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10 'Dissolving Condominium, Private Takings, and the Nature of Property'

*Douglas C. Harris & Nicole Gilewicz**

10.1 Introduction

The condominium statutes that many common law jurisdictions introduced in the 1960s facilitate the subdivision of buildings into multiple private titles. Where there was once a single freehold or fee simple interest, after condominium legislation it becomes relatively straightforward, using what Carol Rose describes as "off the rack entitlements" set out in statute, to create many such interests within a building.[1] These individually titled parcels of land are supported, protected, and serviced by common property, and under the statutory schemes the holders of individual freehold or fee simple titles within condominium are also co-owners of that common property, each holding an undivided share of the whole.[2] That share may be divided equally among title holders, or calculated based on floor areas or some other method for recognizing differing values among the parcels. As owners and co-owners, the title holders are entitled to participate in the collective governance of the private and common property, and have an obligation to contribute to the maintenance and repair of the common property in proportion to their share. It is this combination of rights and responsibilities – individual title to a defined parcel of land, an undivided share of the common property, a right to participate in the governance of the property, and a shared obligation to maintain the common property – that defines condominium.[3]

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1. C. Rose, 'What Governments Can Do for Property (and Vice Versa)', *in* N. Mercuro & W.J. Samuels (Eds.), *The Fundamental Interrelationships between Government and Property*, Routledge, New York, 1999, pp. 212-226, at pp. 217-218.
2. Some common-law jurisdictions use 'freehold', others use 'fee simple' to describe the interests in land that are held by the person who is commonly understood as the owner. We use freehold, except in our discussion of the cases from British Columbia, where fee simple is the common term.
3. In this paper we use condominium, the oldest and most common label for the legal form that facilitates the subdivision of buildings into multiple titles. Other terms for the same legal form include 'strata title', 'divided co-ownership', 'horizontal ownership', 'sectional title', and 'commonhold'.

Condominium constructs a community of title holders.[4] In most cases, the community is not intentional in the sense of like-minded people choosing to live together for a particular purpose other than to hold individual titles.[5] Condominium permits many individuals to hold separate titles to land within a single building.[6] That is its principal virtue, and what differentiates statutory condominium from other legal forms – including cooperatives, leasehold, and tenancy in common structures – that are also used to subdivide interests within buildings.[7] Condominium enables the repackaging of interests of land into smaller, separate parcels and joins them, through co-ownership of common property, with other individual titles to distribute the costs of construction and maintenance. In Amnon Lehavi's typology of property hybrids, condominium is one of a larger group of common-interest communities that create mixed private–common property regimes.[8] By producing physically smaller interests in land and distributing some of the costs of land ownership among co-owners, this private–common property hybrid enables some, who might not otherwise afford it, to purchase a freehold interest in land. Indeed, it is the capacity of condominium to expand the property-owning franchise that most excited some of the early observers of the legal form in North America.[9]

Condominium legislation utilizes a corporate form to provide the community of title holders with a mechanism for governing their private and common property. Title holders have voting rights to elect a condominium council, and the processes of the council are usually set out in draft by-laws that accompany the statutory schemes. Some decisions will be left to the council, but others require a direct vote of title holders. Whatever the scale of decision, condominium legislation creates a

4. We have chosen 'title holders' rather than 'owners' or 'members' because it references the attribute of condominium – individually held titles – that distinguishes it from other arrangements for subdividing property interests within buildings.
5. A. Lehavi, 'How Property Can Create, Maintain, or Destroy Community', 10 *Theoretical Inquiries in Law* 2009, pp. 43-76, analyzes the different impacts of property rights in intentional, planned, and spontaneous communities.
6. C.G. van der Merwe, 'The South African Sectional Titles Act and Israeli Condominium Legislation', 14 *Comparative and International Journal of South African Law* 1981, pp. 129-164, at pp. 132-134, describes two broad categories of condominium systems: universalistic and dualistic. In the universalistic, more common in continental Europe, the co-ownership interest is the primary interest, while individual ownership is ancillary. The dualistic system gives primacy to the individual interest, while the co-ownership interest plays a secondary and supporting role. Common-law jurisdictions with statutory condominium have adopted the dualistic model and that is our focus.
7. P. Butt, *Land Law*, 6th edn, Lawbook Co., Sydney, 2010, at pp. 854-857.
8. A. Lehavi, 'Mixing Property', 38 *Seton Hall Law Review* 2008, pp. 137-212. Common-interest communities or developments (CICs or CIDs) describe residential enclaves that commonly use condominium, cooperative, or housing association to construct private and common property interests and some measure of private government. *See* E. MacKenzie, 'Common Interest Housing in the Communities of Tomorrow', 14 *Housing Policy Debate* 2003, pp. 203-234.
9. A. Rosenberg, *Condominium in Canada*, Canada Law Book, Toronto, 1969, at pp. 1.2-1.3.

governance structure to enable the community of title holders to regulate the uses of private interests, manage and maintain the common property, and generally to avoid the potential gridlock (memorably described by Michael Heller as the "tragedy of the anticommons") that the fragmentation of property interests might produce.[10]

Perhaps the single most important decision in the lifecycle of a condominium is the one to dissolve it.[11] We use 'dissolution' rather than 'termination' to describe the end of a condominium because it better describes the breaking apart of the constituent elements. The process of dissolving a condominium involves terminating the individually titled freehold interests and winding up the condominium corporation. On dissolution, the former title holders become co-owners, as tenants in common, of all the property that was formerly within condominium, including the private and common property. However, this co-ownership interest is usually fleeting: the purpose of dissolving a condominium is most often to realize the value from the sale of the land held in common. Indeed, the impetus to dissolve a condominium usually arises when the co-ownership interests on dissolution have a greater exchange value than the separately titled interests within condominium.[12] Title holders pursue dissolution to maximize the exchange value of the assets formerly within the legal form. Most commonly, this is the result of the gains to be had from re-developing land, the need for extensive renovation of the common property, or some combination of the two, and we discuss several examples below.

Not surprisingly, the question of whether to dissolve a condominium usually becomes more pressing as buildings age. Most of the common-law world introduced condominium legislation in the 1960s, and title holders within condominium buildings, particularly those constructed in the early decades of the statutory schemes, increasingly confront significant renovation expenses. Moreover, escalating land prices and, in some cases, changes to municipal zoning or development regimes create pressure to redevelop land. Some land-scarce jurisdictions such as Singapore have actively sought to encourage redevelopment of older properties as one means to create new housing.[13]

10. M. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets', 111 *Harvard Law Review* 1998, pp. 621-688.
11. H. Easthope, *et al.*, 'How Property Title Impacts Urban Consolidation: A Life-Cycle Examination of Multi-title Developments', 32 *Urban Policy and Research* 2014, pp. 289-304, use the biological concept of lifecycle to describe the different challenges and legal issues that confront a condominium development from formation to dissolution.
12. L. Sim, S. Lum & L. Malone-Lee, 'Property Rights, Collective Sales and Government Intervention: Averting a Tragedy of the Anticommons', 26 *Habitat International* 2002, pp. 457-470, at p. 458, refer to this as an '*en bloc* sale' in order to capitalize on the 'marriage value'.
13. *Id.*; *see also* K. Ter, 'A Man's Home Is [Not] His Castle – *En Bloc* Collective Sales in Singapore', 20 *Singapore Academy of Law Journal* 2008, pp. 49-98.

When the exchange value of co-ownership interests on dissolution exceeds that of individually titled interests within condominium, some title holders may push for dissolution. Other title holders may oppose it, hoping to retain their individual titles within condominium as a continuing entity. Anticipating this potential for conflict between title holders, condominium legislation establishes dissolution rules. Those rules differ across jurisdictions and we discuss the different regimes in part 10.2, but in brief outline, there are two basic variations. Most common is what we refer to as the *supermajority rule*: a supermajority of title holders, usually at least two-thirds and commonly more, may force the dissolution of condominium. The other approach – the *unanimity rule* – requires unanimous consent among title holders to dissolve condominium. Non-consensual dissolution and the involuntary loss of titles to land are still possible in regimes with a unanimity rule, or where the threshold is not met under the supermajority rule, but only with court intervention. This is also the case in the few jurisdictions that allow dissolution only with court supervision.

The capacity of some title holders to dissolve condominium over the objections of other title holders, and thus to end freehold interests without consent, is an extraordinary power. Those who hold titles outside condominium cannot combine to force the termination of a neighbor's title. This power is most pronounced in jurisdictions that permit a supermajority to dissolve condominium, but it also exists in jurisdictions where title holders may seek a court order for dissolution over the objections of other title holders. We argue that the non-consensual dissolution of condominium is a form of private takings. In effect, where condominium legislation allows dissolution without consent, governments have delegated to title holders the power to terminate the property interests of other title holders. The particular individuals with this power are not named or identified in advance; instead, condominium statutes identify a certain class of title holders (usually forming a supermajority in favor of dissolving condominium) and delegate to that class the power to divest another class of title holders (usually a minority opposed to dissolution) of their individual freehold titles. Sometimes courts supervise the process, but that is not uniformly required where the necessary threshold is met in jurisdictions with a supermajority rule.

