus actions of its agents acting on its behalf and showing the difficulty in distinguishing between the two).

[236] *See* sources cited *supra* notes 162 and 165 and accompanying text.

[237] *See infra* Section IV.C.3.

[238] *See* sources cited *supra* note 5.

[239] *Id.*

[240] DUKEMINIER & KRIER, *supra* note 15, at 162.

[241] *See, e.g.*, Wadsworth v. Dep't of Transp., 915 P.2d 1, 4 (Idaho 1996).

lation that precludes governmental entities from using substantive adverse possession against private landowners.[242] This clarification within the law is necessary to avoid the creation of more conflicting and confusing case law, not to mention the difficult pleading issues that are a result thereof.

3. Allowing Municipal Corporations to Acquire Property Through Adverse Possession

One area of case law that appears to be well-settled involves the ability of a municipal corporation or public school board's ability to possess private property adversely.[243] These decisions are unique primarily because they claim that a municipal corporation is not an arm of the state but a quasi-corporation that is akin to a private entity.[244] Courts using this rationale have relied on minute distinctions between a traditional state actor and a municipal corporation. As one court has noted, some municipal corporations are autonomous from the state because they do not rely on the state treasury for their funds but obtain their money through other means.[245] Similarly, another court argued that their independent status gave them the power to sue or be sued.[246] Others bolster the fact that municipal corporations are autonomous from the state because they are not supervised by the governor or the legislature but act on their own behalf like any other private corporation.[247] While the prevailing view accepts the notion that a municipal corporation can act in a private capacity, several courts have held that adverse possession by a municipality does constitute an actionable takings claim.[248]

So what is a municipal or quasi-corporation and how are these state corporations not acting on behalf of the state when they acquire property? A municipal corporation has been defined as:

> A body politic and corporate, established by sovereign power, evidenced by a charter, with a defined area, a population, a corporate name, and perpetual succession,

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[242] This legislation could be modeled after state legislation that precludes adverse possession against property held by the state by creating a mirror provision that prevents adverse possession of privately held property by the state. *E.g.*, IND. CODE § 32-21-7-2 (2006) (illustrating an example of a state statute that prevents the use of adverse possession against property held by the state).

[243] *See generally* Vann, *supra* note 7, at 687, 689.

[244] *See, e.g.*, McDonald v. Bd. of Miss. Levee Comm'rs, 832 F.2d 901, 906-07 (5th Cir. 1987); Morgan v. Cherokee County Bd. of Educ., 58 So. 2d 134, 136 (Ala. 1952); Beckett v. City of Petaluma, 153 P. 20, 22-24 (Cal. 1915); Roche v. Town of Fairfield, 442 A.2d 911, 916-17 (Conn. 1982). *See also* R.K.G., *supra* note 11, at 231 ("A municipal corporation falls into the same category as any other corporation which has the capacity to hold land in its own right, and can acquire a title by the usual rules of adverse possession.").

[245] *McDonald*, 832 F.2d at 906-07.

[246] *Morgan*, 58 So. 2d at 136.

[247] *See McDonald*, 832 F.2d at 907.

[248] See, e.g., Johnson v. City of Mt. Pleasant, 713 S.W.2d 659, 663-64 (Tenn. Ct. App. 1985). Some courts argue that municipal corporations can be distinguished from private corporations based on the fact that they often have the ability to acquire property through eminent domain, thus they cannot be a willful trespasser, but only enter land through its eminent domain powers. See, e.g., Sch. Dist. of Donegal Twp. v. Crosby, 112 A.2d 645, 648 (Pa. Super. Ct. 1955). They also argue that governmental officials are presumed to do right, therefore, no presumption of wrongdoing will be implied without strict proof of actual wrong. *See id.* at 647-48.

