TAKINGS, LEGITIMACY, AND EMERGENCY ACTION:
LESSONS FROM THE FINANCIAL CRISIS OF 2008

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INTRODUCTION

In the decade since the landmark U.S. Supreme Court property rights case *Kelo v. City of New London*, there have been few surprises in takings jurisprudence. As anticipated, public dismay over *Kelo*—in which a closely divided Court ruled that the condemnation of land for an “economic development” project was for “public use” and thus a valid act of eminent domain—led to laws and state constitutional amendments designed to curb government power to seize property. Also as foreseen, the challenges inherent in drafting such restrictions have proved formidable, resulting in a patchwork of constraints of uncertain impact. In the area of “regulatory takings,” which involve questions of when public action is the functional equivalent of formal seizure, disputes over the line between land holder autonomy and government authority have continued to hold center stage.

That said, takings law has taken an unexpected turn in the wake of the 2008 financial crisis. Believing themselves deprived of significant rights by official actions justified as needed to combat the threat of economic catastrophes...
trophe, investors and business owners sued the federal government and related entities on a variety of grounds. The most prominent of these suits arose out of the “bailouts” of American International Group (“AIG”), Chrysler, General Motors, the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”), and include takings claims or have significant takings overtones. Although discounted in some quarters as frivolous, a number of these suits have shown real staying power. That means that the takings clause has emerged as an important vehicle for evaluating government actions during the financial crisis and in its aftermath. This Essay examines these developments and offers three observations.

First, these suits have already served an important purpose by uncovering information about how and why the United States Department of the Treasury (“Treasury”), the Federal Reserve, and other key actors chose to do what they did. Gaining understanding is crucial, for the more that is known about the response to the 2008 crisis, the better the odds of avoiding serious error in the next one. It is a critical time to learn more about the actions taken as Congress weighs changes to the powers of the Federal Reserve and to securities law. More information about the response to the financial crisis can also increase government transparency and accountability.

Second, the availability of relief for takings claims can bolster the legitimacy of public action that stems from financial crises. In dealing with perceived emergencies, governments sometimes venture beyond the clear bounds of their authority or impose heavy costs on a select few firms or individuals. Afterward, there may be a push to forget these incidents or dismiss them as anomalies. Takings claims furnish a means for coming to terms with and, up to a point, rectifying the past. Because the ordinary remedy for a successful takings claim is “just compensation,” takings law can

8 See David Zaring, Litigating the Financial Crisis, 100 VA. L. REV. 1405, 1420-34 (2014).
9 See infra notes 79-85 and accompanying text.
10 See infra notes 86-89 and accompanying text.
help ensure than the burden of addressing a financial crisis is a shared one, thus barring government “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

This leads to this Essay’s final point, which concerns the political economy of measures to contain financial and economic crises. Government choices regarding who gets help, how much, and with what strings attached inevitably yield winners and losers. Insulating these decisions from review can facilitate the use of crisis to subvert government for private ends. Particularly at a time when anxieties about “crony capitalism” and the outsize influence of elites are running high, these are the wrong incentives to create.

This Essay has three Parts. Part I surveys the extraordinary government actions taken in response to the 2008 financial crisis. Part II examines the legitimacy of the takings claims brought in the aftermath of these events. Part III concludes with some thoughts about the political economy of crisis intervention.

I. THE FINANCIAL CRISIS OF 2008 AND AFTER: GOVERNMENT PANIC AND PRIVATE PROPERTY

When trouble began to roil the global credit markets in August 2007, few saw it as a sign of incipient disaster. For nearly a quarter century, the developed world had enjoyed a “great moderation” of steady economic growth, overseen by central bankers who claimed to have tamed the business cycle through the prudent use of sophisticated macroeconomic tools.

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19 See Frederic S. Mishkin, Over the Cliff: From the Subprime to the Global Financial Crisis, J. ECON. PERSP., Winter 2011, at 49, 49.
Financial panics and economic depressions had been for all practical purposes relegated to history—or so conventional wisdom suggested.21

Such optimism turned out to be mistaken. As 2007 turned to 2008, standard remedies for calming markets and warding off economic downturn continued to fail, and novel monetary policy measures fashioned on the fly by increasingly alarmed central bankers also proved inadequate.22 By March 2008, what started as a hiccup in the financial markets threatened to turn into a “systemic meltdown” as investors staged a “run” on Bear Stearns, a leading investment bank and a linchpin of the securities markets.23 A hastily negotiated acquisition by commercial banking giant J.P. Morgan prevented a Bear Stearns bankruptcy and attendant losses to the firm’s counterparties and bondholders, but the fact that this outcome was made possible by unprecedented24 and legally questionable25 actions by the Federal Reserve injected yet more uncertainty into an already combustible situation. In any event, the “rescue” of Bear Stearns did not end the crisis. In the months to come, other major financial firms would confront similar losses of investor confidence, as confusion about asset values made it hard to distinguish solvent firms from insolvent ones.26 Along with chaos and uncertainty in the financial sector came a severe economic recession.