Should dissolving condominium require unanimity? Should every title holder need to consent to the termination of his or her title? Or, if a majority of title holders wish to maximize the exchange value of their assets by dissolving condominium, should they be entitled to do so over the objections of a minority? If so, should dissolution require court oversight, or may some pre-determined proportion of title holders impose dissolution without the need to involve the courts? Governments and law reform bodies in the Australian states of Queensland and New South Wales, and the Canadian province of British Columbia have considered these questions,[14] and in July

14. The British Columbia Law Institute (BCLI), *Report on Terminating a Strata* (BCLI Report no. 79), February 2015, provides detailed and thorough treatment. The Australian papers include: Queensland Government, Tourism, Fair Trading and Wine Industry Development, 'Body Corporate and Community

2015, the government of New South Wales circulated draft legislation incorporating a supermajority threshold.[15] In November, British Columbia amended its condominium legislation to shift the province to a supermajority rule.[16] Among the earlier movers from unanimity to supermajority rules, there have been subsequent attempts to limit the consequences of the change. Singapore, which shifted to a supermajority rule in 1999, followed up with additional procedural safeguards for title holders in dissolution proceedings, and the Florida legislature passed legislation in 2015 to bolster protections for dissenting title holders following its move to a supermajority rule in 2007.[17]

Our goal in this paper is not to advocate for a unanimity or a supermajority rule. Instead, we characterize the non-consensual dissolution of condominium as private takings in order to reveal that the choice between dissolution rules is also a choice between different conceptions of property. We argue that to ask what the dissolution rule should be is also to ask what property within condominium should be, and our intent is to bring this important policy choice to the fore.[18]

We begin part 10.2 with an overview of various dissolution rules in common-law jurisdictions with statutory condominium regimes. We then describe the rule as it has developed in British Columbia before turning to several court cases from the province that reveal the common issues associated with the dissolution of condominium. Two of the conflicts we discuss arise under a rarely used common-law condominium form which employs a simple majority rule, and they proceed to the British Columbia Supreme Court as actions for the partition of co-owned property.[19]

Management: Into the 21st Century, A Discussion Paper on Community Living Issues in Queensland', July 2004, at pp. 25-27; NSW Government, 'Making NSW No. 1 Again: Shaping Future Communities, Strata and Community Title Law Reform Discussion Paper', 15 September 2012, at pp. 22-27; and NSW Government, 'Strata and Community Title Law Reform Position Paper', November 2013, at pp. 20-22.

15. Draft *Strata Schemes Development Bill 2015* (NSW) cls. 153-190 (released for public consultation 15 July 2015), online <www.fairtrading.nsw.gov.au/biz_res/ftweb/pdfs/About_us/Have_your_say/Strata_schemes_development_bill_2015.pdf>. *See* the response from C. Sherry, 'Strata law overhaul a step too far', *The Sydney Morning Herald*, 23 August 2015, online <www.smh.com.au/comment/strata-law-overhaul-a-step-too-far-20150823-gj5mz5.html>, describing the move to non-consensual dissolution as enabling "private citizens to compulsorily acquire other people's homes".
16. Strata Property Act, SBC 1998, c43, as amended by SBC 2015, c40, ss 37-55.
17. *See* the discussion in part 10.2 beginning note 44.
18. On the importance of recognizing choice in property law, *see* D. Kennedy, 'Some Caution about Property Rights as Recipe for Economic Development', 1 *Accounting, Economics, and Law* 2011, pp. 1-62, at p. 62: "A property regime, like any other legal order is all about choices. Small and large, these choices cannot be made by reasoning outward from the nature of property or general ideas about what constitutes 'good law'. They require economic, social and ethical analysis, and must be made and contested in those terms".
19. *Mowat v. Dudas*, 2012 BCSC 454; *McRae v. Seymour Village Management Inc.*, 2014 BCSC 714.

In part 10.3, we develop the argument that the non-consensual dissolution of condominium is a form of private-to-private takings by addressing a number of possible objections to this categorization. Presaging that discussion, the non-consensual dissolution of condominium results in the termination of property interests, but not their acquisition by the parties instigating dissolution. As a result, we use 'takings' rather than other common terms such as 'expropriation' or 'compulsory acquisition', following Van der Walt who notes that 'takings' includes the limiting or terminating of interests and does not also require the acquisition those interests.[20] We follow Waring in describing these takings as 'private-to-private' takings to emphasize that one private entity is instigating the termination of property at the expense of another.[21] In doing so, we understand private-to-private takings as a subset of the broader category of private takings that includes takings by a public intermediary which acquires the land from one private entity to transfer it to another. Bell describes these as 'government-mediated private takings' and differentiates them from 'delegated private takings', which do not involve the state, or at least not directly after the initial delegation of takings authority or the enforcement of the right to take.[22]

Having positioned non-consensual dissolution as an exercise of a takings power, we then turn in part 10.4 to a small portion of the vast literature on takings. In various ways, this literature identifies an underlying tension between different conceptions of property that animates much of the debate about the appropriate use of the takings power. These conceptions are identified somewhat differently: Singer describes them as 'castle' and 'investment' models of ownership,[23] Rose as 'propriety' and 'preference satisfaction' conceptions of property,[24] and Calebrasi and Melamed as 'property rule' and 'liability rule' protections for entitlements.[25] We draw from these scholars the idea that two competing conceptions of property – one that defends property interests themselves and another that protects the exchange value of property interests – underlie debate about the appropriate use of the takings power and, in our case, the capacity of private actors to instigate the non-consensual taking of property. In short, the legislative choice between a supermajority rule or a unanimity rule, or

20. A.J. van der Walt, *Constitutional Property Clauses: A Comparative Analysis*, Juta & Co, Cape Town, 1999, at p. 18.
21. E.J.L. Waring, 'Private-to-Private Takings and the Stability of Property', 24 *King's Law Journal* 2013, pp. 237-259. *See also* E.J.L. Waring, 'The Prevalence of Private Takings', *in* N. Hopkins (Ed.), *Modern Studies in Property Law* Vol. 7, Hart Publishing, Oxford, 2013, pp. 420-437.
22. A. Bell, 'Private Takings', 76 *University of Chicago Law Review* 2009, pp. 517-585, at pp. 545, 548.
23. J.W. Singer, 'The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations', 30 *Harvard Environmental Law Review* 2006, pp. 309-338.
24. C. Rose, '"Takings" and the Practices of Property: Property as "Wealth", Property as "Propriety"', *in* Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership*, Westview Press, Boulder, 1994, pp. 49-70.
25. G. Calabresi & A.D. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral', 85 *Harvard Law Review* 1971, pp. 1089-1128.

the judicial choice between ordering or declining to order the dissolution of condominium, is also a choice between different conceptions of property and between different roles for the institution of property.

The takings literature is not the only place to seek guidance about the extent to which, and circumstances under which, some title holders may be permitted to force the dissolution of condominium. Condominium legislation utilizes the corporate form to construct a governance regime among title holders, and the issues raised in the winding up of companies over the objections of some shareholders may well be instructive in the dissolution of condominium. We have chosen to focus instead on the takings literature because the dissolution of condominium involves, first and foremost, the loss of an interest in land. It is a desire to protect an interest in land, not shares in a corporation, that animates those who dissent and thus suggests that the takings literature may be particularly relevant and useful. Another place to turn might be the literature on the partition of co-owned property. Indeed, two of our examples from British Columbia proceed to court under a motion for an order to sell co-owned property.[26] One outcome of the partition of co-owned property is its sale and distribution of proceeds, but that is not a necessary result if the property is divisible. Moreover, what is lost in such a forced sale is title to co-owned property, not title to a separate freehold interest, which marks the dissolution of condominium. As a result, we have turned to the takings literature. Other literatures might well be helpful were our aim to canvas all possible analogues to the dissolution of condominium with a view to pronouncing on the merits of a particular regime.[27] Instead, our goal is to reveal that the choice – for legislators when considering dissolution rules, and for judges when deciding between litigants who want to dissolve or sustain condominium – is between competing conceptions of, and functions for, property.

In some cities, condominium is becoming the principal legal architecture for owning land, particularly for new-build residential properties.[28] It is now, using Dagan's characterization, an increasingly significant property institution in structuring the ownership of land.[29] As a legal form, it exists primarily to create individual titles, but it does so within structures of co-ownership and collective governance that are indelibly bound to the individual titles. In the concluding part 10.5, we turn to the work of scholars who use ideas such as 'hybrid property',[30] the

26. *Mowat*, *supra* note 19; *McRae, supra note* 19.
27. *See* e.g. the analysis in BCLI (2015), *supra* note 14, including the recommendation to adopt a supermajority rule at pp. 53-57.
28. *See* D.C. Harris, 'Condominium and the City: The Rise of Property in Vancouver', 36 *Law & Social Inquiry* 2011, pp. 694-726; G. Rosen & A. Walks, 'Castles in Toronto's Sky: Condo-ism as Urban Transformation', 37 *Journal of Urban Affairs* 2015, pp. 289-310.
29. H. Dagan, *Property: Values and Institutions*, Oxford University Press, Oxford, 2011.
30. Lehavi 2008, *supra* note 8.

'liberal commons',[31] or 'governance property'[32] to explain legal forms that combine private and common property and to suggest what they entail for understandings of ownership and property. In doing so, we argue that the rule for dissolving condominium is important not only for determining the nature and function of property within condominium, but, more generally, for establishing the nature and function of property in land. This increasingly prolific form of ownership deserves our attention not only because of its growing prevalence, but also because it has the capacity to reorient our understandings of property by accentuating the embeddedness of private property within community.

10.2 Non-Consensual Dissolution of Condominium in Statutes and the Courts

The circumstances under which title holders within statutory condominium regimes are permitted to instigate the non-consensual dissolution of condominium may be set out in the enabling statutes, left to the courts or, most commonly, determined through some combination of statutory direction and judicial discretion. Although there is considerable variation in the detail among jurisdictions, there are two basic approaches, distinguished by the degree of consent required among title holders in order to dissolve condominium. The most common approach is a *supermajority rule*: title holders within condominium may decide, by special vote usually requiring a majority of at least two-thirds, to dissolve condominium.[33] This is the regime in a majority of Canadian provinces,[34] that is recommended in the United States in the Uniform Common Interest Ownership Act,[35] that is currently proposed in the Australian state of New South Wales[36] and that has been adopted in Singapore in 1999,[37] in England and Wales when commonhold was introduced in 2002,[38] in Florida in

