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The Georgia Condominium Act's Authorization of Private Takings: Revisiting Kelo and "Bitter with the Sweet"

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THE GEORGIA CONDOMINIUM ACT'S AUTHORIZATION OF PRIVATE TAKINGS: REVISITING *KELO* AND "BITTER WITH THE SWEET"

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Homeownership provides owners with certain property rights and a sense of security. One of the most important property rights is the Takings Clause of the U.S. Constitution, which prohibits the government from taking private property without just compensation. The Clause has been incorporated against the states and is interpreted as prohibiting any taking that does not serve a public use. Despite these constitutional protections, numerous condominium owners face the threat of private investors taking their units for no public use, without just compensation, and without the owners' consent.

Many state condominium laws allow private investors who obtain a specified percentage of a condominium's units to force the minority unit owners to sell their units. Although the U.S. Supreme Court has written many opinions interpreting the Takings Clause, the Court has not addressed whether states may permit the forcible transfer of condominiums—or other forms of common-interest homeownership—without the unanimous consent of the owners. Although takings for economic development are permitted, no scholarship has considered whether the Court's reasoning behind its rejection of the "bitter with the sweet" doctrine can be applied to the Court's Takings Clause analysis to prohibit states from statutorily conditioning condominium ownership upon waiver of constitutional protections. This Note suggests that the Georgia Condominium Act—and other state condominium termination statutes—may unconstitutionally permit investors to effectuate private takings by forcing dissenting minority owners to sell their fee simple interests in their units.

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I. INTRODUCTION

Property rights are often considered essential for self-government and political liberty.[1] Real property ownership carries with it certain rights that many consider to be fundamental.[2] Generally, state law creates and defines property rights,[3] but the U.S. Constitution provides several key property protections by prohibiting the following: quartering of soldiers without an owner's consent;[4] unreasonable searches and seizures;[5] deprivations of property without due process of law;[6] and takings of private property for public use without just compensation.[7] The Fourteenth Amendment has been interpreted to incorporate most of these protections against the states.[8]

Of the property rights that the Constitution affords, the Fifth Amendment's Takings Clause is likely the most significant to homeowners. The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."[9] The American Dream purportedly encourages all individuals to become homeowners, but homeownership would be meaningless if the

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[1] James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 40 ("[T]he Framers of the Constitution and Bill of Rights were motivated in large part by the desire to establish safeguards for property. They felt that property rights and liberty were indissolubly linked.").

[2] *See, e.g.*, Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 GEO. L.J. 555, 560 (1997) (arguing that some property rights are fundamental and should be accorded substantive due process protections).

[3] *See* Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) ("Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .").

[4] U.S. CONST. amend. III.

[5] *Id.* amend. IV (providing that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated").

[6] *Id.* amend. V (prohibiting the federal government from depriving citizens of property "without due process of law"); *id.* amend. XIV, § 1 (prohibiting states from depriving citizens of property "without due process of law").

[7] *Id.* amend. V.

[8] Richard J. Hunter, Jr. & Hector R. Lozada, *A Nomination of a Supreme Court Justice: The Incorporation Doctrine Revisited*, 35 OKLA. CITY U. L. REV. 365, 379–80 (2010) (noting that the U.S. Supreme Court's selective incorporation doctrine incorporates most guarantees of the Bill of Rights against the states).

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

government could take one's property without a legitimate purpose and without justly compensating the deprived owner.[10]

One form of homeownership—common interest communities—presents a unique Takings Clause question. Common interest communities, such as condominiums, permit some individuals to own homes when they otherwise could not afford to do so, because they can live on smaller properties and share amenities.[11] These communities are uniquely structured because, while the individuals own their properties, a central document and association govern their communities in a manner similar to corporations.[12] Because of this unique real property structure, many states have adopted condominium termination statutes that permit a condominium to be terminated and sold if a specified percentage of unit owners desire it to be.[13] Such termination statutes have produced some seemingly unintended consequences.[14] For example, termination statutes often permit investors to become "bulk owner[s]" by purchasing the requisite percentage of units and then allowing

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[10] *See, e.g.*, A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership is Not Always a Good Thing*, 84 IND. L.J. 189, 189 (2009) ("Home ownership is viewed as key to achieving the 'American Dream.'"). *Cf.* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 661 (1833) ("[I]n a free government, almost all other rights would become utterly worthless, if the government possessed an uncontrollable power over the private fortune of every citizen.").

[11] *See* Douglas C. Harris & Nicole Gilewicz, *Dissolving Condominium, Private Takings, and the Nature of Property* ("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."), *in* RETHINKING EXPROPRIATION LAW II: CONTEXT, CRITERIA, AND CONSEQUENCES OF EXPROPRIATION 263, 264 (Björn Hoops et al. eds., 2015); *see also* Zoomer, *Is Condo Living Right for You?*, EVERYTHINGZOOMER.COM (June 25, 2014), https://www.everythingzoomer.com/money/personal-finance/2014/06/25/is-condo-living-right-for-you/ (describing some of the benefits of living in a condominium, including the sharing of costs and amenities).

[12] *See* Harris & Gilewicz, *supra* note 11, at 264 (noting that "[c]ondominium legislation utilizes a corporate form . . . [as] a mechanism for governing their private and common property").

[13] *See id.* at 266 (discussing how jurisdictions typically enact statutes that establish condominium dissolution rules and procedures because of the "potential for conflict between title holders").

[14] *See* Phillip M. Hudson, *Unintended Consequences of Fla.'s Condo Termination Law*, LAW360 (July 16, 2015, 10:50 AM), https://www.law360.com/articles/678944 (recognizing that Florida's condominium termination statute raises several unintended constitutional issues).

them to force the remaining owners to sell their units.[15] Currently, some condominium unit owners in Athens, Georgia are fighting an investor's attempt to terminate their condominium and force the sale of their units under the Georgia Condominium Act's termination statute, O.C.G.A. section 44-3-98.[16]

Although the U.S. Supreme Court has written numerous opinions applying and interpreting the Takings Clause, the Court has not directly addressed whether states may permit the termination of condominiums without the unanimous consent of the owners. Some have argued that these statutes are unconstitutional.[17] But this literature overlooks U.S. Supreme Court decisions which permit takings and transfers of property to other private parties for economic development.[18] Further, no scholarship considers whether the Court's reasoning behind its rejection of the "bitter with the sweet" doctrine can be applied to a Takings Clause inquiry to prohibit states from statutorily conditioning ownership in condominiums upon waiver of constitutional protections.[19]

This Note suggests that the Georgia Condominium Act (the GCA)—and other state condominium termination statutes—may be unconstitutional as it permits investors to effectuate private takings by forcing minority owners to sell their fee simple interests

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[15] *See, e.g.*, FLA. STAT. ANN. § 718.117(3) (West, Westlaw through 2020 2d Reg. Sess.) (providing a process of condominium termination for a "bulk owner").

[16] *See* Jim Thompson, *Athens Condo Owners Sue Developer and Others, Alleging Violations of State RICO Act*, ATHENS BANNER-HERALD (June 28, 2017, 4:00 PM), https://www.onlineathens.com/local-news/2017-06-28/athens-condo-owners-sue-developer-and-others-alleging-violations-state-rico (discussing a lawsuit alleging that an Athens investor is using "a scheme to acquire eighty percent (80%) of [a condominium's] units . . . , partition the condominium at a reduced fair market value, and eject [the p]laintiffs from their homes"). For examples of hostile condominium takeovers outside of Georgia, see Deborah Goonan, *Can Hostile Takeovers of Condominium Associations Be Prevented?*, INDEP. AM. COMMUNITIES (Jan. 2, 2017), https://independentamericancommunities.com/2017/01/02/can-hostile-takeovers-of-condominium-associations-be-prevented/, which discusses condominium termination attempts in Arizona, Florida, Illinois, Pennsylvania, and Virginia.