Unprepared for and unsettled by this chain of events, those charged with oversight over the United States financial system struggled to respond. Memoirs of this period depict an atmosphere of near pandemonium, with decisions made in haste and on the basis of sketchy information.27 When


24 See Phillip Swagel, The Financial Crisis: An Inside View, Brookings Papers on Econ. Activity, Spring 2009, at 1, 32 [hereinafter Swagel, The Financial Crisis] (noting that to incentivize J.P. Morgan to make the deal the Federal Reserve had “not just lent [it] money,” but had “in effect” agreed to take on “the downside of a portfolio of $29 billion of possibly dodgy assets”).


Congress passed laws, including the Emergency Economic Stabilization Act of 200828 ("EESA") that set up the Troubled Asset Relief Program ("TARP") and the Housing and Economic Recovery Act of 200829 ("HERA") designed to shore up flailing mortgage giants Fannie Mae and Freddie Mac, it did so without the “procedural virtues” of public consultation and legislative deliberation that legal philosopher Jeremy Waldron characterizes as of the “utmost importance for the rule of law.”30 When in early September 2008, just a bit more than a month after HERA’s passage, then Secretary of the Treasury Hank Paulson decided to force Fannie Mae and Freddie Mac into “conservatorship,” which meant putting two private, albeit “government sponsored,” entities under government control,31 he did not consult the boards of directors of the affected companies.32 That Paulson took this precipitous action soon after publicly telling Congress he planned to do no such thing fueled the impression that, in the admission of Timothy Geithner, who as head of the Federal Reserve Bank of New York worked closely with Paulson, “we were lurching from emergency to emergency without a comprehensive plan.”33

This “adhocracy” approach, in which government responses appeared to flow “from hurried decisions of unelected officials deriving their authorities from obscure sources,”34 continued unabated for the rest of September 2008. On September 15, Lehman Brothers, the nation’s fourth largest investment bank, filed for bankruptcy after the government declined to engineer a soft landing of the sort it had six months earlier for Bear Stearns.35 The refusal to save Lehman was later explained as stemming from a judgment that the Treasury and Federal Reserve lacked adequate powers to do so.36 But remarks made by Paulson at the time indicated that by letting Lehman go under, he meant to make it clear to investors they must bear their own losses.37 Paulson’s tough message did not have the hoped for ef-

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32 See PAULSON, supra note 27, at 1-6. Paulson justified his actions on the grounds that taking the Fannie Mae and Freddie Mac boards “by surprise” ensured their acquiescence to government control. Id. at 1-2; see also PHILIP A. WALLACH, TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS 59-62 (2015).
33 GEITHNER, supra note 27, at 175.
34 WALLACH, supra note 32, at 17.
35 PAULSON, supra note 27, at 222-23.
fect of stabilizing the financial markets by clarifying the government’s limited role in them. Although investors knew that Lehman might be insolvent and also had ample time to prepare for its possible demise, financial markets did not absorb the firm’s collapse with ease but instead “went from bad to awful.” It seemed plausible that the lesson markets took from the Bear Stearns rescue was that government backstops were the new normal.

Just one day after Lehman’s bankruptcy filing, news broke that the era of “bailouts” had not, in fact, ended. On September 16, the Federal Reserve Board announced that “with the full support of the Treasury Department” it had authorized the Federal Reserve Bank of New York to lend up to eighty-five billion dollars to AIG, then the nation’s largest insurance company, to create a “liquidity facility” to “assist AIG in meeting its obligations as they come due.” The Federal Reserve justified this intervention on the grounds that “in current circumstances, a disorderly failure of AIG could add to already significant levels of financial market fragility,” materially weakening the economy.

Sensitive to the public’s distaste for bailouts, the Federal Reserve stressed that all assets of AIG (including the stock of AIG’s regulated subsidiaries) and all assets of AIG’s non-regulated subsidiaries stood as collateral for the loan. AIG’s liquidity facility also carried a high interest rate. The announcement contained one more twist: “The U.S. government will receive a 79.9 percent equity interest in AIG.” Unlike assets put up as collateral, which are forfeit only if a debtor fails to pay, the AIG stock would remain government property even when AIG repaid all loans in full. No other private financial firm that got help during the crisis was pressured to turn over the lion’s share of its equity to gain access to liquidity facilities.
time was short and the AIG Board of Directors, in the position of a suppliant, had no real power to push back against government demands.\footnote{See Starr Int’l Co. v. Fed. Reserve Bank of N.Y., 906 F. Supp. 2d 202, 207 (S.D.N.Y. 2012); William J. Sjostrom, Jr., The AIG Bailout, 66 WASH. & LEE L. REV. 943 (2009).}