31. G. Alexander, 'Governance Property', 160 *University of Pennsylvania Law Review* 2011, pp. 1853-1887.
32. H. Dagan & M. Heller, 'The Liberal Commons', 110 *Yale Law Journal* 2000, pp. 549-623.
33. Because of the complexity of some of the regimes, in the notes that follow we reference recent scholarly literature discussing the dissolution provisions in each jurisdiction rather than the statutes themselves.
34. *See* the survey of Canadian provinces in BCLI (2015), pp. 37-40 and 113-118, *supra* note 14.
35. National Conference of Commissioners on Uniform State Laws, *Uniform Common Interest Ownership Act (2008)*, Big Sky Montana, 18-25 July 2008. Section 2-118 allows for termination of a common-interest community by a termination agreement garnering at least 80% consent. For an early analysis of the different approaches within the United States, *see* P.K. Rohan, 'Drafting Condominium Instruments: Provisions for Destruction, Obsolescence and Eminent Domain', 65 *Columbia Law Review*, 1965, pp. 593-624.
36. Draft *Strata Schemes Development Bill 2015*, *supra* note 15.
37. Sim *et al*. (2002), *supra* note 12; Ter (2008), *supra* note 13.
38. *Commonhold and Leasehold Reform Act 2002*, c15, s. 43(1)(c) requires 80% of association members to consent in order to voluntarily wind-up. *See* C. Webster & R. Goix, 'Planning by Commonhold', *Economic Affairs*, Vol. 25, No. 4, 2005, pp. 19-23; S. Blandy, 'Legal Frameworks for Multi-Owned Housing in England and Wales: Owners' Experiences', *in* Blandy, J. Dixon & A. Dupuis (Eds.), *Multi-Owned Housing: Law, Power and Practice*, Surrey, Ashgate Publishing Ltd, 2010, pp. 13-34, pp. 29-30; and *see also* L. Xu,

2007,[39] and in British Columbia in 2015.[40] Thresholds of consent vary among these jurisdictions, but 80% is the most widely adopted proportion of title holders needed to effect dissolution. Some jurisdictions permit a condominium council to set the threshold higher. The other, less common approach in statutory condominium regimes is to require unanimous agreement among title holders to dissolve condominium. This *unanimity rule* applies in a minority of Canadian provinces, in most Australian states,[41] in Malaysia,[42] and in South Africa.[43] However, whether operating under a supermajority rule or unanimity rule, all jurisdictions provide title holders with an option to approach the courts for a dissolution order if the threshold has not been met.

Singapore has attracted considerable attention for its decision to move, in 1999, from a unanimity rule to a supermajority rule as part of its response to the need for more housing. Labeled a matter of 'national interest', legislators lowered the consent threshold for dissolving condominium because the unanimity rule was thought to inhibit urban renewal.[44] In doing so, they established different thresholds according to the age of the building: 90% of the title holders can trigger dissolution in buildings newer than 10 years old, 80% in buildings of 10 or more years.[45] However, removing the need for unanimous consent unleashed what Ter describes as an "*en bloc* frenzy" that was "unprecedented and unparalleled anywhere else in the world".[46] Moreover, the rapid escalation in sales of condominium buildings for redevelopment was driven not only by residents wishing to realize the value of their units through a collective sale, but also by speculating 'condo-raiders' or 'serial *enbloc*kers' who targeted buildings with development value, purchased units, and agitated for collective sale.[47] A significant backlash from those who were pushed out of their homes, or from those who feared it, caused Singapore to review the dissolution rules and, while not altering thresholds, in 2007 it added new procedural requirements intended primarily to

'Commonhold Developments in Practice', *in* W. Barr (Ed.), *Modern Studies in Property Law*, Vol. 8, Hart Publishing, Oxford, 2015, pp. 331-350.

39. Fla. Stat. *Condominium Act* § 718.117 (2007).
40. Strata Property Act, SBC 1998, c43 as amended by SBC 2015, c40.
41. In its recommendation that New South Wales adopt a super majority rule, the Property Council of Australia, 'Strata and Community Scheme Review: Submission to the NSW Department of Finance and Services' (February 2012) at p. 9, provides a brief summary of dissolution rules in the Australian states. The Northern Territories is the only state with a super majority rule.
42. *See* T.K. Sood, *Strata Title in Singapore and Malaysia*, 4th edn, LexisNexis, Singapore, 2012, p. 431.
43. *See* A. Boraine & P. O'Brien, 'The Winding-up of a Body Corporate Established in Terms of the Sectional Titles Act *In re: Body Corporate of Caroline Court* [2002] 1 All SA 49 (SCA)', 65 *THRHR* 2002, pp. 307-316; G.J. Pienaar, *Sectional Titles and other Fragmented Property Schemes*, Juta & Co, Cape Town, 2010, pp. 270-283.
44. Ter 2008, *supra* note 13, p. 98: "As long as there is strong economic growth and stability and a booming property market, the demand for land will exceed supply and *en bloc* sales will continue to flourish. One has to give up one's castle in the national interest".
45. Land Titles (Strata) (Amendment) Act 1999 (No. 21 of 1999), Part VA.
46. Ter 2008, *supra* note 13, p. 49.
47. *Id.*, pp. 52, 54.

safeguard minority title holders, if not from the dissolution of the condominium, then from harassment and abuse in the process.[48]

Singapore is not the only jurisdiction grappling with the repercussions of moving from a unanimity rule to a supermajority rule. In 2007, Florida amended its condominium legislation, replacing a unanimity rule with a supermajority threshold of 80%.[49] In doing so, legislators explained that they were acting to preserve the value of property within condominium:

> the Legislature further finds that it is the public policy of this state to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof that owners have in the condominium property before and after termination.[50]

However, the subsequent increase in non-consensual, developer-instigated dissolutions provoked charges that the law was 'un-American' in its failure to protect property rights,[51] and in 2015 Florida introduced additional procedural safeguards, including a provision to enable a dissenting block of 10% to stop non-consensual dissolution.[52]

The year before Singapore introduced a supermajority rule, British Columbia moved in the other direction. Several decades of rapid growth and poor construction in the Canadian province's condominium sector left many title holders with water-damaged buildings and crippling renovation costs. In response to what had become known as the 'leaky condo crisis', the province commissioned a former premier "to inquire into [...] the adequacy of protection for, and accountability to, consumers for faulty condominium construction".[53] The resulting recommendations did not address the question of dissolution, but when it rewrote its condominium (strata title) legislation in 1998, British Columbia replaced a little understood set of 'deemed destruction' provisions, which used fictive destruction to allow a supermajority to dissolve condominium, with a unanimity rule.[54] If title holders were unanimous, then the strata plan could be

48. *Id.*, pp. 96-97. *See also* K. Ter, '*En Bloc* Sales in Singapore – Critical Developments in the Law', 21 *Singapore Academy of Law Journal* 2009, pp. 485-516; T.K. Sood, 'Collective Sales in Singapore', 22 *Singapore Academy of Law Journal* 2010, pp. 66-109.
49. Fla. Stat., *Condominium Act* § 718.117 (2007).
50. *Id.*, § 718.117(1) (2007).
51. Helio De La Torre, 'Un-American Condo Termination Law Needs to Be Changed', *Daily Business Review*, 26 September 2014. *See also* the reply: Mark B. Schorr, 'In Rebuttal: Another Take on Condo Termination Law', *Daily Business Review*, 1 October 2014.
52. Fla. Stat. *Condominium Act* § 718.117(3) (2015).
53. D. Barrett, Commission of Inquiry into the Quality of Condominium Construction in British Columbia 'The Renewal of Trust in Residential Construction', 'Terms of Reference', Victoria, June 1998.
54. *Strata Property Act*, SBC 1998, c 43, s 272(1). *See* BCLI (2015), *supra* note 14, pp. 11-16, on the history of the dissolution provision in British Columbia. *See also* D. Pavlich, *Condominium Law in British Columbia*, Butterworths, Vancouver, 1983.

cancelled, the strata corporation wound up, and the former title holders would become co-owners of the land that had been within condominium.[55]

Despite the attention directed toward the features of condominium ownership in the commission and subsequent legislative revisions in British Columbia, there appears to have been little discussion about the dissolution provisions. The public record focuses not on the choice between unanimity or supermajority rules, but rather on the need to simplify and clarify the process.[56] Removing the need for a court order if there were unanimous consent among title holders was seen to simplify the process. If unanimity could not quite be achieved in a strata corporation of ten or more units (only one dissenting vote, or less than 5% of voters opposed), then the revised legislation provided a mechanism whereby a supermajority (75%) of eligible voters (a broader category than just title holders) could pass a resolution that the strata corporation seek a court order to invalidate the dissenting votes in the dissolution vote, providing it "is in the best interests of the strata corporation and would not unfairly prejudice the dissenting voter or votes".[57] If a court were to grant this order, then dissolution would proceed as if there had been a unanimous vote.[58] Alternatively, any individual title holder or the holder of a mortgage on any individual title could seek a court order to dissolve the condominium.[59] In considering whether to grant this order, courts were instructed to ask if "the winding up would be in the best interests of the owners, registered charge holders and other creditors",[60] and in determining 'best interests', the courts were to consider:

a. the scheme and intent of this Act,
b. the probability of unfairness to one or more owners, registered charge holders or other creditors, if winding up is not ordered, and
c. the probability of confusion and uncertainty in the affairs of the strata corporation or the owners if winding up is not ordered.[61]

The shift in 2015 to a supermajority rule, which allows 80% of title holders to force dissolution of condominium, includes a requirement for court confirmation of a strata corporation's dissolution resolution if there are 5 or more strata lots. In determining whether to make this order, the courts are directed to consider the following:

55. *Id.*, 272(2).
56. British Columbia, *Official Report of the Debates of the Legislative Assembly (Hansard)*, 36th Parl., 3rd Sess., Vol. 12, No. 4 (23 July 1998) pp. 10379-10381 (Hon. J. MacPhail; R. Coleman).
57. *Strata Property Act*, SBC 1998, c 43, s 52.
58. *See* BCLI (2015), *supra* note 14, pp. 16-29, for detail of the dissolution (termination) procedures.
59. Strata Property Act, SBC 1998, c43, s 284(1).
60. *Id.*, s 284(2), subsequently amended by SBC 2015, c 40, s 54.
61. *Id.*, s 284(3), subsequently amended by SBC 2015, c 40, s 54. *See* BCLI (2015), *supra* note 14, pp. 29-31, for detail of the court-ordered dissolution procedures.

a. the best interests of the owners, and
b. the probability and extent, if the winding-up resolution is confirmed or not confirmed, of
   (i) significant unfairness to one or more
      (A) owners, or
      (B) holders of registered charges against land shown on the strata plan or land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, and
   (ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.[62]

The non-consensual dissolution of condominium has been rarely litigated in British Columbia, but some predict a deluge of litigation as buildings age and development pressures escalate.[63] To date, there are only three court decisions from British Columbia that consider petitions for non-consensual dissolution. The statutory provisions for court-ordered dissolution in the 1998 amendments arise only indirectly in two of them, but the three cases nonetheless reveal the sources of conflict over dissolution that are common across jurisdictions.