[17] *See, e.g.*, Marlene Brito, *Terminating a Condominium or Terminating Property Rights: A Distinction Without a Difference*, 45 REAL EST. L.J. 200, 232 (2016) (arguing that Florida's condominium termination statute "is currently unconstitutional and cannot be upheld"); Harris & Gilewicz, *supra* note 11, at 266 (arguing that legislation permitting the dissolution of condominiums without unanimous consent is an unconstitutional private taking).

[18] *See infra* Section III.B.

[19] *See infra* Section III.B.*6*.

in their units.[20] Part II reviews the background of the GCA and explains how it permits bulk owners to terminate condominiums and force the sale of non-consenting owners' units. Part III examines the U.S. Supreme Court's Takings Clause doctrine and the Georgia Constitution. This Part then discusses whether unit owners consent to termination statutes by purchasing units in states with such statutes. Or does the U.S. Supreme Court's rejection of the "bitter with the sweet" doctrine prohibit states from limiting unit owners' Fifth Amendment rights by conditioning unit ownership upon consent to termination statutes? While the GCA may be unconstitutional, modern courts are not likely to find a taking when bulk owners force minority owners to sell their units pursuant to a previously enacted statutory scheme.

Nevertheless, Part IV suggests that the Georgia General Assembly should consider taking at least two steps to protect the state's homeowners. First, the General Assembly should amend the termination statute to require bulk owners to submit a termination plan that affirms that a non-consensual termination would result in a recognized public benefit. Second, the General Assembly should amend the GCA to require condominium declarations to specify a percentage of unit votes necessary for termination. This would require the unit owners to contractually waive takings claims, as the state would not be authorizing the taking by prescribing its own statutory default percentage.

II. BACKGROUND

Common interest communities are "creatures" of state law.[21] The Apartment Ownership Act (the AOA) originally governed common interest communities in Georgia, but the state General Assembly passed the GCA in 1975 to replace the AOA.[22] The GCA was

[20] This Note only addresses whether the GCA's termination statute is constitutional when an investor or bulk owner seeks to terminate a condominium solely for its private benefit without the unanimous consent of the unit owners. This Note does not challenge, for example, the constitutionality of the statute insofar as it permits termination upon a vote by a specified percentage of unit owners or date expressly provided in the condominium's declaration.

[21] *See* Brito, *supra* note 17, at 201 ("[T]he existence of condominiums is only allowed by the granting power of a statute.").

[22] *See generally* O.C.G.A. § 44-3-113 (West, Westlaw through 2020 Legis. Sess.) (explaining that the GCA "shall apply to all property which is submitted to [the GCA] and shall also apply

originally drafted by the State Bar of Georgia's Section of Real Property Law's Condominium Statute Review Committee.[23] The GCA governs condominiums created after its effective date, while the AOA generally continues to govern condominiums that were created prior to the GCA's enactment.[24]

The GCA permits unit owners who own four-fifths of the condominium association's votes to terminate the condominium.[25] Thus, a single investor or bulk owner can terminate a condominium by obtaining eighty percent of the condominium's units. Once an investor terminates the condominium, the property that once constituted the condominium becomes owned by all of the unit owners as tenants in common in proportion to their prior ownership interests.[26] As a tenant in common, the investor can then petition a superior court for a partition for sale.[27] The minority unit owners would have an opportunity to buy the investor's condominiums at fair market value;[28] however, if the minority owners cannot afford

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to any condominium created . . . pursuant to the [AOA] if the instruments creating such condominium are amended in accordance with their terms in order to submit the condominium" under the GCA).

[23] *See* Jeffrey E. Young, *The Georgia Condominium Act of 1975: A Sound Basis for Innovative Condominium Practice*, 24 EMORY L.J. 891, 891 n.2 (1975) (describing the legislative history of the GCA).

[24] *See* O.C.G.A. § 44-3-113(a) (West, Westlaw through 2020 Legis. Sess.) (providing that the GCA shall apply to any condominium created after 1975); Young, *supra* note 23, at 891 n.3 (stating that the AOA "will still govern condominiums created before October 1, 1975").

[25] *See* O.C.G.A. § 44-3-98(a) (West, Westlaw through 2020 Legis. Sess.) ("The condominium shall be terminated only by the agreement of unit owners of units to which four-fifths of the votes in the association pertain . . . .").

[26] *See id.* § 44-3-98(d) ("Upon the effective date of a termination agreement, all of the property constituting the condominium shall be owned by the unit owners as tenants in common and shall be in proportion to their respective undivided interests in the common elements immediately prior to the effective date.").

[27] *See id.* § 44-6-160 ("When two or more persons are common owners of lands and tenements . . . any one of such common owners may apply by petition to the superior court . . . for a writ of partition . . . .").

[28] *See id.* § 44-6-166.1(b) ("Whenever an application is made for the partition of property and any of the parties in interest convinces the court that a fair and equitable division of the property cannot be made by means of metes and bounds because of improvements made thereon . . . the court shall proceed pursuant to this Code section."); *id.* § 44-6-166.1(e)(2) ("Each party in interest may pay toward the amount required to purchase any petitioners' shares of the appraised price an amount in proportion to that party's share of the total shares of property of all parties in interest . . . .").

the investor's units, the entire property would be subjected to a public sale, where the investor or bulk owner can bid on the property.[29] If the investor wins the bid, it has completed a hostile takeover, forcing the minority owners to transfer their titles to it.[30] No reported cases in Georgia state courts examine the constitutionality of the hostile takeovers of condominiums that the GCA authorizes.

III. ANALYSIS

The GCA permits condominium unit owners with "four-fifths" of a condominium's units to terminate the condominium[31] and seek a partition for sale, forcing the transfer of title from the minority unit owners.[32] This Part reviews the GCA under both the U.S. and Georgia constitutions and finds that although the GCA may be unconstitutional for authorizing private takings, modern courts are unlikely to arrive at this conclusion.

A. THE U.S. CONSTITUTION'S CONTRACTS CLAUSE

The U.S. Constitution's Contracts Clause prohibits states from passing a law that "impair[s] the Obligation of Contracts."[33] Courts can declare condominium termination statutes unconstitutional under the Contracts Clause if they have retroactive effect.[34] Since condominium declarations are binding contracts between the condominium's association and its owners, a later-enacted statute that creates a termination provision absent in the declaration conflicts with the condominium owners' vested contractual rights.

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[29] *See id.* § 44-6-166.1(e)(1) (providing that if the minority unit owners are unable to purchase the majority unit owner's units at the appraised price, "the property shall be subject to public sale").

[30] *See id.* (allowing, implicitly, for investors to bid on and buy the other owners' units in the public sale).

[31] *Id.* § 44-3-98 (permitting condominium terminations and transforming all condominium property to be owned by the unit owners as tenants in common).

[32] *See supra* notes 25–30 and accompanying text.

[33] U.S. CONST. art. I, § 10, cl. 1.

[34] *See* Brito, *supra* note 17, at 223 (arguing that Florida's condominium termination statute would be an impairment of contract in violation of the U.S. and Florida constitutions if it was retroactively applied to declarations created before the statute's enactment).

For example, in 2016, a Florida appellate court affirmed that Florida's condominium termination statute could not apply retroactively to condominium declarations that existed prior to the statute's effective date "without causing a constitutional impairment of contract."[35]

Although condominium termination statutes can be unconstitutional under the Contracts Clause, the GCA does not violate it. Prior-enacted statutes like the GCA cannot impair contracts or declarations that are made *after* the statutes' enactment.[36] Unlike the Florida condominium termination statute—which was held unconstitutional because it applied retroactively to condominiums whose declarations did not provide for termination upon a specified percentage of unit owners' consent[37]—the GCA's termination statute does not automatically apply to declarations that were created before its enactment.[38] Rather, the AOA governs declarations created prior to the GCA's 1975 enactment, unless the condominiums amend their declarations to "avail themselves" of the GCA.[39] Therefore, the GCA's termination statute does not impair unit owners' vested contractual rights in violation of the Contracts Clause.

B. THE U.S. AND GEORGIA CONSTITUTIONS' TAKINGS CLAUSES

Although the GCA does not violate the Contracts Clause, it may violate the U.S. Constitution's Takings Clause and the Georgia Constitution's takings clause. Both constitutions provide that private property may not be taken unless the property will be used for a public use and the owner is justly compensated.[40]

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[35] Tropicana Condo. Ass'n v. Tropical Condo., LLC, 208 So. 3d 755, 757, 759 (Fla. Dist. Ct. App. 2016).