Now AIG’s most powerful creditor as well as its de facto majority owner, the government was in a strong position to influence AIG’s operations. This high level of involvement gave rise to potent accusations of “crony capitalism.”\footnote{See Malcolm S. Salter, Annals of Crony Capitalism: Revisiting the AIG Bailout (Edmond J. Safra Research Lab, Working Paper No. 50, 2013).} Of particular controversy is the “backdoor bailout”\footnote{H.R. COMM. ON OVERSIGHT & GOV’T REFORM, 111TH CONG., PUBLIC DISCLOSURE AS A LAST RESORT: HOW THE FEDERAL RESERVE Fought to Cover Up the Details of the AIG Counterparties Bailout from the American People (2010) [hereinafter PUBLIC DISCLOSURE], https://oversight.house.gov/wp-content/uploads/2012/02/20100125aigstaffreportwithcover.pdf.} of some AIG counterparties through the purchase at essentially face or “par” value of collateralized debt obligations that underlay a portion of AIG’s portfolio of credit default swaps.\footnote{See OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, SIGTARP-10-003, FACTORS AFFECTING EFFORTS TO LIMIT PAYMENTS TO AIG COUNTERPARTIES 5 (2009) [hereinafter SIGTARP, AIG COUNTERPARTIES].} These purchases had the stated purpose of extricating AIG from contracts that threatened AIG’s liquidity by subjecting it to calls for more collateral.\footnote{Id. at 3-4.} Critics argued that AIG counterparties would likely have received significantly less if there had been a true arm’s length negotiation.\footnote{See PUBLIC DISCLOSURE, supra note 50, at 2.} To a suspicious mind, it might appear that big financial firms were enjoying a windfall due to the government’s determination to prop them up.

To be sure, the payoff of AIG counterparties “in full” could be, and was, defended as the right call given that the chief objective was to prevent financial system meltdown.\footnote{See, e.g., GEITHNER, supra note 27, at 246-48 (characterizing the “no-haircuts strategy” as a “no-brainer”).} Inflicting losses (or “haircuts”) on AIG’s counterparties might send them into a tailspin, or so the argument went, with unknowable but potentially cataclysmic consequences for the economy as a whole.\footnote{See SIGTARP, AIG COUNTERPARTIES, supra note 51, at 15-19.}

It is impossible to know for sure whether “haircuts” for AIG counterparties would have triggered disaster. But it is beyond dispute that the spectacle of favorable, anomalous treatment for elite corporations was an unattractive one. Even if accusations of flat out corruption—namely, that government insiders were using their high offices to raid the national treasury on behalf of their buddies—were unfounded, it seemed plausible that decisionmakers were conflating the survival of specific firms with the well-being of society as a whole. Looking back on her tenure as chairman of the
Federal Deposit Insurance Corporation (“FDIC”), the nation’s chief bank regulator, during the crisis, Sheila Bair raises this point. “To this day, I wonder if we overreacted,” she writes, asking whether the influx of public money to finance firms stabilized the system or merely ensured that top financial executives “didn’t have to skip a year of bonuses.” The “mere fact” that financial companies face big losses, notes Bair, “does not a systemic event make.”

TARP’s establishment in October 2008 laid the foundation for yet more government engineered changes in property and contract rights. TARP’s putative purpose was to ensure adequate liquidity in the financial sector. As the recession deepened, however, the severe problems of the domestic automobile industry spurred politicians and government officials to advocate diverting some of the program’s money to Detroit. This move did not go unopposed. As with bailouts of financial firms, the auto bailouts carried risks of moral hazard. That two of the three big domestic car makers—GM and Chrysler—teetered on the edge of bankruptcy was a predictable (and predicted) byproduct of decades of excessive labor costs, inferior products, and inadequate management. To “save” GM and Chrysler from the consequences of their behavior could only weaken the United States economy in the medium and long term.

But in late 2008 and early 2009, the focus was on the short term. Fears arose about the possibility of an uncontrolled bankruptcy of GM or Chrysler reverberating through the economy, eliminating millions of jobs and ballooning the costs to government of social welfare and pension guarantee programs. These concerns led to the release of TARP funds to GM and Chrysler starting in December 2008—the first wave of federal government support that was to total $80 billion—to give lifelines to the companies as well as to the February 2009 formation of the Presidential Task Force on the Auto Industry, charged with reviewing the government’s options. The Auto Task Force worked closely with GM and Chrysler and soon an-

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56 BAIR, supra note 27, at 119.
57 Id.
58 Id. at 120; see also James Kwak, Cultural Capture and the Financial Crisis, in PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 71-98 (Daniel Carpenter & David Moss eds., 2013).
62 Id. at 8-9.
63 Id. at 20.
nounced plans for each firm to go through a fast bankruptcy.\footnote{See Kevin Krolicki & John Crawley, \textit{GM Files for Bankruptcy, Urges Quick Action}, \textit{REUTERS} (June 2, 2009), http://www.reuters.com/article/2009/06/02/us-gm-idUSN3044658620090602.} By mid-July both GM and Chrysler had emerged from bankruptcy as new companies in which the United States government had substantial ownership stakes.\footnote{Kimberly Amadeo, \textit{Auto Industry Bailout (GM, Ford, Chrysler): Why the Big 3 Needed a Bailout and What It Cost the U.S. Taxpayer}, \textit{ABOUT.COM}, http://useconomy.about.com/od/criticalss/a/auto_bailout.htm (last visited Jan. 31, 2016).}