Cypress Gardens is a 177-unit, residential townhouse and apartment development in North Vancouver. Built in 1962, the former rental property was later converted into a common-law condominium development.[64] The common-law form was intended to mimic the statutory form in function and operation, with slightly different legal mechanics. Within this common-law condominium structure, title holders became co-owners of a single fee simple interest covering the whole property, and this was combined with rights to the exclusive occupation of a particular unit, to access the common property, and to participate (through shares in a corporation) in the governance of the complex.

In 2011, a developer made an offer to buy Cypress Gardens, intending to maximize the permitted density under the prevailing zoning by-law by demolishing the aging buildings and re-developing the lot. Some within Cypress Gardens wanted to sell. They noted the need for expensive renovations and claimed that the "state of disrepair" made individual sale difficult.[65] Moreover, they believed the exchange value of their co-ownership interest in the fee simple would be greater if the whole property were sold to the developer than if they arranged individual sales. Other owners did not want to dissolve Cypress Gardens. Even with the substantial renovation costs (there was much disagreement about the costs of needed repairs), they wanted to

62. *Id.*, s. 284(3).
63. F. Bula, 'Condo owners face-off in property-rights tiff', *The Globe and Mail*, 9 April 2012 online: <www.theglobeandmail.com/news/british-columbia/condo-owners-face-off-in-property-rights-tiff/article2396711/>; BCLI (2015), pp. 9-10, *supra* note 14.
64. *Mowat*, *supra* note 19, para 27. In 1994, British Columbia prohibited future common law condominium developments: *Land Title Act*, SBC 1994, c 26, s 7; *see* current version of provision in RSBC 1996, c 250, s. 73(4).
65. *Id.*, paras 21, 23.

retain their interests within the common-law condominium. In the context of rising property values, dissolution would not only push them out of the complex, but also out of the neighborhood and even municipality. The exchange value of their co-ownership interest on the dissolution of Cypress Gardens might be greater than what they would receive in an individual sale (this point was contested as well), but would not be enough to purchase elsewhere in the city.

One group of title holders within Cypress Gardens, who together held approximately 30% of the units, petitioned the British Columbia Supreme Court under the Partition of Property Act for an order enabling them to proceed with the sale.[66] The respondents to the action included a group of 'consenting respondents', who opposed the process but not the sale of Cypress Gardens, and another larger group opposing the sale. Many of the latter testified, and much of Justice Ehrcke's judgment recounts the evidence of those opposing the partition and sale.[67] It is clear that the testimony had an impact, for Justice Ehrcke summarized it as follows:

> The evidence before me demonstrates that an order for sale would force particularly vulnerable people out of their homes, including young children, single parents, the elderly, the infirm, and people of very limited financial means. There would be a negative impact on the children, who would suffer the disruption of having to move, change schools, and develop new support networks, if indeed their parents were even able to find new accommodation to purchase, which in many cases is doubtful. Many of the respondents have deposed that they were only able to buy their homes at Cypress Gardens because the prices there were much lower than for other accommodation on the North Shore, and that if there were a sale, the proceeds would be insufficient for them to find suitable replacement housing.[68]

It is also clear that Justice Ehrcke understood the title holders in Cypress Gardens as owners of their homes, and that 'suitable replacement housing' meant comparable home ownership. In a later paragraph, the prospects of being forced either to rent in order to remain in the municipality or to move to another municipality appear equally dire:

> Moreover, many of the respondents would not be able to finance the additional cost of purchasing replacement accommodation, with the result that they would lose their homes and be forced either to rent or to move to a different municipality, far from their work, their friends, and their children's schools.[69]

Equating the dislocation of a move to a different municipality with the shift from owner to renter reflected a perception of value in the status of homeowner. One might

66. *Partition of Property Act*, RSBC 1996, c 347, ss 2, 6.
67. *Mowat*, *supra* note 19, paras 91-94.
68. *Id*., para. 162.
69. *Id*., para. 167.

not have the right to a particular home, but homeownership included the right not to be involuntarily dispossessed of that status.[70] Justice Ehrcke declined to grant the order for partition and sale. He left the common-law condominium, and the interests within it, intact.

Seymour Estates, another common-law condominium development in North Vancouver, became the site of similar conflict between title holders. Built in the late 1960s, and needing major renovation, the title holders received a developer's offer that exceeded what each could secure were they to sell their individual interests. Some wanted to dissolve the condominium, others wanted to stay, and the conflict ended up in the courts.[71] The title holders seeking dissolution brought an action for an order to proceed with the partition and sale of property. However, whereas only 30% of the title holders in Cypress Gardens had petitioned to partition and sell the land, 92% of title holders in Seymour Estates joined the petition. Only 9 of 114 title holders were opposed. Justice Fenlon summarized the parties, their positions, and her decision as follows:

> In the case before me more than 90% of the owners have concluded that a sale of the property will not only permit them to maximize their current investment but will also give them an opportunity to move into a new, modern unit which will not carry with it the risk of significant capital expenditures and which will be easier to both manage and sell in the future.
>
> The respondents' view is, understandably, that it is not fair for them to be forced from their homes. I acknowledge how difficult that prospect is, but forced sale of co-owned property has been part of our law for a very long time. Shared ownership has advantages. It permits those who might not otherwise be able to own a home to do so, but it also has significant disadvantages – a forced sale by the other co-owners is one of them.[72]

The right to home ownership within the common-law condominium for a minority of title holders had to give way to the interests of a large majority of title holders who wished to sell in order to maximize their investment. That was part of what co-ownership entailed. Justice Fenlon granted the order for partition and sale, and Seymour Estates was no more.[73]

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70. On the role of status preservation in takings, *see* R. Godsil and D. Simunovich, 'Protecting Status: The Mortgage Crisis, Eminent Domain, and the Ethic of Homeownership', 77 *Fordham Law Review* 2008, pp. 949-998.
71. *McRae*, *supra* note 19.
72. *Id.*, paras. 43-44. *See* F. Bula, 'Shared property owners in North Vancouver can force sale, B.C. Supreme Court rules, *The Globe and Mail*, 21 January 2014 online <www.theglobeandmail.com/news/british-columbia/shared-propery-owners-in-north-vancouver-can-force-sale-court-rules/article16423781/>.
73. In fact, there was further litigation to resolve a dispute over competing offers. *See Cox v. Seymour Village Management Inc.*, 2015 BCSC 275.

Garnering consensus within large condominium developments may be particularly difficult, but the case of Strata Plan VR 1411 demonstrates that unanimity can never be assumed when there is more than one title holder.[74] Initially constructed in violation of the City of Vancouver's height by-law, shoddy modifications to the three-unit, two-building condominium created serious structural problems and substantial water damage. The buildings needed extensive renovation, but the title holders could not agree on the division of costs. As a result, one of the title holders in the two-unit building (and the only resident-owner) sought and secured a court order requiring all title holders to contribute to the cost of repairs based on their shares of the common property.[75] The court also appointed an administrator to oversee the work and the division of expenses. When that process foundered, the resident-owner secured a second court order assessing special levies against the other title holders to fund the renovations.[76] Consultant's, administrator's, and lawyer's fees continued to escalate, but nothing was spent on repairs and the parties ended up in court a third time with countervailing actions. The resident-owner sought a third assessment order; the other title holders sought an order to dissolve the condominium. Noting the 'fundamental disagreement' between title holders and their 'dysfunctional' relationship, Justice Curtis indicated that it would be unfair to the two non-resident title holders not to dissolve the condominium.[77] Neither had the funds to cover their likely shares, and nor, it seemed, did the resident-owner. Moreover, he seemed convinced by the evidence that to order repairs, even if they could be funded, would compel significant expenses that could not be recovered in a subsequent sale of individual units. Justice Curtis refused to grant a third assessment order.[78] However, he also declined to grant the dissolution. Despite appearing to view it the better option, he gave the parties another opportunity "to contemplate the possibilities as there may be better ways to realize their respective interests".[79]

Cypress Gardens, Seymour Estates, and Strata Plan VR 1411 illustrate two common scenarios that produce conflict over the dissolution of condominium. The first arises when some within condominium wish to take advantage of a development windfall that would create additional value were the condominium dissolved and the land sold. The second is a consequence of the need to undertake extensive repair or renovation that some wish to conduct while others want out. They can arise together, as was the case in Cypress Gardens and Seymour Estates, but whether development

74. *Buchanan v. Strata Plan VR1411*, 2008 BCSC 977.

75. In British Columbia, this is called the 'unit entitlement'. *Strata Property Act*, SBC 1998, c 43, s 1.

76. *Id*., paras. 8, 16.

77. *Id*., paras. 37-38. *Strata Property Act*, SBC 1998, c 43, s 284(3)(b) and (c) directs a court to consider 'the probability of unfairness to one or more owners' and 'the probability of confusion and uncertainty in the affairs of the strata corporation or the owners' if it does not make an order to wind-up the strata corporation.

78. *Id*.

79. *Id*., para. 39.

windfall, expensive renovations, or both, conflict will arise when some title holders wish to maximize the value of their interests by dissolving condominium while others wish to retain their titles within condominium.

10.3 Non-Consensual Dissolution of Condominium as Private-to-Private Takings

Our argument is that the non-consensual dissolution of condominium in which some title holders force the termination of all individual titles within condominium is an exercise of the takings power. In an early commentary on condominium in Canada, Risk noted that a minority may raise 'the cry of expropriation' where a majority can force the dissolution of condominium.[80] Ter has made a similar point in consecutive articles on the phenomenon of collective or *en bloc* sales in Singapore, describing the forced dissolution and sale of condominium that occurred after the nation-state reduced the dissolution threshold from a unanimity rule to a supermajority rule as "akin to compulsory purchase".[81] We concur, but go further. Non-consensual dissolution is not just akin to, but is a form of taking – a private-to-private taking – in which one private entity dispossesses another private entity of an interest in land. In this section we address a number of possible concerns with describing the non-consensual dissolution of condominium as an exercise of the takings power. In doing so, we note the features that non-consensual dissolution shares with other forms of takings, but also the uniqueness of this form of private-to-private or delegated takings. Finally, we consider the non-consensual dissolution of condominium within Waring's suggested typology for private-to-private takings and find that it straddles her proposed categories.