[36] *See* Texaco, Inc. v. Short, 454 U.S. 516, 531 (1982) ("[A] statute cannot be said to impair a contract that did not exist at the time of its enactment.").

[37] *See supra* note 35 and accompanying text.

[38] O.C.G.A. § 44-3-113(b) (West, Westlaw through 2020 Legis. Sess.) ("Nothing in [the GCA] shall be construed to affect the validity of any provision of any instrument recorded prior to October 1, 1975.").

[39] *Id.*

[40] U.S. CONST. amend. V ("[P]rivate property [shall not] be taken for public use, without just compensation."); GA. CONST. art. I, § III, para. I(a) ("[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.").

1. Private Property. For the U.S. and Georgia constitutional takings clauses to apply, "private property" must be taken.[41] As a general matter, condominium units are the private property of the unit owners.[42] In defining "property" under the Due Process Clause of the Fifth Amendment, the U.S. Supreme Court has held that an individual has a property interest once they have a "legitimate claim of entitlement" to the property.[43] Similarly, with regard to the Takings Clause of the Fifth Amendment, the Court has held that states cannot statutorily alter permitted uses of property in a manner inconsistent with "reasonable investment-backed expectations."[44] Subject to the prohibition on interfering with property owners' reasonable investment-backed expectations, state law generally defines property interests.[45]

In Georgia, condominium units are private property within the meaning of the Fifth Amendment.[46] The GCA provides that "[f]or all purposes, *each condominium unit shall constitute* a separate parcel of *real property* which shall be distinct from all other condominium units."[47] Unit owners' property interests in their units are referred to as being held in "fee simple."[48] Since Georgia law defines condominium units as real property, unit owners have property interests in their units; a taking of those units without a public purpose and just compensation thus violates the Takings Clause.

2. Taking. To establish a takings claim, property owners must first show that their property was taken.[49] Two types of takings are

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[41] U.S. CONST. amend. V ("[P]rivate property [shall not] be taken . . . ."); GA. CONST. art. I, § III, para. I(a) ("[P]rivate property shall not be taken . . . .").

[42] *See* Harris & Gilewicz, *supra* note 11, at 263 (describing condominium ownership as "individually titled parcels of land" held by "individual freehold or fee simple titles" and co-owned with "each [owner] holding an undivided share of the whole"). Depending on the jurisdiction, ownership interests are termed "single freehold" or "fee simple" interests. *Id.*

[43] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[44] Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017).

[45] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests . . . ." (citing Phillips v. Washington Legal Found., 524 U.S. 156, 164 (1998))).

[46] *See* Brewer v. Williams, 305 S.E.2d 891, 892 (Ga Ct. App. 1983) (recognizing condominium units as private property "owned in fee simple").

[47] O.C.G.A. § 44-3-96 (West, Westlaw through 2020 Legis. Sess.) (emphasis added); *see also Brewer*, 305 S.E.2d at 892 ("Each condominium [unit] is owned in fee simple.").

[48] *Brewer*, 305 S.E.2d at 892.

[49] U.S. CONST. amend. V ("[P]rivate property [shall not] be taken . . . .").

recognized under the U.S. Constitution's Takings Clause.[50] First, a regulatory taking occurs when the government "goes too far" when regulating an owner's property rights.[51] Second, physical takings occur when an owner is permanently deprived of their property.[52] Condominium termination statutes similar to the GCA are in a unique position because they do not fit neatly within either form of taking.[53] In regulatory takings, for example, the owner's right to use the property is restricted, but the right to possess the regulated property is generally not taken.[54] Further, the regulations or statutes that are challenged are typically enacted after one receives title to the property at issue.[55] However, the GCA permits an investor or bulk owner to strip the minority unit owners of all interests in their units, including their rights to possession.[56]

Non-consensual condominium termination statutes also do not fit well under a physical takings analysis because physical takings are generally executed through a governmental entity's eminent domain power.[57] Yet statutes that authorize a majority to terminate a condominium typically undergo an entirely separate process than

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[50] *See* Brito, *supra* note 17, at 216–17 (contrasting regulatory takings from physical takings).

[51] *See id.* at 216–17 (describing regulatory takings as occurring when a regulation denies owners all economically beneficial use of their property).

[52] *See id.* at 217 (noting that a physical taking occurs when the government physically occupies or intrudes upon one's private property).

[53] *Cf. id.* (noting that Florida's former condominium "termination statute not only acts as a regulatory taking but as a physical taking as well").

[54] *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (explaining that regulatory takings occur when a regulation "compel[s] . . . a physical 'invasion'" of one's property or "denies [the owner] all economically beneficial or productive use of [their] land"). Under either form of regulatory taking, the owner retains possession of her property. *Id.*

[55] *See, e.g.*, *id.* at 1006–09 (challenging an act enacted two years after the owner came into possession of two beachfront properties); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (finding a taking when a New York statute authorized television companies to install television cables on a landlord's property). *But see* Palazzolo v. Rhode Island, 533 U.S. 606, 626–32 (2001) (permitting a plaintiff to bring a suit against a restriction that was enacted prior to him gaining ownership of the restricted property).

[56] *See* O.C.G.A. §§ 44-3-98, 44-6-166.1 (permitting bulk owners of condominiums to terminate the condominium and subsequently force minority owners to sell their interests if they cannot purchase the majority owners' interests at the majority owners' appraised price).

[57] *See, e.g.*, Deltona Corp. v. United States, 657 F.2d 1184, 1190 (Ct. Cl. 1981) ("The ordinary taking occurs when a governmental entity formally condemns a landowner's property and obtains the fee simple pursuant to eminent domain proceedings.").

eminent domain and condemnation proceedings.[58] Rather, such statutes generally only require the execution of a private agreement between a specified percentage of unit owners.[59] Nevertheless, condominium terminations facially resemble physical takings because they strip all property interests from the minority owners and give them to another private party (usually the investor or bulk owner). Given the difficulty of fitting condominium termination statutes within either the regulatory or physical categories of takings, this Note assesses each element of a takings claim under both categories.

The U.S. Supreme Court has refused to implement a "set formula" for determining whether a statute rises to the level of a regulatory taking, instead opting to conduct "ad hoc" inquiries by applying what have been deemed the *Penn Central* factors.[60] These factors include "[t]he economic impact of the regulation on the claimant"; "the extent to which the regulation has interfered with distinct investment-backed expectations"; and "the character of the governmental action."[61] But the Court has identified two circumstances when a regulation will be deemed a taking per se without application of the *Penn Central* factors.[62] First, a regulatory taking occurs whenever a regulation authorizes a physical invasion of one's property.[63] Such takings require just compensation no

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[58] For example, states often have separate statutes that deal with condominium terminations resulting from eminent domain or owner agreement. *Compare* UNIF. CONDOMINIUM ACT § 2-118(a) (UNIF. LAW COMM'N 1980) ("Except for a taking . . . by eminent domain . . . a condominium may be terminated only by agreement of unit owners of units to which at least [eighty] percent of the votes in the association are allocated . . . ."), *with id.* § 1-107(a) ("If a unit is acquired by eminent domain . . . the award must compensate the unit owner for the unit and its interest in the common elements, whether or not any common elements are acquired.").

[59] *See, e.g.*, *id.* § 2-118 ("[A] condominium may be terminated only by agreement of unit owners of units to which at least [eighty] percent of the votes in the association are allocated . . . .").

[60] *Lucas*, 505 U.S. at 1015 (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[61] *Penn Cent.*, 438 U.S. at 124.

[62] *Lucas*, 505 U.S. at 1015 ("We have . . . described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.").