> established primarily to regulate the local or internal affairs of the area incorporated, and secondarily to share in the civil government of the state in the particular locality.[249]

Municipal law has long accepted the notion that corporations established by the state have the ability to act in a governmental/public capacity or in a private/proprietary capacity[250] (this optional capacity is often referred to as a dual status). If the municipal corporation is acting for the public good on behalf of the state, rather than for itself, it is considered a governmental function.[251] However, if it is acting for its own private advantage then it is considered a private function.[252]

The dual status was originally created as an exception to sovereign immunity.[253] Initially, municipal corporations were granted status as sovereigns because they were acting on behalf of the state when performing their chartered functions.[254] It was assumed that municipal corporations usually did not make a profit through taxation; therefore, excessive litigation had the potential of exhausting their resources.[255] Suing the local government for public services was also thought to be ungrateful.[256] After some time, courts recognized that sovereign immunity was contrary to basic tort concepts and that the spirit of the Constitution guaranteed every person the right to a legal remedy for injuries to person or property.[257] To reduce the harsh effects of sovereign immunity, courts and legislatures created exceptions to the rule, one of which was the dual status of municipal corporations.[258] Under the exception, immunity from liability only attached to governmental functions and not for proprietary functions.[259]

Understanding the distinction between a governmental and proprietary function is crucial within this area of law, since courts are allowing municipal corporations to use adverse possession when acting in their proprietary capacity.[260] These courts analogize the municipal corporation's private function to

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[249] *See* Latovick, *supra* note 43, at 477.

[250] 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 182 (2000).

[251] *Id.*

[252] *Id.*

[253] *See* 18 McQUILLIN MUN. CORP. § 53.02.10 (3d ed. 2003).

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *See, e.g.*, Morgan v. Cherokee County Bd. of Educ., 58 So. 2d 134, 136 (Ala. 1952) ("[A] county board of education is a quasi corporation, an independent agency of the state, which can sue or be sued as to matters within the scope of its corporate power."); Beckett v. City of Petaluma, 153 P. 20, 24 (Cal. 1915) ("We see no reason why public corporations are not governed in this respect by the same rule as private corporations."); Roche v. Town of Fairfield, 442 A.2d 911, 916 (Conn. 1982) ("A municipality, like an individual, may acquire title by adverse possession . . . ."); Levering v. City of Tarpon Springs, 92 So. 2d 638, 639 (Fla. 1957) ("[T]he rule appears to be generally accepted that a municipality, like an individual, may acquire title to land by adverse possession . . . ."); Wyalusing Twp. Sch. Dist. v. Babcock, 11 Pa. D. & C. 536, 540 (Ct. Com. Pl. 1928) ("A municipal corporation may

that of a private corporation that has the ability to possess private property adversely.[261]

Applying the private function status to allow a governmental entity to use adverse possession is troubling for a number of reasons. Municipal corporations are powerful players in American government, spending nearly forty-five percent of all governmental funds while also wielding power sufficient to affect the property rights of nearly every citizen in the United States.[262] The private function essentially gives municipal corporations or their agents the ability to acquire property without being subjected to any procedural protections guaranteed under the federal and state constitutions. It also raises a host of questions on the legitimacy of municipal governments and their ability to use the dual status rule to their advantage.[263] Courts applying the dual status exception fail to recognize that the distinction has been rejected by many courts and highly criticized by legal scholars.[264]

Criticisms of the dual status exemption appear to be endless; as a result, many states have abolished the distinction in whole or in part.[265] Critics recognize that the distinction is contrary to its purpose of protecting the local governments from excessive liability because the uncertainty created by the dual status functions has actually increased litigation and exposed the municipalities to more liability.[266] The problem with the dual status rule is identifying what type of actions are deemed governmental as opposed to proprietary actions.[267] One critic stated:

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acquire title to land by adverse possession for corporate purposes, and *even for other than corporate purposes*." (quoting 2 CORPUS JURIS, 228)) (emphasis added).

[261] *See* cases cited *supra* note 260.

[262] *See* Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 370 (1985).

[263] The legitimacy of municipal corporations is also questioned when they attempt to use the governmental function exception from the dual status rule to prevent liability for property damage or potential takings claims. *See, e.g.*, Perkins v. Blauth, 127 P. 50, 53 (Cal. 1912) (defendant public officers attempted to claim an exemption from liability for property damage under the governmental function exemption; however, the court reject their claim); Griswold v. Town Sch. Dist. of Weathersfield, 88 A.2d 829, 830-31 (Vt. 1952) (landowner sued municipality alleging a taking of property rights because the municipal employees destroyed the plaintiffs water supply; the municipality claimed the governmental function exception, but was denied).