Perhaps the most significant objection to the use of takings terminology to describe the non-consensual dissolution of condominium is that takings are commonly understood to involve not only the elimination of a property interest, but also its acquisition by another entity. This is reflected in the description of the takings power in some jurisdictions as 'compulsory purchase' or 'compulsory acquisition'.[82] In the non-consensual dissolution of condominium, the 'taking' parties are not acquiring property interests from those whose interests are being 'taken'. Instead, they are terminating or eliminating individual titles. However, the takings power, understood broadly, includes the capacity to end or terminate property interests; it does not necessarily require that another entity acquire those interests.[83] Indeed, the realm of regulatory

80. R.C.B. Risk, 'Condominiums and Canada', 18 *University of Toronto Law Journal* 1968, pp. 1-72, at p. 64-65.
81. Ter 2008, *supra* note 13, p. 49; Ter 2009, *supra* note 48, p. 509. Sood 2010, *supra* note 48, p. 67, describes it as 'a new form of statutory sale'.
82. *See* K. Gray & S.F. Gray, *Elements of Land Law*, Oxford University Press, Oxford, 2009, pp. 1387-1392.
83. Van der Walt 1999, *supra* note 20.

taking revolves around limiting and, in some cases, terminating property interests; it does not require the transfer of property interests, although Gray notes the apparent Canadian exception to this proposition.[84] The fact that there is no acquisition does not disqualify thinking of this non-consensual termination of a property interest as a taking. As we explained in the introduction, our use of 'takings' terminology instead of 'expropriation' reflects its broader ambit.

Not only is the non-consensual dissolution of condominium a taking without acquisition, the taking parties place themselves in the same position as those whose property is taken; all individual titles in land will come to an end and all title holders will become co-owners of the property that was formerly held as private and common property within condominium. However, while the fact that all title holders end up in the same position may have some bearing on our perception of the legitimacy of this private-to-private takings, it does not invalidate the characterization of non-consensual dissolution as a takings. Individual titles are still taken involuntarily from some, even if the titles of others are terminated voluntarily.

Third, framing the power to instigate a non-consensual dissolution of condominium as a taking of property does not fit the paradigm of a taking by a public entity for a public purpose that animates most discussion of takings law. The takings power is usually analyzed in the context of a non-consensual acquisition of a property interest for a public purpose. Indeed, some jurisdictions have explicit constitutional provisions requiring a public purpose for the taking of private property, although these provisions have not eliminated discussion or debate about the scope or extent of public purposes, sometimes reframed more broadly as public interest.[85] Instead of taking for a public purpose, the power to force the dissolution of condominium is all the more extraordinary because it is a form of private-to-private taking: one private entity terminates the property interests of another. In private-to-private takings, the state is not involved, at least not directly, and the public purpose, if any, manifests itself indirectly through some calculation that the property is better held by one owner than another. Nonetheless, a public purpose or the public interest is commonly invoked in discussions about the dissolution of condominium. In Singapore, legislators, judges, and academics have characterized the public interest in redeveloping land

84. K. Gray, 'Can Environmental Regulation Constitute a Taking of Property at Common Law?', 24 *Environmental and Planning Law Journal* 2007, pp. 161-181, at p. 176, n. 96, referring to *CPR v City of Vancouver*. For a background to that case and a discussion of regulatory takings in Canada, *see* D.C. Harris, 'A Railway, A City, and the Public Regulation of Private Property: *CPR v. City of Vancouver*', *in* E. Tucker, B. Ziff & J. Muir (Eds.), *Property on Trial: Canadian Cases in Context*, Osgoode Society for Canadian Legal History and Irwin Law, Toronto, 2012, pp. 455-486.

85. Nowhere did this become more evident than in *Kelo v. City of New London* 545 US 469 2005, and the extraordinary public and legislative reaction to the USSC decision. The *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, does not contain a property rights provision.

and thus in having a dissolution rule that facilitates the redevelopment of land, as a matter of urgent 'national interest'.[86] The law reform report on condominium in New South Wales places the discussion of dissolution under the heading of 'Urban Renewal'.[87] However, the state need not be directly involved, and nor must there be an appeal to a public purpose in order to characterize the private termination of property interests as takings.

A fourth potential objection to analyzing the non-consensual dissolution of condominium as takings revolves around the question of consent. It is possible to construe that individuals who acquire title within condominium have consented to the potential loss of that title at the instigation of other title holders. Justice Fenlon suggested as much in her ruling on the Seymour Estates.[88] Even in those regimes that require unanimity to dissolve condominium, a court may order dissolution over the objections of some title holders, and therefore all title holders within condominium may be presumed to have consented to this possibility when acquiring their interests. However, the extent to which acquisition should be understood to entail consent may depend, at least in part, on the notoriety of this aspect of condominium ownership. In the haste to sell or buy units, the particular virtue of condominium ownership – individual title – may obscure some of its limitations.[89] Nonetheless, assuming that prior consent exists, it emulates that which is assumed in the context of takings for public purposes. Individuals may object to the state's taking of their property, but are understood to have recognized and consented to this possibility as a feature of the system within which they hold their property interests. The fact that the title holders object to the transfer or the termination of a property interest, whether by a public or private entity, at the moment of its transfer or termination, constructs the event as a taking. Even if we understand that title holders within condominium have given prior consent to the possible loss of title, this does not disqualify the subsequent non-consensual dissolution as a taking.

However, if we insist on some form of consent as a necessary element of the legitimate use of the takings power, then this affects proposals to move from a unanimity rule to a supermajority to dissolve condominium. Title holders who acquired their titles within the former regime may be understood to have given prior consent to the non-consensual loss of their titles, but only if it occurs through a process supervised by the courts and not simply by supermajority vote. If we are to understand title holders, who acquired their interests under a unanimity rule, as having consented to the possible loss of their titles by supermajority vote, then it requires pushing

86. Ter 2008, *supra* note 13, p. 98.

87. NSW 2012, *supra* note 14, p. 22.

88. *McRae*, *supra* note 19, para. 44.

89. *See* S. Blandy, J. Dixon, & A. Dupuis, 'Theorising Power Relationships in Multi-owned Residential Developments: Unpacking the Bundle of Rights', 43 *Urban Studies* 2006, pp. 2373-2379.

the notion of consent back to the recognition among all property holders that legislatures may change terms of ownership within a property regime. This is in fact the case – legislatures do have the power, subject in many jurisdictions to constitutional constraints, to alter property rules – but the fact that the consent to the potential loss of a property interest is even more remote from the moment of taking may affect how we think about the retroactive application of a rule that facilitates the non-consensual dissolution of condominium and thus the taking of property.

Finally, the manner of compensation for title holders who lose their individual titles when condominium is dissolved without their consent is unusual within the purview of takings. Compensation is not a necessary element of takings law. Although it may be required by constitutional provision or statute, the lack of compensation does not disqualify the confiscation of property as a taking. In the non-consensual dissolution of condominium, title holders whose interests are taken do not receive compensation from those initiating the dissolution, but they do receive the exchange value of their interests. When condominium is dissolved, the former title holders become co-owners, as tenants in common, and will receive the value of their co-ownership interest when the property is sold. It would be unusual for the exchange value of that interest to be lower than the the sale price of their individual title. Indeed, the principal motivation for dissolving condominium lies in an assessment that the exchange value of the co-ownership interests on dissolution exceeds that of the individual titles within condominium. If subjective assessments of value are put aside, as they are in most takings compensation regimes, and only the market or exchange value of respective interests considered, then the former title holders (including those who sought or opposed dissolution) are at least no worse and usually better off when condominium is dissolved. This outcome mimics the requirements of most constitutional provisions and expropriation statutes. If the goal of compensation provisions within takings law is to replace a property interest with its exchange value, objectively determined, then that is achieved when condominium is dissolved and the remaining interests sold. Moreover, the fact that the title holders who precipitate non-consensual dissolution put themselves in the same position as those who are not consenting creates an incentive to pursue dissolution only when it will maximize the exchange value of the interests in land.

In sum, not only is the non-consensual dissolution of condominium analogous or akin to the takings power; it should be thought of as a form of private-to-private taking. Moreover, it is a form of private-to-private taking that enables the assembly of land for the purposes of its redevelopment. Bell describes takings for land assembly "as the proto-typical case where takings are necessary to overcome strategic barriers to voluntary transactions".[90] He is referring principally to holdouts and bilateral

90. Bell 2009, *supra* note 22, p. 567.

monopolies, two prominent examples (discussed in the following section) from a larger set of transaction costs that inhibit efficient resource allocations and that takings provisions attempt to overcome. Regimes that permit the non-consensual dissolution of condominium endeavor to circumvent these same challenges to the efficient allocation of resources. As a result, the non-consensual dissolution of condominium should not be thought of as fitting awkwardly within the purview of takings, but instead as a clear example of the takings power.

Waring describes three variants of private-to-private takings that she distinguishes, at least in part, on the source of authority for the taking.[91] In the first instance, the authority of one private entity to take the property of another arises explicitly in statute, as in the case of the statutes that enable utility companies to take private land to facilitate the distribution of their products.[92] The second category includes authority for private takings that arises in the common law, such as in the law of adverse possession, which establishes when a squatter will acquire the property interest of the title holder. Waring's third and final category of private-to-private takings includes those that occur as an incidence of or within a larger regulatory regime, and which authorize a partial taking. She uses the example of restrictions on the capacity to exclude neighboring owners, in doing so stressing that this third category of private-to-private takings results in the loss of a right within the bundle of property rights, but not of the whole bundle.[93]

The private-to-private taking that operates when condominium is dissolved without the consent of all title holders straddles Waring's first and third categories. In relation to the first, the authority to take through the non-consensual dissolution of condominium is less explicitly authorized than it is an incidence of a larger regulatory regime that enables title holders to make decisions that affect the interests of other title holders. This suggests Waring's third category might be the better fit. However, the property right that is taken when condominium is dissolved is not one among the bundle of ownership rights. It is the individual freehold title. The purpose of terminating that title is not to diminish a bundle that otherwise remains intact, but to dismantle ownership within condominium. Condominium legislation that permits non-consensual dissolution has the effect of enabling private entities to extinguish the property in land of another private entity without consent, although the statutes do not label or acknowledge it as a takings power. The capacity to take the property of another comes in the form of a supermajority vote or the opportunity to seek a court order to dissolve condominium.