[63] *See id.* (stating that a regulation that "compel[s]" a physical invasion of one's property is a taking).

matter the size of the intrusion.[64] For example, the U.S. Supreme Court found a regulatory taking when a state statute authorized a private company to occupy one and a half cubic feet of a landlord's building for a television cable.[65] Second, a per se regulatory taking occurs when the regulation denies the property owner "all economically beneficial or productive use of land."[66]

The GCA's termination statute may appear to effect a taking under both of these regulatory takings categories and thus not require an ad hoc factual inquiry through the *Penn Central* factors. The statute authorizes private parties to terminate condominiums and partition for a forced sale.[67] Therefore, the statute not only authorizes the intrusion of other parties into minority owners' units, but it also authorizes the majority to obtain full possession and ownership of the units, depriving the minority unit owners of "all economically beneficial or productive use" of their properties.[68] The GCA's termination provision also seems to classify as a taking under a physical takings analysis because it authorizes an investor or bulk owner to take the minority owners' units through a forced sale.[69]

Some have identified condominium termination statute "takings" as occurring the moment a condominium is terminated and the objecting minority unit owners' fee simple property interests are transformed into a tenancy in common.[70] That proposition does not require the ousting of unit owners from their units following a public sale for there to be a taking: a non-consensual transformation

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[64] *See id.* (providing that such a regulation requires just compensation "no matter how minute the intrusion, and no matter how weighty the public purpose behind it").

[65] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 438–41 (1982) (finding a taking when a New York statute authorized television companies to install television cables on the landlords' properties).

[66] *Lucas*, 505 U.S. at 1015.

[67] *See supra* notes 25–30 and accompanying text.

[68] *Lucas*, 505 U.S. at 1015; *see also* Brito, *supra* note 17, at 217 (arguing that condominium termination statutes effect a regulatory taking by turning unit owners' titles to their properties into "worthless piece[s] of paper").

[69] *See* Brito, *supra* note 17, at 217–18 (arguing that condominium termination statutes are "more comparable" to physical takings than regulatory takings because each unit owner "is losing title to his property along with all possible uses").

[70] *See, e.g.*, Harris & Gilewicz, *supra* note 11, at 266 ("[C]ondominium statutes identify a certain class of title holders . . . 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.").

of one property interest into a less valuable one is the only requirement.[71] However, this Note suggests that in determining whether a taking has occurred, no single part of the condominium termination and sale process should be viewed in isolation; rather, the entire transfer and sale process that the state's statute permits must be assessed to determine the true authority that the legislature grants to private parties. Accordingly, the GCA's statutory process for termination permits private takings not only because unit owners may terminate other unit owners' fee simple property interests, but also because Georgia law permits forced sales to follow.[72] For example, while Florida's condominium termination statute expressly provides for both the termination and sale of condominiums, Georgia law permits the same result while omitting express language in the GCA that permits a sale to follow termination.[73] Rather, a Georgia condominium owner may force a public sale under the state's tenancy in common law.[74] Under Georgia law, investors or bulk owners may terminate the fee simple interests of the minority unit owners and the minority's remaining property interests through a forced public sale.[75] States cannot escape their constitutional obligation to pay just compensation under the Fifth Amendment by authorizing takings through methods which may not seem like a traditional taking or state act

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[71] *Id.* at 278 ("Non-consensual dissolution is . . . a form of taking—a private-to-private taking—in which one private entity dispossesses another private entity of an interest in land.").

[72] *See supra* notes 25–30 and accompanying text.

[73] *Compare* FLA. STAT. ANN. § 718.117(3) (West, Westlaw through 2020 2d Reg. Sess.) (providing that when a bulk owner terminates a condominium, the bulk owner may gain ownership of the remaining units if the remaining unit owners are compensated with the fair market value of their units), *with* O.C.G.A. § 44-3-98 (West, Westlaw through 2020 Legis. Sess.) (creating a tenancy in common upon termination which would then allow an owner to seek a partition for sale under section 44-6-160).

[74] *See* O.C.G.A. § 44-6-160 (West, Westlaw through 2020 Legis. Sess.) (permitting tenants in common to petition for a partition for sale).

[75] *See supra* notes 25–30 and accompanying text.

yet permit the same outcome.[76] Such "functionally equivalent" state actions still constitute takings.[77]

A later section of this Note addresses a potential argument that takings cannot occur under the GCA because the government is not the actor directly taking the property. Another argument addressed is that the owners never had a property interest in continued ownership because they consented to—or otherwise took their property subject to—the possibility of termination.[78]

3. Public Use. The takings clauses of the U.S. and Georgia constitutions provide that governments cannot take private property unless doing so will serve a public use.[79] Courts interpret these clauses to generally prohibit the government from using its eminent domain power to transfer one's private property to another private party.[80] A "private taking" can occur in two ways: the government takes private property and gives it to another private party for a non-public use;[81] or a private party, acting pursuant to government authorization, terminates the property interests of another private party.[82] Private takings are unconstitutional

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[76] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010) ("[T]hough the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing.").

[77] Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005) (noting that the Court's regulatory takings jurisprudence seeks to "identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain").

[78] *See infra* Section III.B.*6*.

[79] U.S. CONST. amend. V ("[N]or shall private property be taken for *public use*, without just compensation." (emphasis added)); GA. CONST. art. I, § III, para. I(a) ("[P]rivate property shall not be taken or damaged for *public purposes* without just and adequate compensation being first paid." (emphasis added)).

[80] *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984) ("[T]he Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party."); City of Atlanta v. Atlanta Gas Light Co., 240 S.E.2d 730, 731 (Ga. Ct. App. 1977) ("[T]he power of eminent domain may never be used to acquire property to be used by private individuals solely for private use and private gain.").

[81] *See Midkiff*, 467 U.S. at 245 (describing private takings as transfers of property "for no reason other than to confer a private benefit on a particular private party").

[82] *See* Harris & Gilewicz, *supra* note 11, at 278 ("[T]he takings power, understood broadly, includes the capacity to end or terminate property interests; it does not necessarily require that another entity acquire those interests.").

because they "serve no legitimate purpose of [the] government."[83] Therefore, whether an end use is public or private is significant in determining if one's real property may be taken, regardless of whether the taking party pays just compensation.

This Note does not present the first argument that condominium termination statutes that authorize non-consensual terminations may be unconstitutional.[84] In 2017, a federal district court in Florida considered a condominium unit owner's claim that Florida's termination statute violated the Takings Clause because the bulk owner defendant's termination of the condominium was "not for a public purpose but for . . . private profit";[85] however, the case was decided on different grounds without reaching the constitutional question.[86] Other authority and literature do not appear to address whether the U.S. Supreme Court's public use decisions permit states to enact non-consensual condominium termination statutes.

In 1954, the Court began interpreting the Takings Clause's "public use" requirement more broadly than in its prior decisions by holding that a public use may exist even if the government takes private property and gives it to a "private enterprise for redevelopment of the area."[87] In *Hawaii Housing Authority v. Midkiff*, the Court expanded its interpretation of public use to uphold the constitutionality of a Hawaii statute which allowed the state to take title in real property from lessors and transfer it to lessees to reduce the concentration of land ownership.[88] The Court recognized that "[a] purely private taking" would be "void,"[89] but

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[83] *Midkiff*, 467 U.S. at 245.

[84] *See* Bestoso v. BBVA Compass Bank, No. 17-60884-CIV, 2017 WL 5634936, at *3 (S.D. Fla. July 25, 2017) (recognizing a plaintiff's argument that Florida's condominium termination statute "is unconstitutional because it permits the taking of private property without full compensation, and not for a public purpose"); Brito, *supra* note 17, at 217–18 (arguing that Florida's condominium termination statute violates the Takings Clause); Harris & Gilewicz, *supra* note 11, at 266 (arguing that condominium termination statutes that authorize terminations without unanimous consent permit unconstitutional private takings).

[85] *Bestoso*, 2017 WL 5634936, at *3.

[86] *Id.* at *6 (holding that the plaintiff's constitutional claim would not support the relief he seeks).

[87] Berman v. Parker, 348 U.S. 26, 33 (1954).

[88] 467 U.S. at 241–42 ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.").