The GM and Chrysler bankruptcies, in the words of one expert, “were successful in that they quickly removed assets from the burden of unmanageable debt amidst a global recession.”\footnote{Barry E. Adler, \textit{A Reassessment of Bankruptcy Reorganization After Chrysler and General Motors}, 18 \textit{AM. BANKR. INST. L. REV.} 305, 305 (2010).} But this success came at a heavy cost, for “charges of illegitimacy and illegality”\footnote{WALLACH, supra note 32, at 123.} have dogged the auto bailouts. The heavy hand of the Auto Task Force in determining the reorganization terms, coupled with unusually harsh treatment of some creditors of GM and Chrysler\footnote{See Adler, supra note 67, at 305 (concluding that the “price of [the] achievement” of the GM and Chrysler bankruptcy processes was “unnecessarily high because the cases established or buttressed precedent for the disregard of creditor rights”); Todd Zywicki, \textit{The Auto Bailout and the Rule of Law}, \textit{NAT’L AFF.}, Spring 2011, at 66, 74-76; see also Mark Roe & David Skeel, \textit{Assessing the Chrysler Bankruptcy}, 108 \textit{MICH. L. REV.} 727, 770-71 (2010).} and the abrupt termination of the franchise rights of approximately two thousand automobile dealers,\footnote{See Bill Canis & Michaela D. Plutzer, \textit{CONG. RESEARCH SERV., R40712, U.S. MOTOR VEHICLE INDUSTRY RESTRUCTURING AND DEALERSHIP TERMINATIONS BILL} (2009).} sparked accusations that the national government had once again arrogated to itself sweeping powers to pick economic winners and losers.\footnote{Zywicki, supra note 69, at 79.} These decisions caused creditors and franchise owners to suffer severe, unanticipated losses as the result of a government initiative that would have been unthinkable in normal times. Despite these repercussions, the architects of the bailouts seemed oblivious to the damage.

Some auto bailout defenders have expressed disquiet at the blurring, if not full erasure, of the boundary between the public and private sectors. “[N]o one involved in the decision to rescue and restructure General Motors and Chrysler ever wanted to be in the position of bailing out failed companies or having the government own a majority stake in a major private company,”\footnote{Goolsbee & Krueger, supra note 61, at 22.} admit Austan Goolsbee and Alan Krueger, two economists who worked on the auto industry restructuring in the early years of the Obama Administration. But for all their misgivings, Goolsbee and Krueger nonetheless suggest that what was done was the right thing—or at least not the obviously wrong thing—because catastrophe was avoided and GM and Chrysler “got back on their feet.”\footnote{Id.}
“Adhocracy” did not end completely with the acute phase of the financial crisis. In 2012, shareholders of Fannie Mae and Freddie Mac learned that the federal government had “in effect expropriated” their stakes in the companies by amending senior preferred stock purchase agreements to transfer all net worth and all future earnings of both firms to the Treasury. Known as the “Net Worth Sweep” or the “Third Amendment,” this measure is defended as no more than a government policy decision by the Treasury and Federal Housing Finance Agency under HERA. But not even the federal district judge who in fall 2014 granted the government’s motion to dismiss a suit by Fannie and Freddie investors looks at the Net Worth Sweep as a garden variety exercise of administrative power.

II. THE AFTERMATH OF CRISIS: PROPERTY RIGHTS AND LEGITIMACY

In times of crisis, governments take actions that fall outside—sometimes far outside—the norm and reduce or destroy the value of resources held by firms and individuals. Aggrieved owners may then sue the government, arguing that they are entitled to relief because: (1) what the government did exceeded its legal authority; and/or (2) even if within the bounds of the law, the government action complained of amounts to a taking of their property. The financial crisis of 2008 and its aftermath have generated a cascade of such lawsuits from GM and Chrysler creditors, former owners of terminated auto franchises, Fannie Mae and Freddie Mac stockholders, AIG stockholders, and others.