91. Waring 2013, *supra* note 21.
92. *Id.*, pp. 243-247.
93. *Id.*, pp. 252-257.

10.4 Dissolving Condominium, Takings, and Conceptions of Property

The non-consensual dissolution of condominium is a form of private takings in which some title holders exercise the power to wind-up the condominium corporation and terminate individual titles. "The central question of takings law", argues Singer, "is whether the obligations imposed on an owner by a property law rule are just and fair".[94] Answers to this question vary considerably, perhaps particularly in the domain of private takings.[95] The US Supreme Court's decision in *Kelo v. City of New London*, which condoned the taking of privately held titles to residential properties to prevent their owners from blocking a large-scale land assembly and redevelopment by another private entity, attracted extraordinary public, legislative, and academic attention, and reveals the extent to which takings can provoke intense debate in some jurisdictions over its use.[96] For our purposes, the takings literature is useful because it reveals that the choice between condominium regimes that enable or restrict non-consensual dissolution, and therefore that enable or restrict the takings power, is also a choice between conceptions of property and between the functions that the institution of property is to serve. In setting the rules for non-consensual dissolution, legislators and judges are making choices about property; they are shaping the form of property in land and establishing its purposes.

In their analyses of takings jurisprudence in the United States, Rose and Singer argue that the debate over the takings power is a function of different and competing conceptions of property.[97] Rose goes one step further to suggest that the choice between competing conceptions or models of property depends on another, prior question: "what are we trying to accomplish with a property regime?"[98] Once we know the goals of a property regime, then we can define the parameters of private property, identify takings, and determine the circumstances in which the takings power is legitimate. However, the nature of property and its uses are not fully formed in advance of disputes over the takings power: the idea of property is being constructed in the legislative and judicial determinations of the takings power. Given what is at stake, it is hardly surprising that the legitimate scope of the takings power attracts much attention and debate.

Rose suggests two competing visions of property and its purposes that underlie the takings debate in the United States: the dominant contemporary vision of property as

94. Singer 2006, *supra* note 23, p. 338.
95. *But see* Waring 2013, *supra* note 21, on the ubiquity and uncontested acceptance of many forms of private taking.
96. *Kelo*, *supra* note 85.
97. Rose 1994, *supra* note 24, p. 50; Singer 2006, *supra* note 23, p. 317.
98. Rose 1994, *supra* note 24, p. 50.

a vehicle for preference satisfaction "that, first and foremost, maximizes the satisfaction of preferences by maximizing wealth";[99] and an older, republican vision that understands property not "as a set of tradeable and ultimately interchangeable goods" but rather as a "vehicle for propriety and decent good order".[100] Alexander describes this older (and he argues enduring) conception of property as propriety this way: "property is the material foundation for creating and maintaining the proper social order, the private basis for the public good".[101] These goals of wealth maximization and of constructing a particular social order may overlap, but the institution of property will be modeled on the prevailing vision of its purposes, and takings law is one location for that modeling.

Singer also suggests two dominant models of property in US takings jurisprudence: the first marshals the image of a castle, the second trades on the owner as investor.[102] In its most fortified form, the castle model constructs an impenetrable wall around private property. Property interests can never be transferred or terminated without the owner's consent; owners have veto powers over any attempt to dislodge them of their property. Property interests are secure. On the other hand, "the investment model focuses instead on protecting the *justified expectations of investors*".[103] Property owners are entitled to a reasonable return on their investments based on justified expectations, but not necessarily to their property. In this model, property's value is secure. Singer goes on to argue that the veto inherent in the castle model "gives the owner too much power," while the right to fair market value of the investment model "gives owners too few rights".[104] Both need tempering, and he argues for a citizenship model of property to better capture the rights, but also the responsibilities, of ownership. We return to the citizenship model below.

Singer's castle and investment models of property bring to mind Calabresi's and Melamed's much-discussed distinction between entitlements protected with a property rule and those protected with a liability rule.[105] Property rules require that the holders of entitlements voluntarily agree to their transfer. Liability rules provide that an entitlement may be destroyed if its holder receives its value.[106] The property rule requires consent; the liability rule affords compensation. Calabresi and Melamed focus on remedies, not specifically on the nature of property, but as Rose points out, "property remedied by a liability rule is not the same as property remedied

99. *Id.*, p. 52
100. *Id.*, pp. 59, 64.
101. G. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970*, University of Chicago Press, Chicago, 1997, at p. 1.
102. Singer 2006, *supra* note 23.
103. *Id.*, p. 323 (emphasis in original).
104. *Id.*, p. 316 (reference omitted).
105. Calabresi & Melamed 1971, *supra* note 25.
106. *Id.*, p. 1092.

by property rules".[107] The liability rule protects the exchange value of property even though the interest itself may be lost; the property rule secures the interest or entitlement itself, but not necessarily its exchange value because, as in the case of land assembly, those with a veto may block a transfer that might generate the most value. Among their examples, Calabresi and Melamed describe the assembly of many privately owned lots to create a park in order to illustrate the circumstances (individual financial preferences set against the strategic barriers that would inhibit preference maximization) in which the liability rule (to allow the state to exercise its takings power to assemble land) is preferred.[108]

Abraham Bell takes up Calabresi and Melamed in making the case for private takings. In doing so, he outlines the conditions under which private takings are appropriate, and even to be preferred, to takings by a public authority:

> a private taking power should be granted where the dual conditions of an appropriate taking are met: (1) the taker is the preferred owner of the property right (for reasons of justice or efficiency); and (2) strategic difficulties block the efficient or just transfer of property rights in the market place.[109]

Bell does not elaborate on what he means by "for reasons of justice", or what the conditions of a 'just transfer' might be, except perhaps to imply that the efficient allocation of property encompasses its just allocation. Instead, he focuses on the question of efficiency and on when private takings may be justified to overcome 'strategic difficulties' that block the efficient transfer of property rights. These strategic difficulties include two of the most commonly discussed transactions costs that inhibit the smooth operation of markets: holdouts and bilateral monopolies.[110] Holdouts describe situations where an individual or a small subset of the larger group blocks a transfer and, by doing so, the efficient allocation of resources. Bilateral monopolies describe the circumstance of one buyer and one seller; each must deal with the other, so each can block the other. In both instances, efficient resource allocations may be barred, and where they are, Bell argues, the delegation of a private takings power to overcome 'strategic difficulties' may be justified.[111] Building on Calabresi and Melamed, and using a similar example of land assembly, Bell argues for a 'pliability rule' in which the remedies shift from property rule protection (consent required to transfer) to a liability rule protection (entitled to compensation for transfer), which enables a private entity to pry a property interest loose from a non-consenting owner, and then back to a property rule when the entitlement

107. C. Rose, 'Property and Expropriation: Themes and Variations in American Law', 2000 *Utah Law Review* 2000, pp. 1-38, at p. 10.
108. Calabresi & Melamed 1971, *supra* note 25, p. 1106-1108.
109. Bell 2009, *supra* note 22, p. 558.
110. *Id*., pp. 530-31.
111. *Id*., pp. 530-531.

is in the hands of the taker.[112] In this sequence, Bell claims "full compensation is the key to properly incentivizing private takers in land assembly".[113]

These fragments of the takings scholarship reveal its usefulness in analyzing the non-consensual dissolution of condominium. In terms of the dichotomy constructed by Calabresi and Melamed, the choice between unanimity or supermajority rule is a choice between a property or liability rule. The unanimity rule provides a veto; the supermajority rule permits the taking but provides compensation. In Singer's castle/investment dichotomy, the unanimity rule buttresses the castle model, the supermajority rule enhances the investment model. In practice, the distinctions are not so sharp. Under both unanimity and supermajority regimes, the option exists for a title holder to seek a dissolution order through the courts, but this only defers to the courts the decision of whether to construct property primarily in the image of a castle or an investment, or to deploy a property or liability rule.

At this point, we return to the conflicts over the dissolution of Strata VR 1411, Cypress Gardens, and Seymour Estates to analyze them as disputes over the legitimacy of private-to-private takings. In the first instance, the cases may be interpreted as providing examples of the strategic barriers to land assembly that inhibit efficient allocations of property interests, but which the delegation of a takings power could overcome.

Strata VR 1411 involved only three title holders, one of whom opposed the other two in their efforts to dissolve the condominium. The pair of title holders had to deal with the third, creating a bilateral monopoly and the possibility that intransigence on one or both sides could frustrate the efficient allocation of resources.[114] Whatever the optimal outcome in this case, it is clear from the multiple court proceedings and the lack of action on the property – neither renovation nor dissolution – that the title holders could not resolve the dispute themselves. Even so, the court gave the parties a final opportunity to negotiate a settlement. Without pronouncing on whether the court should have ordered the dissolution to secure the efficient outcome (a determination that would require a cost–benefit accounting), the conflict between title holders in Strata VR 1411 appears an instance where a property rule in the context of a bilateral monopoly might well frustrate that allocation. If so, then a liability rule to allow the two title holders who sought dissolution to dismantle the condominium over the objections of the third title holder would facilitate the efficient outcome. All title holders, including the dissenter, would receive more for their shares in a subsequent sale of the remaining co-owned land than they would have received for the individual sale of their units.

112. *Id.*, at p. 541. *See also* A. Bell and G. Parchomovsky, 'Pliability Rules', 101 *Michigan Law Review* 2002, pp. 1-79.
113. *Id.*, p. 573.
114. A bilateral monopoly is a particular type of holdout involving two parties. Although there are more than two parties involved in this scenario, we have described it as a bilateral monopoly because there are two clear and opposing positions on the question of dissolution, and each side must deal with the other. However, the single title holder seeking an assessment order could also be described as a holdout.