[89] *Id.* at 245.

reasoned that since the Hawaii legislature passed the statute in response to a land concentration problem, transferring the land ownership to reduce land concentration constituted a public use that was not purely private.[90]

In a landmark 2005 case, the Court held in *Kelo v. City of New London* that economic development was a public use that justified an otherwise unconstitutional private taking.[91] While the Court noted that states cannot take property "under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," the taking in *Kelo* was executed pursuant to a "'carefully considered' development plan."[92] The Court relied on its "longstanding policy" of deferring to "legislative judgments" in determining what public needs justify takings.[93]

Therefore, the Court's holdings in *Berman, Midkiff*, and *Kelo* authorize the forcible transfer of private property to private parties when the properties will be used for economic development or other public purposes that state legislatures determine are beneficial to the public.[94] In light of the Court's Takings Clause jurisprudence, the non-consensual condominium terminations permitted by the GCA likely do not serve a public use. While the Court's holdings in *Kelo* and *Midkiff* support the notion that taking private property and giving it to another private party for economic development constitutes a "public use," the private takings permitted by the GCA

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[90] *Id.* ("[N]o purely private taking is involved in these cases. The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii—a legitimate public purpose.").

[91] 545 U.S. 469, 489–90 (2005) (upholding a city's development plan that took homeowners' properties to revitalize the city's economy).

[92] *Id.* at 478 (quoting Kelo v. City of New London, 843 A.2d 500, 536 (Conn. 2004)).

[93] *Id.* at 480 ("The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field.").

[94] Berman v. Parker, 348 U.S. 26, 33 (1954) (allowing appropriation of property for a "public purpose" to make the community more beautiful); *Midkiff*, 467 U.S. at 241–42 (1984) (finding appropriation of property constitutional for the public purpose of regulating oligopolies in the real estate market); *Kelo*, 545 U.S. at 490 (affirming a city's development plan to revitalize its economy that required taking homeowners' properties).

are not for any public use—such as economic development—and are only beneficial to the hostile investors' private interests.[95]

Unlike *Kelo*, where legislative findings explained that the takings would promote economic development through a carefully considered development plan,[96] the GCA contains no legislative findings that its termination provision would serve a public purpose such as economic development.[97] While the property owners in *Kelo* knew that the taking of their properties would generally serve a public purpose,[98] the GCA provides no assurance that units taken from a termination and partition will serve a public purpose—it lacks any procedure to ensure that terminations will result in a public benefit.[99] For example, an investor could take over a condominium with the mere intent of managing the property in its current state or selling it to a third party who would manage the property in its current state. The GCA would even permit a disgruntled unit owner to obtain the remaining statutory percentage of units to force a sale simply to evict his undesirable neighbors. In none of these examples would the bulk owner take the units for economic development or for any other public purpose. Some jurisdictions avoid these potential misuses of condominium termination statutes by providing detailed processes to ensure that non-consensual terminations will result in a public purpose being

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[95] *Cf.* Brito, *supra* note 17, at 218–22 (arguing that Florida's condominium termination statute does not serve a public purpose). This Note addresses whether the GCA's termination provision is constitutional when an investor or bulk owner seeks to terminate a condominium solely for its private benefit. Non-consensual termination statutes may serve public uses when the votes are cast by many unit owners rather than a single bulk owner. For example, termination statutes that permit owners to terminate the condominium when the area becomes blighted could be beneficial to the public in general. *See, e.g.*, FLA. STAT. ANN. § 718.117(1)(b) (West, Westlaw through 2020 2d Reg. Sess.) (permitting condominium termination when continuing to enforce condominium covenants "may create economic waste and areas of disrepair"). However, these issues are not present—and the public is not necessarily benefited—when an investor terminates a condominium.

[96] *Kelo*, 545 U.S. at 476 (noting that the state statute "expresse[d] a legislative determination that the taking of land . . . as part of an economic development project is a 'public use' and in the 'public interest'" (quoting *Kelo*, 843 A.2d at 515–21)).

[97] *See generally* H.R. 619, 133d Gen. Assemb., Reg. Sess. (Ga. 1975).

[98] *Kelo*, 545 U.S. at 495–96 (O'Connor, J., dissenting) (noting that the homeowners were not "opposed to new development in the area" and that the homeowners argument acknowledged that "new owners may make more productive use of the property").

[99] *See generally* O.C.G.A. § 44-3-70 (West, Westlaw through 2020 Legis. Sess.).

served.[100] Such statutes better conform with *Kelo* because they ensure that takings will be for a public use.

Even if the GCA's termination statute is deemed to satisfy the public use requirement of the U.S. Constitution's Takings Clause because an investor *may* sell the property to an economic developer, the statute fails to serve a public use under the Georgia Constitution's takings clause.[101] The Georgia Constitution left it to the legislature to determine what constitutes a "public use."[102] In 2006, the Georgia General Assembly defined "public use" as the following:

> (i) The possession, occupation, or use of the land by the general public or by state or local governmental entities;
> (ii) The use of land for the creation or functioning of public utilities;
> (iii) The opening of roads, the construction of defenses, or the providing of channels of trade or travel;
> (iv) The acquisition of property where title is clouded due to the inability to identify or locate all owners of the property;
> (v) The acquisition of property where unanimous consent is received from each person with a legal claim that has been identified and found; or
> (vi) The remedy of blight.[103]

The statute proceeds to expressly reject economic development as a public use.[104] The GCA's termination statute does not fall

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[100] *See, e.g.*, FLA. STAT. ANN. § 718.117(3) (West, Westlaw through 2020 2d Reg. Sess.) ("Before a residential association submits a plan to the division, the plan must be approved by at least [eighty] percent of the total voting interests of the condominium. However, if [five] percent or more of the total voting interests of the condominium have rejected the plan . . . [it] may not proceed.").

[101] *See* O.C.G.A. § 44-3-111 (West, Westlaw through 2020 Legis. Sess.) (including no restrictions for sales of property for the purpose of economic development).

[102] *See* GA. CONST. art. IX, § 2, para. VII(a) ("The power of eminent domain shall not be used for redevelopment purposes by any entity, except for public use, as defined by general law.").

[103] O.C.G.A. § 22-1-1(9)(A) (West, Westlaw through 2020 Legis. Sess.).

[104] *See id.* § 22-1-1(9)(B) ("The public benefit of economic development shall not constitute a public use.").

within any of the General Assembly's enumerated forms of public use. When a unit owner terminates a condominium and seeks a partition against objecting owners, the property goes to a private party, is not used for public utilities, does not open paths of travel, does not clear clouds of title, does not result from unanimous consent, and does not remedy blight.[105]

Since the GCA permits private parties to forcibly transfer another's private property to themselves without requiring it to be used for any public purpose, the GCA may violate the Georgia Constitution's takings clause.[106] The General Assembly passed a statute that provides that if the state passes a "law authorizing the taking of property for private use rather than for public use, the courts should declare the law inoperative."[107] Since the statute authorizes private parties to terminate and take the private property of others without serving an apparent public use, the courts should declare the termination statute inoperative.

Nevertheless, if the General Assembly were to make rational findings and redefine public use, the GCA's termination statute may serve a public purpose. The U.S. Supreme Court has broadly interpreted "public use" and has given state legislatures wide discretion in determining what takings would serve a public use.[108] It is well-established that "[w]hen the legislature's purpose is legitimate and its means are not irrational . . . empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts."[109] Perhaps the General Assembly could permit economic development to be a public use and adopt a statute that authorizes bulk owners to terminate condominiums only upon filing a verification that the termination will serve a public use, such as economic development.

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[105] *See supra* notes 25–30, 99 and accompanying text.

[106] *See supra* notes 40, 99 and accompanying text.

[107] O.C.G.A. § 22-1-3 (West, Westlaw through 2020 Legis. Sess.).

[108] *See* Kelo v. City of New London, 545 U.S. 469, 483 (2005) ("[O]ur public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

[109] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984).