74 Never Been Better, ECONOMIST (Feb. 20, 2015), http://www.economist.com/news/business-and-finance/21644525-americas-mortgage-insurance-giants-are-now-making-bigger-profits-financial-crisis (“[B]oth Fannie and Freddie have emerged from the financial crisis churning out more profits before tax than they ever have before . . . . Who benefits most from this is a subject of controversy.”).
75 These Senior Preferred Stock Purchase Agreements, executed in 2009, were between the U.S. Department of the Treasury and the Federal Housing Finance Agency, as conservator to Fannie Mae and Freddie Mac. David Skeel, Now Uncle Sam is Ripping Off Fannie and Freddie, WALL ST. J. (Feb. 27, 2014), http://www.wsj.com/articles/SB10001424052702304610404579404811651661726.
76 Id.
78 Id. (“It is understandable for the Third Amendment . . . to raise eyebrows, or even engender a feeling of discomfort . . . . [T]his court does not seek to evaluate the merits of whether the Third Amendment is sound financial—or even moral—policy.”).
80 Id.
82 See, e.g., A & D Auto Sales v. United States, 748 F.3d 1142 (Fed. Cir. 2014).
83 See, e.g., Perry Capital LLC, 70 F. Supp. 3d 208.
A common reaction to these suits is that they are without merit and sure to fail. “An absurdist comedy, rich in ironies, worthy of the Marx Brothers or Mel Brooks,” is The New Yorker’s verdict on suits brought by Starr International, AIG’s largest shareholder. Financier Steven Rattner, who as lead advisor to the Presidential Task Force on the Auto Industry helped structure the GM and Chrysler bailouts, terms the challenges of Fannie Mae and Freddie Mac shareholders to the Net Worth Sweep a form of “extortion” carried out through the “weapon” of “expensive, time-consuming court battles.” And takings law expert John Echeverria suggests that the very concept of takings as applied to the “federal bailout of the automobile and financial services industries during the economic crisis of a few years ago” makes no sense. “After all,” argues Echeverria, “if the government spent billions of taxpayer dollars to protect particular companies, and the economy as a whole, from going over a cliff, how could the government be accused of taking anything?”

Two distinct but related threads of argument run through this line of commentary. The first is that in economic emergencies the powers of government necessarily expand. That is, the very existence of a crisis renders permissible acts that in ordinary times would be against the law. The second—touched on by John Echeverria’s rhetorical question—is that irrespective of whether government exceeded its powers in the financial crisis, complaining investors and business owners suffered no actual losses. Absent government bailouts, their property would be worth zero, or at least less than it is in a post-bailout world. That means that if the government is obliged to pay out money, property owners will get a windfall.

89 Id.
The first idea—that in economic crisis government power balloons to permit actions the government deems necessary that would be unlawful in a “no crisis” time—is simply wrong. The United States Constitution does not provide the President, Congress, or any other part of the government with additional powers during crises, with the limited exception of the suspension of habeas corpus “in cases of rebellion or invasion.”91 To some this may be counterintuitive, for surely crises may arise during which a faithful public official—particularly the President—will feel compelled to take bold action. And a quick glance at United States history confirms this intuition. In times of extremity, Presidents and other officials have exceeded their powers, or likely so.92

But that an action seems necessary to address a crisis does not make it lawful. The architects of the United States Constitution “well understood” that Presidents might decide they must “take extreme measures” in dire times and nonetheless opted not to include any “sort of generic emergency power, temporary or otherwise.”93 The same goes for Congress. Since 1787, the United States has fought numerous wars and endured at least seven major financial panics94 without any serious moves to amend the Constitution to beef up executive or legislative crisis powers. Nor has the Supreme Court interpreted the Constitution to give the federal government broader latitude in crises. Indeed, what precedent there is on the subject stands for the principle that the executive and legislative branches lack special emergency powers.95

It is true the Anglo-American legal tradition has long recognized an “emergency exception” to property owners’ right to exclude. In physical emergencies such as wars and fires, authorities have limited powers to commit what would otherwise be trespasses and injure or destroy private property.96 But this exception to the general rule that property owners may exclude the government from their holdings is a very narrow one, and has

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91 U.S. CONST. art. I, § 9, cl. 2. The full clause reads: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”


not been applied outside the context of imminent, physical threats to public safety.\footnote{See Davidson, supra note 96, at 206 (arguing for changing the law to permit the application of this “emergency exception” to address “grave threats” that economic crises may pose).} While the monetary risks posed by the financial crisis to the population were extreme, given the narrow nature of the “emergency exception,” it would be a stretch to invoke it to justify the bailouts of 2008.

The second line of argument—that property owners have no reasonable grounds for grievance because it is certain they are better off by dint of the government response to the financial crisis—is unpersuasive because it assumes its own conclusion. What the value of a particular asset would be absent a particular bailout is a counterfactual question. Answers will vary. It is entirely plausible that some former automobile dealers who lost their franchises after the federal government pressured GM and Chrysler to step up the pace of dealer closings\footnote{See Office of the Special Inspector Gen. for the Troubled Asset Relief Program, SIGTARP-10-008, FACTORS AFFECTING THE DECISIONS OF GENERAL MOTORS AND CHRYSLER TO REDUCE THEIR DEALERSHIP NETWORKS 7 (2010).} are now in a worse position than they would have been the auto makers gone through ordinary restructurings with no government involvement. Uncertainty on this very point helps explain why two distinct cases before the Court of Federal Claims both rejected the motions to dismiss of the defendant United States in suits that include takings claims brought by holders of terminated franchises.\footnote{The court denied motions to dismiss in both Alley’s of Kingsport, Inc. v. United States, 103 Fed. Cl. 449 (2012), and Colonial Chevrolet, Inc. v. United States, 103 Fed. Cl. 570 (2012). On the government’s appeal, however, the Federal Circuit agreed that the franchisee plaintiffs had failed to state a claim by not pleading a “but-for decline in value,” but the court did grant the franchisees leave to amend their complaints. A & D Auto Sales v. United States, 748 F.3d 1142, 1157-58 (Fed. Cir. 2014).}