Cypress Gardens and Seymour Estates present remarkably similar circumstances except for the proportion of title holders who opposed dissolution. This difference largely explains the different outcomes. In Seymour Estates, a minority of less than 10% were opposed. As such, they were holdouts frustrating the will of the more-than 90% who wished to sell. Although the judge did not speak of efficient allocation or do an explicit cost–benefit accounting, her decision to grant a dissolution order reflected the preponderance of opinion in favor of a sale. Its effect was to allow a supermajority to overcome the barrier to land assembly presented by the few holdouts. In the case of Cypress Gardens, it is difficult to discern from the decision exactly how many title holders within the common-law condominium sought to dissolve it and how many wished it to continue. However, it is clear that those who wished to preserve the condominium were not a small minority, and may well have been the majority. The judge could not construct them as holdouts that were preventing a large majority of title holders from achieving their goals and so did not order dissolution.

Whether a permissive takings rule is necessary to secure efficient outcomes requires an empirical determination based on analysis of strategic barriers that inhibit the market in property interests. We have not done an efficiency analysis of the conflicts over Cypress Gardens, Seymour Estates, and Strata VR 1411, but the preceding discussion assumes that it can be done and that, in some instances, a private-to-private takings through the non-consensual dissolution of condominium, to overcome holdouts or circumvent a bilateral monopoly, would facilitate the assembly of property interests and secure their optimal allocation. Within this analytical frame, the role for legislators is to establish a regime that deploys a liability rule to permit the non-consensual dissolution of condominium when it would be efficient to do so. Similarly, when the decision in individual cases is deferred to judges, their role is to determine whether a liability rule, to enable non-consensual dissolution and facilitate land assembly, would facilitate efficient allocations.

Although the decisions seem to correspond with an efficiency analysis, the language in the three decisions suggests there is more at stake in these conflicts than the efficient allocation of property. In fact, Singer's dichotomy of castle and investment models of property captures the choice that judges confront when hearing cases involving the non-consensual dissolution of condominium. In Cypress Gardens and Strata Plan VR 1411, the line between those who sought to dissolve condominium and those who wished to retain their property interests within condominium was also the line between owner-investors and resident-owners.[115] In both cases, the owner-investors sought to maximize the value of their investments and in doing so articulated a vision of property based on their justified expectations as investors. Their interests as title

115. The correlation is less pronounced in Seymour Estates as some of those who petitioned to dissolve the condominium were resident-owners, but the affidavit evidence recounted by the judge reveals that those who opposed dissolution were resident-owners. *See McRae*, *supra* note 19, paras 29-37.

holders, indeed the property interests of all title holders, were more valuable if the condominium structures were dissolved, and a dissolution order would enable all title holders to realize that value. The role of a property interest was to protect, even to maximize value for its holder. On the other hand, the resident-owners fought dissolution in order to retain their individual titles and, by doing so, their homes. In challenging the owner-investors, the resident-owners articulated a model of property based not on investor value or maximizing wealth, but on the home as the fulcrum of social life. Property interests in homes were not to be thought of primarily in terms of fungible, transferable objects of value, but rather as a means to secure autonomous and fulfilling lives embedded within community. Property interests might well protect the expectations of owners as investors, but that role ought to be secondary to the protection of the property interests themselves when the property in question was the home. In articulating their opposition to the dissolution of condominium, they presented a model of property as castle.

The resident-owners were also presenting a vision of the appropriate function for property in the home. It was a vision, echoing Rose and Alexander, of property as propriety, of property as securing the private basis of a public life. In the context of condominium and other common-interest communities, a 'public life' exists within the legal structure and beyond it. The dissolution of condominium dismantles the mechanism for collective governance and destroys the public or communal life of title holders within the legal form. This may not be a particular concern for many, and perhaps most condominium 'communities', which use the legal form primarily to create individual titles rather than an intentional community. However, property interests within condominium can act to secure a place in the public life within and beyond the legal form, and the resident-owners who opposed dissolution described their property interests as the basis for their continuing presence and capacity to participate in the public realms of neighborhood and municipality. Protecting their private property also involved securing their place within the larger public realm.[116]

The decisions reveal that the determination of whether the exercise of the takings power is just and fair depends on the prevailing concept of property and its purposes. A regime that is premised on the owner-as-investor model of property and focused on maximizing preference satisfaction may well produce a different answer about the justness and fairness of takings than a regime intended to construct or perpetuate a vision of the public that stretches beyond facilitating the interactions of wealth-maximizing individuals. The non-consensual dissolution of condominium is a form of private-to-private taking. As such, the choice between constructing a regime that inhibits

116. The dissolution rule is not the only site of conflict within condominium between resident-owners and owner-investors. *See* R. Lippert, 'Governing Condominiums and Renters with Legal Knowledge Flows and External Institutions', 34 *Law & Policy* 2012, pp. 263-290, on the divergent interest in regulating of renters.

non-consensual dissolution of condominium (with a unanimity rule) and another that facilitates it (with a supermajority rule), is also a choice between conceptions of property. When legislators choose between a unanimity rule and a supermajority rule they are also constructing the nature of property within condominium. Legislators in Florida recognized as much when announcing that they were acting "to preserve the value of the property interests and the rights of alienation" in the shift to a supermajority rule.[117] Similarly, when judges are asked to consider granting a dissolution order, they are also being asked to rule on the nature of property within condominium. In those determinations, they are constructing a particular conception of property.

The jurisdictions that are examining their dissolution rules and considering change need to ask what role they ascribe to property within condominium. Given that property will invariably play a number of roles, the better question is which role should have priority. Moreover, this question is best answered with a clear understanding of how property within condominium is used. Residential and commercial property serve different functions, so may produce different priorities and thus suggest different rules. But while attention to the uses of property within condominium is important, legislators who are choosing between dissolution regimes (and thus conceptions of property) are also making choices that will have an impact beyond the particular form of ownership. The rapidly increasing prominence of condominium as a form of ownership in land means that determinations about the nature of property within condominium are increasingly definitive determinations of the nature of property in land.

10.5 Condominium, Dissolution, and the Nature of Property

The events that cause interests in land to come to an end reveal much about the nature of those interests. Indeed, within the common law, the two broad categories of estates (freehold and leasehold) and even the different forms of freehold estates (fee simple, fee tail, and life estates) are defined by their end points.[118] The dissolution of condominium brings separate titles to an end; former title holders become co-owners, as tenants in common, of all the property that was held in individual titles and as common property within condominium. Our final claims are, first, that the rule determining the degree of consent required to dissolve condominium is a singularly and increasingly important site in determining what it means to hold property in condominium, and second, that condominium is the crucible in which contemporary understandings of property in land are being forged.

117. Fla. Stat., *Condominium Act*, § 718.117(1) (2007).

118. This idea was elegantly captured in *Walsingham's Case* (1573) 2 Plowd 547 at 555, 75 ER 805 at 816-817: "the land itself is one thing, and the estate in land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time".

As one form of common-interest community, condominium has attracted the attention of property theorists for its blending of property rights,[119] or mixing of property regimes.[120] Lehavi categorizes common-interest communities as private–common hybrids, and describes them as one among a "proliferation of property configurations" that offer advantages over the 'pure' property regimes of private, common, and state or public property.[121] Similarly, Dagan and Heller suggest that the idea of the 'liberal commons' augments "the well-worn trilogy of ownership forms that constitute the conceptual apparatus of property law".[122] Their intent is to describe the forms of property that recognize the rights of individuals (liberal) embedded within community (commons). As Heller argues in a later piece, "[e]very liberal commons form creates the conditions in which people can achieve the economic and social gains possible from cooperation, while also ensuring that individual autonomy exists on reasonable terms".[123] All these scholars suggest the mixed, blended, or hybrid property institutions offer better solutions to the tragedies of the commons (overuse) and anti-commons (underuse), than any of the pure or standard forms of property. But regardless of these normative claims, the hybrid forms of ownership that layer different property interests deserve attention because of their prominence. "More and more", write Dagan and Heller, "as 'sole and despotic dominion' fades from economic life, versions of liberal commons regimes are becoming the dominant form of ownership".[124]

Whether understood as hybrid property or liberal commons, the legal form of condominium requires close attention to the relations between title holders in order to understand the nature of their property interests. Alexander describes condominium and other legal forms that create common-interest communities as 'governance property', a category that he distinguishes from 'exclusion property' in order to emphasize the importance of relations between owners in understanding the nature of property.[125] The prominence accorded the right to exclude as the defining characteristic

119. M. Heller, 'Common Interest Developments at the Crossroads of Legal Theory', 37 *Urban Lawyer* 2005, pp. 329-334, at p. 331.
120. Lehavi 2008, *supra* note 8; S. Blandy, 'Collective Property: Owning and Sharing Residential Space', *in* N. Hopkins (Ed.), *Modern Studies in Property Law, Vol. 7*, Hart Publishing, Oxford, 2013, pp. 151-172, p. 163, suggests the term 'collective property' to describe the owning and sharing that are essential elements of co-housing developments.
121. Lehavi 2008, *supra* note 8, pp. 140, 141; *see also* W. Schwartz, 'Condominium: Hybrid Castle in the Sky', 44 *Boston University Law Review* 1964, pp. 37-55, who noted this hybrid quality in an early analysis of condominium in the United States.
122. Dagan & Heller 2000, *supra* note 32, p. 555.
123. Heller 2005, *supra* note 119, p. 333. J. Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and the Law*, Oxford University Press, Oxford, 2011, p. 130, makes a generalized claim about possibilities that emerge when moving beyond the public or private to legal forms that recognize their combination: "Freeing ourselves from misleading categories and false choices opens the possibility of individual autonomy in the context of collectivity".
124. Dagan & Heller 2000, *supra* note 32, pp. 622-623.
125. Alexander 2011, *supra* note 31, p. 1858.

of property in much property theory is inadequate, he argues, particularly in relation to forms of governance property, such as condominium, where the character and quality of the property interests are defined as much by the relations between owners as by the capacity to exclude third parties or by any other relationship between owners and third parties. A focus on multi-ownership property reveals "ownership's internal relations are every bit as essential to understanding ownership as are its external relations".[126]