4. Just Compensation. The GCA may also conflict with the Fifth Amendment's Takings Clause because minority unit owners stripped of their units are not likely to receive just compensation. The Takings Clause requires that "just compensation" be paid to property owners when their property is taken.[110] Generally, just compensation is "the market value of the property at the time of the taking."[111] But the public sale that a bulk owner can force following a condominium termination does not *ensure* that unit owners will receive just compensation.[112] Once a Georgia condominium is terminated, the investor may seek a partition for sale under tenancy in common law.[113]

When an owner applies for a partition, an appraisal is conducted to provide the minority unit owners with the opportunity to purchase the petitioner's units at the appraised value.[114] However, if the minority owners cannot afford or are otherwise unable to purchase the petitioner's units, the public sale that follows does not require that the minority unit owners receive the appraised price of their units.[115] Instead, the court will appoint three commissioners "to conduct such [a] sale under such regulations and upon such just and equitable terms as it *may* prescribe."[116] Therefore, the court has discretion to decide whether to prescribe a minimum bid at a forced condominium sale to ensure that the unit owners recieve just compensation. This discretion is at odds with the Takings Clause's mandate that "private property [shall not] be taken . . . without just compensation."[117]

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

[111] Olson v. United States, 292 U.S. 246, 255 (1934).

[112] *See* Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount,"* 37 FLA. ST. U. L. REV. 589, 590–91 (2010) (describing how forced sales generally receive less than fair market value).

[113] *See* O.C.G.A. § 44-3-98(d) (West, Westlaw through 2020 Legis. Sess.) (providing that once a condominium is terminated, the unit owners become tenants in common subject to and governed by tenancy in common law); *see also id.* § 44-6-160 (permitting any tenant in common to seek a partition for sale).

[114] *See id.* § 44-6-166.1 (permitting interested parties an opportunity to purchase any petitioner's interest at the cost of its appraised share).

[115] *See id.* § 44-6-167.

[116] *Id.* (emphasis added).

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

Some courts and legal scholars presume that any public sale automatically results in the receipt of fair market value because the sale reflects what purchasers in the relevant market are willing to pay for the property.[118] Others, however, have argued that public sales—especially when forced—are significantly less likely to result in owners receiving fair market value for their properties.[119] The U.S. Supreme Court has characterized fair market value as the "*antithesis* of forced-sale value" because fair market value is reached in circumstances that are not present at a "public auction or a sale forced by the necessities of the owner."[120] For example, public sales usually are not advertised well, do not provide sufficient time to search for potential purchasers, do not give potential purchasers ample opportunity to inspect the property in order to make bids that do not need to account for uncertainties, and are not the result of a price that is agreed upon by the parties after negotiation.[121] These factors often lead to tenants in common receiving far less than fair market value for their property.[122] Since the Takings Clause requires fair market value to be paid to property owners as just compensation,[123] and because the GCA authorizes bulk owners to effectuate forced sales that do not guarantee fair market value compensation,[124] the GCA arguably violates the Takings Clause.

5. Government Actor. A property owner cannot succeed on a takings claim unless a government actor was responsible for the taking.[125] The taking must generally be "caused *directly* by the

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[118] *See, e.g.*, Drachenberg v. Drachenberg, 58 A.2d 861, 865 (N.J. 1948) ("By partition sale the estate in common is assumed to realize fair market value . . . .").

[119] *See, e.g.*, Mitchell et al., *supra* note 112, at 589 ("[F]orced sales of real or personal property are conducted under conditions that are rarely likely to yield market value prices.").

[120] BFP v. Resolution Tr. Corp., 511 U.S. 531, 537–38 (1994).

[121] *See* Mitchell et al., *supra* note 112, at 604–05 (discussing in more depth the factors that inhibit fair market value from being offered at a forced public sale).

[122] *Id.* at 602 ("Comparing the conditions of a forced sale with the conditions viewed as necessary for markets to function efficiently helps one understand why a forced-sale price is likely to represent a significant discount from an asset's fair market value.").

[123] *See supra* note 111 and accompanying text.

[124] The GCA allows bulk owners to force a public sale of minority-owned units, but public sales typically do not lead to offers for the fair market value of the auctioned property. *See supra* notes 25–30, 121–122 and accompanying text.

[125] *See* U.S. CONST. amend. V (prohibiting the federal government from taking private property "for public use, without just compensation"); Hunter & Lozada, *supra* note 8, at 378,

challenged government conduct," not just an "incidental result" of it.[126] A state cannot escape a takings claim, however, by just statutorily authorizing a private entity to take the private property; a takings claim based on private, third-party action is permitted if the government authorized the action.[127] The U.S. Supreme Court has explained that although "the classic taking is a transfer of property to the [s]tate or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing."[128] A government action, although "short of acquisition of title or occupancy," amounts to a taking "if its effects are so complete as to deprive the owner of all or most of [their] interest in the subject matter."[129]

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court found a taking occurred when the New York legislature passed a statute requiring landlords to permit television companies to install cables on their properties.[130] The Court held that the permanent physical occupation authorized by the government was a taking although it was a third party that intruded upon the landowner's property.[131] Since New York statutorily authorized the intrusion, the takings were subject to the Takings Clause and had to be backed by just compensation from the state.[132]

Similar to the New York Legislature's responsibility for ensuring that property owners received just compensation when the state authorized a private party to effectuate a taking, the Georgia

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380 (noting that the U.S. Supreme Court's selective incorporation doctrine incorporates most guarantees of the Bill of Rights, including the Takings Clause, to apply to state governments).

[126] Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, 34 ECOLOGY L.Q. 307, 321 (2007).

[127] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (holding that a taking "authorized by government constitutes a 'taking' of property for which just compensation is due"); Meltz, *supra* note 126, at 322 (noting that a government may be liable for a taking if it "directed or authorized third-party conduct with specific reference to the plaintiff's type of property").

[128] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 713 (2010).

[129] United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945).

[130] 458 U.S. at 441 ("We affirm the traditional rule that a permanent physical occupation of property is a taking.").

[131] *Id.* at 426 ("[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.").

[132] *Id.* at 438, 442 (holding that the pertinent New York statute worked as a taking of the owner's property for which the owner was entitled to just compensation).

General Assembly is likewise responsible for the takings authorized by the GCA.[133] Although Georgia condominium unit owners facing termination do not go through the traditional eminent domain process, the GCA authorizes takings because it "achieve[s] the same thing" when bulk owners use the state's partition for sale statute,[134] and "its effects are so complete as to deprive the owner of all or most of his interest in the subject matter."[135] Further, some scholars argue that legislatures are the actors responsible for takings that occur from condominium termination statutes because the traditional justification for such statutes is that the legislature believes that it would be better for the property to be held by another person.[136]

6. Consent and the "Bitter with the Sweet" Doctrine. A strong argument exists that no taking occurs when a condominium unit is purchased after the GCA's effective date. This is because the owner "consented" to the possibility of a termination and forced sale by choosing to purchase a unit from a condominium whose declaration does not require unanimous consent for termination. This consent argument may prevail, but it is inconsistent with the U.S. Supreme Court's reasoning behind the unconstitutional conditions doctrine[137] and its rejection of the "bitter with the sweet" doctrine.[138]

By applying the Court's regulatory takings principles, it is uncertain whether unit owners consent to property deprivations by condominium termination statutes that exist at the time the owners gain their property interests. In *Lucas v. South Carolina Coastal Council*, the Court examined a claim where an owner of two beachfront properties alleged that a regulation which had a

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[133] *Id.* at 442 (holding a private party liable for a takings claim when the state legislature authorized a private taking).

[134] *Stop the Beach Renourishment*, 560 U.S. at 713.

[135] *Gen. Motors Corp.*, 323 U.S. at 378.

[136] *See, e.g.*, Harris & Gilewicz, *supra* note 11, at 279 ("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.").

[137] The unconstitutional conditions doctrine provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

[138] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985).