There is another consideration: that of baselines.\footnote{Cf. LIAM MURPHY AND THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE (2002).} In some instances, the right comparison may be not to what property would be worth had the government done nothing at all but to what its value would be had the government done something else. The June 2015 decision of the Court of Federal Claims in Starr International Company v. United States\footnote{121 Fed. Cl. 428 (2015).} illustrates this point. The court ruled in favor of Starr International, AIG’s largest shareholder, on its claim that its property had been illegally exacted.\footnote{Id. at 431.} While the Federal Reserve Bank of New York had legal authority to “serve as a lender of last resort” in “unusual and exigent circumstances,” the court found, it lacked authority to acquire equity “as consideration for the loan.”\footnote{Id.}
But Starr International’s victory was in a sense “pyrrhic,””\textsuperscript{104} for the court awarded no damages. “[I]f not for the government’s intervention, AIG would have filed for bankruptcy,” reasoned the court, and “shareholders would most likely have lost 100 percent of their stock value.”\textsuperscript{105} Yet even if it is true that if the government had done nothing AIG would have gone bankrupt and shareholders’ ownership interests would have become worthless, AIG shareholders might still make out a colorable argument of loss on the grounds that, as the court found, the “weight of the evidence demonstrates that the Government treated AIG much more harshly than other institutions in need of financial assistance.”\textsuperscript{106} Had AIG gotten the same treatment as other firms in similar distress and not been impelled to surrender an equity stake, plaintiffs could reasonably argue that Starr and other AIG shareholders would be substantially better off. The government would have loaned AIG emergency funds at a high interest rate with the firm’s assets as collateral to ensure AIG’s liquidity—probably saving AIG from bankruptcy—but left ownership wholly in the hands of the stockholders. Under such a scenario, government action would have fallen well within the parameters of what complex, sophisticated democracies expect in economic crises: that government (generally through a central bank) will lend freely to solvent firms on good collateral at high rates.\textsuperscript{107}

If the arguments advanced to support the claim that the post-financial crisis takings claims are absurd (or close to it) are so weak, what accounts for the ire expressed so forcefully by so many? One factor may be the identity of the most prominent plaintiffs. The dominant force behind and public face of the AIG shareholder litigation is Maurice “Hank” Greenberg, a billionaire who served as CEO of AIG for over 30 years.\textsuperscript{108} Hedge funds, including one run by Bill Ackman, another billionaire, are key figures in the Fannie Mae and Freddie Mac shareholder suits.\textsuperscript{109} But that it is easy to caricature some of those suing as the “rich and shameless”\textsuperscript{110} cannot wholly account for the dismissive reactions to the bailout litigation. Most of the former GM and Chrysler franchise owners are solid middle class business men and women, not plutocrats. Of the Chrysler creditors, pension funds,

\textsuperscript{104} Tom Braithwaite, \textit{Hank Greenberg Scores Pyrrhic Victory in AIG Lawsuit}, FIN. TIMES (June 15, 2015), http://www.ft.com/cms/s/0/28900784-137b-11e5-aa7f-00144feabdc0.html#axzz3yyqR5thQ2.

\textsuperscript{105} \textit{Starr}, 121 Fed. Cl. at 436.

\textsuperscript{106} \textit{Id}.


not hedge funds or big banks, pursued litigation challenging the terms of the Chrysler bankruptcy the furthest. 111 And many of those who would benefit from victory in the AIG and Fannie Mae/Freddie Mac litigations are far from rich. 112

Another possible explanation lies in how societies process traumatic events. The questionable legitimacy and legality of many of the actions taken to deal with the financial crisis 113 may feed a desire not to examine the past but instead to forget and move on. To the extent the crisis is recalled, what the government did and to whom can be cordoned off in the public mind as an anomaly. This approach keeps the public from confronting hard issues raised by government action and ensures that the government’s conduct is not subjected to the searching review judicial process can provide. One more possible factor deserves attention: hostility toward lawsuits that seem to pose a threat to the broad powers of government to regulate the economy. To some, takings litigation is suspect because it is associated with skeptics of the modern administrative state. 114 By that token, to admit that a takings claim may have merit is to cede ground to political opponents.

Whatever the sources of the visceral distaste for the bailout suits, this reaction is not just unwarranted but also counterproductive. First, to dismiss the lawsuits as a waste of time and money 115 ignores their role in bringing to light sensitive information the government would prefer not to reveal. However comforting it may be to think that nothing like the recent financial crisis will ever happen again, history suggests that financial crises occur with regularity. 116 In addition, many experts on financial regulation doubt that the Dodd-Frank Wall Street Reform and Consumer Protection Act 117 and other post-crisis laws and regulations adequately address the financial system’s vulnerabilities. 118