Attempting to shift from a singular preoccupation with rights toward an understanding of property that includes recognition of obligations or responsibilities, Singer has long called for more attention to the relational elements of ownership.[127] Instead of the castle or investment dichotomy, he offers a third conception of ownership – a 'citizenship model' – and suggests it "starts from the assumption that obligations are inherent to ownership".[128] Applied in the context of takings law, where the investment model provides inadequate protection for property and the castle model too much, the citizenship model, in Singer's formulation, recognizes that the obligations of ownership may require an owner to cede property in the public interest, but the rights of ownership stipulate that the taking is to occur only so long as it is just and fair.[129] He goes on to situate ownership within community:

> Part of what it means to be a member of society, to be an owner among owners, is to be part of a real or imagined social contract that limits liberty to enlarge liberty, that limits property to secure property.[130]

This invocation of the need to recognize the limits of property in order to secure property describes the nature of ownership within condominium better than ownership of land outside condominium. Within condominium, private interests are indelibly bound with common interests and with the capacity of the group to regulate and place limits on the private and common property. Moreover, within condominium a title holder is 'an owner among owners' much more obviously than outside condominium, where many will not be owners of interests in land, at least not of freehold interests. Condominium creates a community of title holders, with the potentially problematic capacity to sequester itself from a greater sense of the public.[131]

126. *Id*., p. 1887. Alexander goes on to argue that not only does governance property better describe the nature of property, but that it is also normatively preferable to further the goal of human flourishing. *See also* J. Leslie, 'Pluralist Moral Theory in the Philosophy of Property and the Legal Form of the Condominium' (LLM thesis, The University of British Columbia, October 2015).
127. J.W. Singer, 'The Reliance Interest in Property', 40 *Stanford Law Review* 1988, pp. 611-751.
128. Singer 2006, *supra* note 23, p. 329.
129. *Id*., p. 338.
130. *Id*., p. 329.
131. The fact that condominium and other forms of common-interest community create communities on the basis of ownership rather than residence or citizenship has formed the basis of a sustained critique.

Nonetheless, as owners among owners, within a structure where individual ownership is inseparably tied to co-ownership of common property, the collectively imposed limits on title holders are not only inescapable, but necessary to secure the private interests.

As one form of property hybrid, condominium combines interests in private property with common property to construct autonomous space for individuals within a community of its making. It is this combination of rights that establishes the foundation for condominium, but the interests co-exist in the tension that the legal form creates between individual and community, or between autonomous and collective decision-making. Sorting out what if any hierarchy exists between the private and common property interests within condominium is mostly unnecessary. The interests co-exist peaceably, the common property supporting the private, or the private nested within the common – it does not matter much which way the co-existence is understood. Nonetheless, the particular attraction of condominium over other legal forms that subdivide ownership within multi-unit developments is its capacity to create individual titles in land. Therefore, the choice of condominium reflects an orientation toward private property; as one early observer of condominium noted, it enables purchasers "to achieve more concomitants of ownership than are now available to renters or to cooperators".[132] Viewed as a form of ownership designed to construct individual titles, the common property interest within condominium plays a supporting role to the private property; the common property exists to enable the private. However, when condominium is dissolved, the private titles disappear. They are displaced by co-ownership interests, which are allocated between co-owners based on the size or quantity of the private titles. This allocation reflects the prominence of the private interests and their continuing effect even after termination, but it is only co-ownership that endures the end of condominium. As a result, whatever their relative position during the lifetime of condominium, the choice of dissolution rule is also a determination on the relative strength of individual interests and co-ownership interests within condominium.

The different weighting of private and common interests in the dissolution rules illustrates Alexander's argument about the importance of relations between title holders in defining the nature and character of the property interests they hold. Title holders within condominium in jurisdictions with a supermajority rule hold different interests than those same title holders under a unanimity rule. The supermajority rule

The literature focuses on homeowner associations in the United States, but the concerns are germane to condominium. Early and influential pieces include: E. McKenzie, *Privatopia: Homeowner Associations and the Rise of Residential Private Government*, Yale University Press, New Haven, 1994; E. Blakey and M.J. Snyder, *Fortress America: Gated Communities in the United States*, Brookings Institution Press, Washington, 1997.

132. C.J. Berger, 'Condominium: Shelter on a Statutory Foundation', 63 *Columbia Law Review* 1963, pp. 987-1026, at p. 989.

constructs property to protect its exchange value for the owner as investor, the unanimity rule to protect the interest itself for the owner, usually as resident or occupant. This division is not absolute. Even in jurisdictions with a supermajority rule, the fact that a simple majority vote is insufficient to precipitate the non-consensual dissolution is recognition that the extraordinary power to terminate individual titles, in order to maximize exchange value, must be tempered in deference to other values, such as the capacity to be secure in one's home. Similarly, those jurisdictions with a unanimity rule do not protect individual titles at all costs. Recognizing that a small minority of title holders who refuse to consent to dissolution may frustrate the legitimate needs of the remaining title holders and possibly the interests of the larger society, jurisdictions with a unanimity rule provide the possibility of court-ordered dissolution. Nonetheless, the change from a supermajority to a unanimity rule marks a fundamental shift in the orientation of property interests within the legal and conceptual framework of condominium. This shift is achieved by reordering relations among title holders, shifting the balance internally between private and common property interests or between individual and collective decision-making, not by changing the property relations between title holders and those outside condominium.

However, to recognize that a unanimity rule bolsters the strength of individual titles is not to claim that it provides greater protection for property interests within condominium. Similarly, if the bundle of sticks metaphor for property is helpful in understanding property within condominium, then it is not the case that jurisdictions with a unanimity rule provide title holders with an extra or a bigger stick in the property bundle. The choice between unanimity and supermajority rules is not a choice between more or less property. Instead, the two rules present different models or conceptions of property. The unanimity rule bolsters the ownership interest, albeit at the cost of the exchange value; the supermajority protects the exchange value, at the cost of the ownership interest.[133] If the goal of the property regime were to protect the capacity of resident-owners to remain in their homes, then the unanimity rule is the better choice. Conversely, if a property regime were designed to secure the exchange value of property interests, then the supermajority rule is the more appropriate. In fact, the rules in all jurisdictions are compromises that reflect attempts to find some middle ground between conceptions of property that prioritize different things. But even in attempting to locate that middle ground, the choice is not between

133. T.K. Sood, 'Collective Sales of Strata Developments: The Singapore Approach', 8 *Australian Property Law Journal* 2000, pp. 157-174, at pp. 160-161, suggests: "the question is really one of balancing two components of the right to property in a strata development, namely, the right of one group (the minority owners) which would like to hold on to the property and an equally legitimate right of another group (the majority owners) which wants to exercise its rights to alienate property". This is a variation of the choice described by the French legal philosopher R. Demogue, 'Security', *in* A. Fouilleé *et al.* (Eds.), *Modern French Legal Philosophy*, Boston Book Company, Boston, 1916, p. 418 at pp. 427-431 [translated by F.W. Scott and J.P. Chamberlain], between static or dynamic security: the first protects the interest, the second secures its transfer.

more or less property. Rather, the choice is between different conceptions of what property is, and what it is to achieve.

Choices about the nature and purpose of property are not, of course, confined to property within condominium. They recur across the spectrum of common-law property doctrine, within civil codes and statutes, in constitutional provisions delimiting property rights and state obligations, and in the articles of international agreements. There is no single doctrinal or institutional location that acts as the arbiter of property or its definition. The sites that combine to construct the nature of property are diffuse and extend beyond the formal legal setting. However, the fact that the sites are dispersed does not make them equal: law may invoke the authority of the state to displace tradition or practice, judges write decisions within court hierarchies, common-law doctrine gives way to legislative intervention, statute must accord with constitutional provision, treaties establish supra-national structures that have the capacity to supersede domestic law. Moreover, the relative importance of these sites changes over time. Even in common-law jurisdictions, legislatures have usurped the role, once assumed by the courts, as the principal arbiters of the idea and nature property. Statutory condominium provides one example of this shift.

Among this panoply of legal forums, we view condominium as a singularly important site in the molding of contemporary understandings of property. Its rising position as the legal architecture of ownership in cities around the world has accompanied the accelerating urbanization of human society in the late 20th and early 21st centuries. Condominium facilitates ownership where human population densities are high, and its prevalence requires that we regard its effect on the shape and form of property in land.

Within the crucible of condominium, the rules that govern the process for dissolving the constituent elements of ownership are key determinants of the nature of that ownership, and understanding the non-consensual dissolution as a private-to-private takings helps to make this clear. Moreover, the dissolution rules are only going to become more important. Statutory condominium is a relatively new legal form that, for the most part, structures ownership in newly constructed buildings. As those buildings age, decisions regarding their replacement, and therefore about the dissolution of condominium, inevitably become more pressing. The choice of rule about the degree of consent required to dissolve condominium will matter more, and will be an increasingly critical determinant of the shape and form of property within condominium.

Understanding the non-consensual dissolution of condominium as a taking also reveals that the tension between private and common property within condominium is a product of the same fault-line that runs more generally between private and public interests, or between individual and community. The takings analysis is useful in analyzing the non-consensual dissolution of condominium precisely because the

tension between individual and collective within condominium mirrors that same tension in other interests in land. But the insights may travel in both directions. What transpires within condominium is useful for understanding what is happening beyond condominium as well.

As a form of ownership, condominium is particularly striking because the private interests that it creates so obviously depend on the co-existence of common property. It is not possible to maintain the private interests within condominium without the support of the common property. Although it may be less transparent, this is also the case for private interests in land beyond condominium. It is possible to suppose that private property exists independently, detached from other interests, because it is not so clearly bound with common property as it is within condominium. An insistence on the right to exclude (or variations of it) as the single defining feature of private property tends to reinforce and perpetuate this illusion of separation and detachment. But this is untenable. Condominium has the virtue of reminding us that private property is embedded in community. The takings analysis brings the tension between individual and community into the open, clarifying the choice between condominium regimes that facilitate and restrict non-consensual dissolution and revealing its significance as nothing less than establishing the nature of property in land.

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