[264] *See* MCQUILLIN MUN. CORP. § 53.02.10 (3d ed. 2003) (discussing how the dual status function has been abandoned in most jurisdictions due to the harsh criticism by courts and commentators); Latovick, *supra* note 43, at 482-83 (recognizing that the dual status role of municipal corporations has come under "blistering attack" and arguing that the distinction should be abolished in the adverse possession context in order to protect municipally owned land); Murray Seasongood, *Municipal Corporations: Objections to the Governmental or Proprietary Test*, 53 U. CIN. L. REV. 469, 497 (1984) (arguing that legislation should be introduced to abolish the dual status distinction since its initial justifications are no longer relevant); Ruth Cook, Comment, *Postscript: Tracing the Governmental-Proprietary Test*, 53 U. CIN. L. REV. 561, 561-62 (1984) (recognizing the criticisms of the dual status function and that it is disfavored, but noting that it still survives in some areas of the law).

[265] *See* sources cited *supra* note 264.

[266] *See* Seasongood, *supra* note 264, at 470 ("A mass of litigation far more than was anticipated has resulted, much of it indeed because of the attempted differentiation of municipal functions . . . .").

[267] *See id.* at 493.

> All this would be bad enough if the test were simple and easy to determine. But no satisfactory basis for solving the problem whether [sic] the activity falls into one class or other has been evolved. The rules sought to be established are as logical as those governing French irregular verbs.[268]

The idea that suing a municipality is a form of ingratitude when it is providing a governmental service can also be dismissed using modern legal reasoning. Simply stated, adverse possession of private property is not a governmental function; thus, any protection granted from suit is not applicable.

The fact remains that the dual status rule was not designed to allow municipalities to avoid liability;[269] rather, it was created to *increase* the liability of municipal governments by subjecting them to potential tort or property claims when the municipality acts in a private capacity.[270] This goal is obstructed when municipalities attempt to decrease their liability by hiding under the dual status rule to acquire property through adverse possession. The purpose of municipal corporations is to promote the "public peace, health, safety, and morals,"[271] not to acquire property rights surreptitiously through adverse possession when municipalities can instead acquire the same rights through legitimate means such as eminent domain.

This author proposes that the dual status rule be abolished and be replaced by a bright-line rule that imposes a presumption that any time a municipal government enters land, it is acting in a governmental capacity.[272] This proposal is analogous to a bright-line rule created by Professor Latovick, but applied differently.[273] Professor Latovick argues that a bright-line rule should be established to presume that all land held by a municipality would be in a governmental capacity.[274] Her goal was to eliminate the possibility of municipally-owned land being adversely possessed when held in a private capacity.[275] This author's proposal would simply take that bright-line rule and apply it to prevent the use of adverse possession by municipal corporations against privately held property and subject the municipality to a potential takings claim any time it enters private property. This would presume that the municipality was acting in a governmental capacity.

This proposal would provide clarity in the midst of judicial confusion while also achieving results similar to that of adverse possession in favor of the government. For example, if a governmental body enters private property and an inverse condemnation claim is not brought before the statute of limitations has run, the municipal body would acquire rights to that property without the obligation of just compensation. On the other hand, if an inverse condemnation claim is brought, the landowner would have an appropriate remedy to seek compensation. More importantly, the bright-line rule would be consistent with

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268 *Id.*

269 *See supra* notes 253-58 and accompanying text.

270 *See* McQUILLIN MUN. CORP. § 53.02.10 (3d ed. 2003).

271 *See* 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 183 (2000).

272 *See generally* Latovick, *supra* note 43, at 475-76, 502-07 (arguing for abolition of the dual status to prevent land held by municipal corporations from being adversely possessed).

273 *Id.*

274 *Id.*

275 *Id.*

Professor Latovick's proposal to protect municipal property from being adversely possessed by private citizens, as all property would be held in a governmental capacity.[276] Under the current dual status rule, property held by a municipality in a private capacity is subject to adverse possession.[277]

Creating a presumption that the entity is acting in a governmental capacity would also decrease litigation and the costs of litigating the dual status distinction, which is why the courts initially created the distinction in the first place.[278] The rule would also maintain consistent application of current takings law and at the same time remove the uncertain concept of adverse possession by a governmental entity. Overall, bringing back traditional takings law would promote a sense of legitimacy to local governments by holding them accountable for their negligent land use and their failure to follow formal condemnation proceedings while also abolishing the highly criticized dual status distinction.