111 See Roe & Skeel, supra note 69, at 743 & n.43.
113 See supra notes 24-73 and accompanying text.
114 Cf. John D. Echeverria, Eschewing Anticipatory Remedies for Takings: A Response to Professor Merrill, 128 HARV. L. REV. F. 202, 219 (2015) (“For the past thirty years or so, the Takings Clause has served as the favorite vehicle for judges, scholars, and advocates seeking to make the Bill of Rights a more robust bulwark against regulation of economic interests by democratically elected government.”).
116 See RINEHART & ROGOFF, supra note 21, at 291.
Consequently, it only makes sense to garner what lessons we can from the most recent crisis. To that end, the bailout litigation continues to produce nuggets of information about government decisionmaking under conditions of extreme pressure.\(^{119}\) The AIG shareholder litigation has produced an especially rich trove, with “bombshells” that include the possibility that U.S. officials discouraged foreign sovereign wealth funds from providing emergency funds to AIG,\(^ {120}\) extensive detail on the pressure brought to bear on the AIG board to accept the terms of the bailout package,\(^ {121}\) and—most tantalizing—indications that some of the firms that got “backdoor bailouts”\(^ {122}\) were amenable to “haircuts.”\(^ {123}\) Strong government resistance to discovery requests in the Fannie Mae and Freddie Mac suits suggests that litigation may produce bombshells of its own.\(^ {124}\)

Second, a knee jerk dismissal of the merits of the bailout suits clouds analysis. What is possible, likely, or advisable in the evolution of constitutional doctrine are hard questions. One lesson from the trajectory of the legal challenges to the Patient Protection and Affordable Care Act\(^ {125}\) (“ACA”) that culminated in the Supreme Court’s 2012 decision in National Federation of Independent Business v. Sebelius\(^ {126}\) is that initial snap judgments can be wrong, even when those making the judgments are highly knowledgeable. Many early assessments of the ACA challenges were scathing.\(^ {127}\) But as time wore on and a number of ACA suits were not summarily


\(^{122}\) See supra text accompanying note 50.

\(^{123}\) Smith, supra note 121.

\(^{124}\) See Gretchen Morganson, After the Housing Crisis, a Cash Flood and Silence, N.Y. TIMES (Feb 14, 2015), http://www.nytimes.com/2015/02/15/business/after-the-housing-crisis-a-cash-flood-and-silence.html (reporting that the government is “taking extraordinary measures “to keep secret the deliberations surrounding” its 2012 decision to begin “expropriating all the earnings of Fannie Mae and Freddie Mac” and expressing skepticism of Treasury and FHFA claims that “disclosure of documents relating to their actions would destabilize the economy and financial markets,” given that the materials in question “were created three to seven years ago”).


\(^{126}\) 132 S. Ct. 2566 (2012).

tossed out of court, even those who had initially sneered at suggestions that Congress might have exceeded its enumerated powers accepted that there were genuine constitutional issues.128

Most important, dismissing the suits as stunts by rich ingrates loses sight of the potential of takings law to enhance the legitimacy of government actions taken during the crisis. Takings law has this potential, in part, because takings claims can lead to recompense of some who suffered collateral damage in the chaotic environment of crisis and government response. The normal remedy for takings—“just compensation”—seeks to put the prevailing property owner in the same position as she would be in but for the government action by paying fair market value for what the state took.129

“Just compensation” will not always achieve this goal, in part because it does not entail compensating owners for all the types of losses they may suffer.130 This “undercompensation” problem is most glaring when government takes private homes and is also a serious issue in cases involving some business properties—such as, possibly, the auto dealer franchises terminated as the result of the fast track GM and Chrysler reorganizations.131 But even if the “just compensation” remedy does not give the dispossessed owner what to her is “full compensation,” the fact it provides for some payment means that the costs of government response to crisis are spread more evenly and do not fall so heavily on those in the wrong place at the wrong time.

If we think of the measures taken to combat the crisis as intended to create the public good of a healthy institutional infrastructure, then this “cost spreading” makes sense. Just as the expense of the physical infrastruc-


129 “Just compensation” is not necessarily the remedy in a takings case. Other potential remedies include declaratory and equitable relief. See Merrill, supra note 6, at 1643-44.

130 See Katrina Miriam Wyman, The Measure of Just Compensation, 41 U.C. DAVIS L. REV. 239, 254-55 (2007) (explaining that “these non-compensable losses” include “out-of-pocket expenses” such as “attorney’s fees” and “relocation costs” as well as “difficult-to-quantify intangible (or subjective) losses”).

131 See supra text accompanying notes 70-73.
ture of roads, bridges, and utilities is a shared burden, so ought to be the costs of the financial system that undergirds economic growth and national prosperity. The fact that “losers” are not stuck with shouldering all the losses caused by the government’s crisis response can help build and maintain public support for the sorts of far reaching actions that decisionmakers found warranted during the last financial crisis. In short, the availability of just compensation for takings may strengthen, not undermine, the administrative state.