"dramatic effect on the economic value of [the owner's] lots" constituted a taking.[139] Justice Scalia, writing for the majority, introduced the notion of "background principles" to regulatory takings law.[140] The Court held that "confiscatory regulations . . . cannot be newly legislated or decreed . . . but must inhere in the title itself, in the restrictions that background principles of the [s]tate's law of property and nuisance already place upon land ownership."[141] On remand, the South Carolina Coastal Council could have defeated the landowner's takings claim only if it showed that the regulation inhered from the "background principles" of South Carolina law.[142]

Following *Lucas*, some interpreted "background principles" to include not only state common law, but also all constitutional and legislative enactments, which—if passed before property is purchased—would automatically preclude an owner from later alleging a takings claim.[143] The presence of a statute that qualifies property interests at the time property is acquired theoretically places the property owner on notice of the limitations on their property interests.[144] But that theory was dismissed just ten years after *Lucas*.[145] In *Palazzolo v. Rhode Island*, the Court rejected the

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[139] 505 U.S. 1003, 1007 (1992).

[140] *Id.* at 1029.

[141] *Id.*

[142] *See id.* at 1063 (Stevens, J., dissenting) (noting that under the majority's holding, a regulation which deprives owners of all economically viable use of their properties are takings "unless the regulation merely makes explicit what was otherwise an implicit limitation on the owner's property rights").

[143] *See, e.g.*, Michael C. Blumm & J.B. Ruhl, *Background Principles, Takings, and Libertarian Property: A Reply to Professor Huffman*, 37 ECOLOGY L.Q. 805, 817 (2010) (noting that "a number of courts have interpreted background principles to include statutes and constitutional provisions").

[144] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001) ("[T]he argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.").

[145] *See id.* at 627 ("The State may not put so potent a Hobbesian stick into the Lockean bundle. . . . A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule."); Blumm & Ruhl, *supra* note 143, at 817 n.63 (recognizing that *Palazzolo* held "that statutes that existed prior to a landowner's acquisition were not categorically exempted from takings claims by virtue of the so-called 'notice rule'" (quoting Michael C. Blumm, Palazzolo *and the Decline of Justice Scalia's Categorical Takings Doctrine*, 30 B.C. ENVTL. AFF. L. REV. 137, 143–47 (2002))); James L. Huffman, *Background*

proposition that "[a] purchaser or a successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking."[146] There, the Court held that a regulation, which was promulgated prior to the property owner's acquisition of title, did not preclude him from raising a takings claim.[147] Although the Court noted that "[a] law does not become a background principle for subsequent owners by enactment itself," it declined to address if or when a legislative enactment may constitute a background principle of state law.[148]

While the case law is unclear on the issue, condominium termination statutes—even when enacted prior to when owners acquire their units—likely do constitute background principles that bar unit owners from alleging takings upon a termination. Since the termination statutes were enacted prior to the time the property was acquired, they arguably "inhere[d] in the title itself."[149] In fact, by acquiring the unit with constructive knowledge that the GCA permits non-consensual terminations, the unit owner's bundle of sticks may have never included a right to continued possession and ownership of the unit.[150]

However, the regulatory takings analysis and notion of background principles arguably should not be applied to condominium termination takings because of the unique circumstances in those cases that are not present in traditional regulatory takings cases. The Court's distinction between cases of direct condemnation and regulatory takings—because of their inherently different considerations—supports this proposition.[151]

Principles and the Rule of Law: Fifteen Years After Lucas, 35 ECOLOGY L.Q. 1, 10 n.46 (2008) (noting that the *Palazzol*o Court "rejected the notion that preexisting statutory provisions are a bar to takings claims").

146 533 U.S. at 626.

147 *See id.* at 630 ("That claim is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction.").

148 *Id.*

149 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

150 *See* Bellon v. Monroe Cty., 577 N.W.2d 877, 879–80 (Iowa Ct. App. 1998) (arguing that a taking does not occur "where it can be shown the property owner's 'bundle of rights' never included the right to use the land in the way the regulation forbids" (citing *Lucas*, 505 U.S. at 1027)).

151 *See* Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) ("Direct condemnation . . . presents different considerations from cases alleging a taking based on a burdensome regulation.").

While regulatory takings limit one's use of their property and require that certain "ripeness requirements" be met before a takings claim can be brought, for physical takings, one's property is taken and the owner becomes entitled to an immediate right to compensation.[152] Unlike regulatory takings cases, when a condominium is terminated and partitioned for sale, unit owners are not only deprived of one use of their properties, they also lose the units' titles and the right to possess the properties themselves.[153] In such cases, where an entire physical taking is effectuated, background principles fail to protect property owners. If background principles were permitted within such cases, states could limit all property rights at their creation and reduce the Takings Clause to afford no protections—and thus no compensation—when a state wishes to take one's property, working "a critical alteration to the nature of property" and constitutional protections.[154] Perhaps this is why the notion of background principles has not yet been applied outside of regulatory takings analyses.

Under a physical takings analysis, some argue that since physical takings can occur only at the time the property is taken, condominium unit owners do not consent to termination statutes at the time their units are acquired, because it is their objections at the time of the takings that matter.[155] Under this reasoning, although all individuals who choose to live in the United States may be said to consent to the government's eminent domain power, a physical takings claim still exists at the time of the taking when an owner objects. Similarly, even if condominium unit owners have consented "to the possible loss of title, this does not disqualify the subsequent non-consensual dissolution as a taking" because the title holder's objection "at the moment of [the] transfer or

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[152] *Id.* ("A challenge to the application of a land-use regulation . . . does not mature until ripeness requirements have been satisfied . . . .").

[153] For example, upon a forced sale in Georgia, "the parties in interest shall execute a title to the purchaser; and, if any of them shall fail or refuse to do so, the commissioners or any two of them shall execute a deed" which "shall be as valid and binding as if made by the parties themselves." O.C.G.A. § 44-6-169 (West, Westlaw through 2020 Legis. Sess.).

[154] *Palazzolo*, 533 U.S. at 609.

[155] *See* Harris & Gilewicz, *supra* note 11, at 280 ("The fact that the title holders object to the transfer or the termination of a property interest . . . at the moment of its transfer or termination, constructs the event as a taking.").

termination" constitutes the taking.[156] However, this argument appears relatively weak and may be summarily dismissed if a court decided to apply the notion of background principles outside of the regulatory takings scheme to reach condominium termination cases—the termination provision would have "inhere[d] in the title itself."[157] Instead, the owner would have to argue that the state never had the ability to condition the unit owner's property interest upon consent or waiver of a takings claim; therefore, the consent was never properly obtained, and background principles could not apply.

Perhaps the reasoning behind the unconstitutional conditions doctrine provides a better argument that states cannot condition property rights upon waivers of takings claims. This doctrine provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[158]

The doctrine was introduced in *Nollan v. California Coastal Commission* when the Court held that a state agency could not condition a rebuilding permit on the owners allowing a public easement across their property.[159] The Court agreed that "a permit condition that serves the same legitimate [state] purpose as a refusal to issue the permit" is not a taking "if the refusal to issue the permit would not constitute a taking," but it found that no "nexus [existed] between the condition and the original purpose of the building restriction"—to preserve "the public's view of the beach."[160] Under this doctrine, the government can only condition

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[156] *Id.*

[157] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[158] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

[159] *See* 483 U.S. 825, 837 (1987) ("[U]nless the permit condition serves the same governmental purpose . . . the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" (quoting J.E.D. Assocs., Inc. v. Atkinson, 423 A.2d 12, 14–15 (N.H. 1981))).

[160] *Id.* at 836–37. The Court also outlined possible conditions that would have been constitutional. *See id.* at 836 ("[I]f the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house—for example, a height limitation, a width restriction, or a ban on fences—so long

property rights when doing so substantially advances "a legitimate state interest."[161] The Court rejected Justice Brennan's argument that the property owners had no protectable "reasonable investment-backed expectation" and thereby consented to the condition because they "were aware that stringent regulation of development along the California coast had been in place at least since 1976."[162]

Similarly, in *Dolan v. City of Tigard*, a city conditioned approval of a property owner's application to expand her building upon her dedicating land for the public purposes of preventing flooding and traffic congestion in the area.[163] The Court held that the city's condition failed under the unconstitutional conditions doctrine because "the findings upon which the city relie[d] do not show the required reasonable relationship between the [requested] easement and the petitioner's proposed new building."[164] The Court clarified that "rough proportionality" must exist between the state's interest and its condition; thus, "the city [had to] make some sort of individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development."[165] The city failed to meet this requirement because it did not "make [an] effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic" problems created by the property expansion.[166]

The reasoning behind the unconstitutional conditions doctrine could apply to condominium termination statutes: a state arguably cannot condition the discretionary benefit of granting residents property rights to condominium units upon their waiver of subsequent takings claims if the property is taken by other unit owners. Like *Nollan* and *Dolan*, the conditioned waiver in condominium termination cases lacks rough proportionality or an

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as the Commission could have exercised its police power . . . to forbid construction[,] . . . imposition of the condition would also be constitutional.").