4. The Use of Adverse Possession to Cure Title Disputes

Adverse possession has also been applied in favor of the government as an equitable means of solving title disputes.[279] For example in *Ault v. State*,[280] the Supreme Court of Alaska was faced with determining whether the state had acquired valid title to an express roadway easement when the grantor apparently did not have any authority to grant the easement.[281] The current property owners argued that they had no express indication of such an easement on their deed; therefore, the government's actions amounted to a taking.[282] The court recognized that adverse possession conflicts with the Takings Clause; however, the court held that adverse possession can be applied in favor of the state, but only when it has an "honest and reasonable belief in the validity of the title."[283] In a different decision, a Louisiana court stated that: "[i]f public bodies or political corporations were prohibited from acquiring by prescription, such defects as may exist in a title to property acquired by purchase or donation could never be cured by possession of any nature, extent, and duration whatsoever."[284]

While these decisions arise far less often than those dealing with the expiration of inverse claims and those involving municipal corporations, they do represent the use of adverse possession by a governmental body. Under this application it does appear to be an equitable solution for difficult decisions, although modern takings jurisprudence through inverse condemnation would allow for the same type of result without struggling to create an exception to the Takings Clause through adverse possession.[285] As mentioned in Section IV.C.2, takings law would benefit the government in a similar manner as

[276] *Id.*
[277] *Id.* at 478.
[278] *See* McQUILLIN MUN. CORP. § 53.02.10 (3d ed. 2003).
[279] *See* cases cited *supra* note 19.
[280] 688 P.2d 951 (Alaska 1984).
[281] *Id.* at 953.
[282] *Id.* at 953-54.
[283] *Id.* at 956.
[284] Lincoln Parish Sch. Bd. v. Ruston Coll., 162 So. 2d 419, 426 (La. Ct. App. 1964).
[285] *See supra* Section II.B.2 (discussing how the inverse condemnation claims can be time-barred).

adverse possession. The use of takings law would limit the time period in which an inverse claim can be filed under current inverse statute of limitations, and if none exists, the courts would apply the appropriate adverse possession statute of limitations.[286] This would give the government the rights it acquired after the running of the inverse time period. In either instance, a quiet title action would be necessary to obtain marketable title. Thus, the use of adverse possession is not necessary to cure title disputes.

Conversely, if a private landowner had a valid interest in property held by the government, he would be able to bring an inverse condemnation claim challenging the validity of the government's title. If the government was negligent in failing to verify the chain of title, it might be able to acquire the rights in the property after the running of the inverse time period. On the other hand, it could be punished for its negligence if a record-title-holder disputed the government's use and filed a claim before the inverse time period. This application appears to be consistent with takings jurisprudence by subjecting the government to limitations when it acts negligently by failing to condemn land or to verify title. In essence, there is no need to introduce adverse possession to eminent domain law when it would obtain the same results and with a traditionally shorter statute of limitation, which would benefit the government.

V. CONCLUSION

Adverse possession has been applied in favor of governmental entities for over one hundred years, but courts have failed to consider adequately the true interplay between adverse possession and the takings doctrine. These decisions have haphazardly applied adverse possession in favor of governmental entities in order to cure title disputes, limit inverse condemnation claims, distinguish actions taken by municipal entities, and favor the public at large. Adverse possession muddies each of these areas of law as it creates unneeded exceptions to rules and complicates coveted property rights held by private land owners.

The use of traditional takings law would cure many of the inconsistencies that these applications create. What many of the existing decisions fail to recognize is that any time a governmental entity enters land or creates a burdensome regulation, it avails itself of a potential takings claim. Applying adverse possession in favor of the government implies that a governmental body can act in a non-governmental capacity; certainly most scholars reject this notion. Adverse possession is unneeded because inverse condemnation statutes place the government in the same position as if it had adversely possessed the land. The courts should adopt a bright-line rule that creates a presumption that the governmental entity is acting in its governmental capacity when it burdens property rights. Courts should also readily avoid the claim that a governmental entity can adversely possess property and, instead, simply apply an inverse condemnation statute to limit claims by burdened landowners. This rule would be consistent with takings jurisprudence and the overarching purpose of the Just Compensation Clause.

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[286] *See supra* Section II.B.2.