Takings law is not a magic elixir. Its doctrines are replete with subtleties and complexities, making it hard to apply in many situations.132 Over the years, Supreme Court precedents have given us two “categorical rules” for when property will be deemed “taken” in the absence of a formal government condemnation: when there is a “permanent physical occupation” of all or part of the property133 and when regulation entails a total wipeout of property value resulting from a severe limitation on property rights by the state that does not “inhere in the title itself.”134 Supplementing these two “categorical rules” is a multifactor test that encompasses considerations of the property owner’s “investment backed expectations,” the magnitude of the loss, and the “character” of the government action that generates the takings claim.135 The Supreme Court has repeatedly emphasized that this multifactor test is not amenable to crisp formulation or application and that courts should take an “ad hoc,” fact-specific approach.136 And when a regulation “goes too far”137 and becomes a de facto expropriation is not the only hard issue. Serious questions frequently arise with respect to whether a particular asset or right counts as “property” for takings clause purposes.138 There are also open questions about the meaning of “public use,” which after Kelo can no longer be assumed to mean any plausible public benefit.139

Takings law’s role as a means of reconciliation after a crisis is also limited by government capacity to bear risk. Baldly put, the government cannot insure an entire economy—or even a substantial chunk of it—against loss.140 That means that, as a practical matter, successful takings claimants can make up only a small fraction of firms and individuals after a

136 See James E. Krier, Judicial Takings: Musings on Stop the Beach, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 217, 224 (2014).
139 See SOMIN, supra note 5, at 3; see also Horne v. Dep’t of Agric., 135 S. Ct. 2419, 2433 (2015) (Thomas, J., concurring).
crisis. An examination of the claims that have arisen so far out of the 2008 crisis, however, suggests that funds at stake would not strain the United States government’s ability to pay, even in the unlikely event that every plaintiff were victorious.

III. THE POLITICAL ECONOMY OF CRISIS INTERVENTION

A driving force behind the American Revolution and the United States Constitution, antipathy toward “corruption” has always loomed large in domestic politics. In time of crisis, the danger that privileged interests will manipulate the government for their own ends may be especially acute, as the need for swift action can short circuit normal safeguards.

According to accounts of the recent financial crisis, government officials were acutely aware of the danger that their actions would lack legitimacy due to public perceptions of favoritism. But this mindfulness was not enough to protect them from accusations of cronyism and even illegitimate motives. The ad hoc and abrupt tenor of the crisis measures, together with the widely varying treatments meted out to different constituencies, stirred anxieties that “crisis” was providing a smokescreen that enabled the politically well-connected to profit at the public’s expense.

Of course, that the specific terms of each of the bailouts were unique is not definitive evidence of corruption. The perceived risks to the financial system and larger economy posed by Bear Stearns, Fannie Mae, Freddie Mac, AIG, Chrysler, and GM differed from one another in material respects. Defenders of government action can argue that had the Treasury, Federal Reserve, and others come up with and imposed a “one size fits all”

143 Cf. Keith E. Whittington, Yet Another Constitutional Crisis?, 43 WM & MARY L. Rev. 2093, 2148 (2002) (“Crisis rhetoric is meant to shorten the patience for deliberation and the tolerance for dissent and uncertainty.”).
144 See WALLACH, supra note 32, at 133.
145 See supra notes 55-59 and accompanying text.
147 See WALLACH, supra note 32, at 43-78.
bailout model, they would be guilty of dereliction of duty and that unusual, unanticipated events will often lead to “adhocracy.”

At the same time, the spectacle of the financial crisis and its aftermath is a perturbing one. Most of what were the nation’s largest and most influential financial firms before the crisis continue to exist. So far as the public can tell, very few of their executives paid much of a price for being—to put the best face on it—overoptimistic about U.S. housing markets and the competence of their institutions to identify and manage risks. Yet ordinary Americans struggle in a still anemic economy.

Against this backdrop, the takings suits that grew out of the government response to the financial crisis are working their way through the courts. It is possible to view these suits as still more manifestations of the greed and selfishness that got the country into trouble in the first place and to conclude they serve no good purpose. But a careful examination of the events of the financial crisis and the takings arguments advanced in the suits points to a different conclusion. Dismissing these suits out of hand would insulate government from review of decisions it made in chaotic circumstances—precisely the sorts of circumstances that tend to create opacity and make it hard for citizens to monitor public officials. Scrutinizing government action when there is ample time to ferret out facts and deliberate with care is precisely what courts are skilled at doing.

There is another benefit to taking seriously the takings claims that surfaced in the aftermath of the financial crisis. Compensating expropriated property owners can make investors less wary about investing in companies that might be vulnerable to government action in a crisis. On the other hand, if there is no realistic chance of being compensated for the losses that may result from the “adhocracy” that reigns in a crisis, investors will factor that into how much they are willing to pay.

CONCLUSION

Decisions made by governments in response to financial crises invariably lead to gains and losses for private firms and individuals. Cordonning off these decisions from later oversight can stoke fears that domestic crisis provides a smokescreen for the politically powerful to profit at the expense of others. In contrast, the availability of the takings clause and other vehicles for judicial review sends the far more positive message that the United States can handle a serious domestic crisis without jettisoning or even significantly fraying its system of constitutional governance.

148 See Davidoff & Zaring, supra note 146, at 465.