[161] *Id.* at 841 ("[O]ur cases describe the condition for abridgment of property rights through the police power as a '*substantial* advanc[ing]' of a legitimate state interest." (alteration in original)).

[162] *Id.* at 859 (Brennan, J., dissenting).

[163] 512 U.S. 374, 379–82 (1994).

[164] *Id.* at 394–95.

[165] *Id.* at 391.

[166] *Id.* at 395–96.

essential nexus to the purpose of providing residents with the ability to live in condominium units. For example, the GCA lacks legislative findings that the unique structure of condominiums requires that they be terminable by the unit owners so that holdouts do not impede economic development. If such a purpose were articulated and of great importance to the legislature, surely the condominium termination statute would apply uniformly to all Georgia condominiums. Instead, the law only applies to Georgia condominiums whose declarations do not specify the number of unit owners that must consent for termination to occur.[167]

Although the U.S. Supreme Court has previously held that the unconstitutional conditions doctrine does not reach "beyond the special context of exactions,"[168] it has since expanded the doctrine "to include permit denials and monetary exactions."[169] Even if courts are unwilling to extend the unconstitutional conditions doctrine to negate the "consent" unit owners give to takings when they purchase their units, the Court's rejection of the "bitter with the sweet" doctrine provides another potential basis.

In *Arnett v. Kennedy*, the Court faced the question of whether a federal employee who was granted a property interest in his job by a regulation may be limited to the amount of process required for employment termination when that regulation provides for less process than required under the Constitution.[170] Then-Justice Rehnquist wrote a plurality opinion holding that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."[171] Therefore, the plurality suggested that statutes and

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[167] *See* O.C.G.A. § 44-3-98 (West, Westlaw through 2020 Legis. Sess.) ("The condominium shall be terminated only by the agreement of unit owners of units to which four-fifths of the votes in the association pertain . . . *or such larger majority as the condominium instruments may specify* . . . ." (emphasis added)).

[168] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999). Exactions are "land-use decisions conditioning approval of development on the dedication of property to public use." *Id.*

[169] Scott Woodward, *The Remedy for a "*Nollan/Dolan *Unconstitutional Conditions Violation,"* 38 VT. L. REV. 701, 702 (2014) (citing Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013)).

[170] 416 U.S. 134, 147 (1974).

[171] *Id.* at 153–54.

regulations could condition the grant of property interests upon the property owner's acceptance of less process than what the Due Process Clause requires.[172] However, "a majority of the justices rejected" Justice Rehnquist's "bitter with the sweet" argument.[173]

In *Cleveland Board of Education v. Loudermill*, the Court had an opportunity to render a majority decision that officially rejected the "bitter with the sweet" doctrine articulated in *Arnett*.[174] The question presented in *Loudermill* was whether a state can condition a security guard's property interest in his job upon acceptance of a lower level of process for deprivation than what the Due Process Clause mandates.[175] The Court rejected the "bitter with the sweet" doctrine, holding that the Due Process Clause's "minimum [procedural] requirements [are] a matter of federal law" and "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."[176] The Court further explained that "[w]hile the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[177] Under the Court's reasoning in *Loudermill*, although a state may create and define property interests,[178] it cannot condition the grant of a property right on a waiver of its constitutional protections: once a state confers a property interest, the owner is entitled to the full protections of the Constitution.

The Court's rejection of the "bitter with the sweet" doctrine conflicts with the proposition that unit owners consent to condominium termination statutes by purchasing units in condominiums whose declarations are silent regarding termination

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[172] *See id.* at 154 (holding that the property owner "must take the bitter with the sweet").

[173] Vitek v. Jones, 445 U.S. 480, 490–91 n.6 (1980); *see also* D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853, 1877 n.127 (1995) ("Justice Rehnquist's position did not command a majority in *Arnett*.").

[174] 470 U.S. 532, 540–41 (1985).

[175] *Id.* at 538–41.

[176] *Id.* at 541 (alterations in original) (quoting Vitek v. Jones, 445 U.S. 480, 491 (1980)).

[177] *Id.* (second alteration in original) (quoting *Arnett*, 416 U.S. at 167 (Powell, J., concurring in part and concurring in the result in part)).

[178] *See, e.g.*, Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests . . . .").

requirements. *Loudermill*'s holding suggests that although states may refuse to provide residents with a property interest in condominium units, once states define the units as property, they cannot statutorily circumvent the protections of the Takings Clause by authorizing private takings that are otherwise unconstitutional. Thus, while the Georgia legislature can define one's property interest in their unit, it cannot bypass the protections of the Takings Clause by conditioning unit ownership upon consent to private takings without just compensation.

However, under the U.S. Supreme Court's current jurisprudence, this rejection of the "bitter with the sweet" doctrine is not likely to proffer successful takings claims. The doctrine has only been used in due process cases and has not been extended to apply in takings cases.

Although the Court has rejected that the Due Process Clause may be used to "do the work of the Takings Clause," applying the principle that states cannot grant property rights on the condition that individuals waive their constitutional protections to the Takings Clause would be consistent with *Loudermill*'s reasoning.[179] The premise is not based on procedural or substantive due process, but rather on the general principle that once a property right exists, it is subject to constitutional protections—statutes in conflict with those protections are not considered in constitutional analyses.[180]

IV. SUGGESTED SOLUTIONS

Although the GCA's termination statute would likely be upheld under the background principles theory, some constitutional doctrines seem to provide unit owners with viable arguments that the GCA authorizes unconstitutional private takings.[181] The General Assembly could resolve these issues, without jeopardizing

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[179] *Id.* at 720.

[180] *Cf.* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (noting that the right to due process is conferred by constitutional guarantee, and "once it is determined that the Due Process Clause applies, 'the question remains what process is due.' . . . The answer to that question is not to be found in the [state] statute." (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972))).

[181] *See* discussion *supra* Section III.B.*6*.

the state's interest in exercising its police power, by amending O.C.G.A. section 44-3-98.

First, the General Assembly should amend O.C.G.A. section 44-3-98 to make it more difficult for investors to conduct hostile takeovers and take minority unit owners' properties against their will. In the 1970s, when numerous states were passing condominium termination statutes, many did not foresee the problem that investors could use the statute as a business strategy.[182] In 2017, Florida recognized this problem and amended its termination statute to provide that whenever five percent of a condominium's unit owners object to a termination plan, the condominium may not be terminated.[183] Similarly, the General Assembly can protect unit owners from private takings by not permitting terminations so long as *any* unit owner makes an affirmative objection. This Note suggests that five percent is not a sufficient standard because, when the condominium has more than twenty units, it would take the objection of at least two unit owners to prevent termination. If multiple unit owners were required to object, then there could be circumstances where an owner's property is forcibly sold despite their objection.

Second, the General Assembly should make legislative findings to support the purpose behind permitting one person to terminate a condominium against the objections of the remaining unit owners. Such findings would provide courts with guidance in determining the public purpose served by the terminations and would entitle the termination statute to the strong deference described in *Kelo*.[184] For example, Florida's condominium termination statute begins with legislative findings, including that the continuance of condominiums sometimes "may create economic waste and areas of

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[182] *See, e.g.*, Susan Taylor Martin, *How a Billion-Dollar Company Could Use a Florida Law to Force These Tampa Bay Seniors Out of Their Condos*, TAMPA BAY TIMES (July 12, 2019), https://www.tampabay.com/business/how-a-billion-dollar-company-could-use-a-florida-law-to-force-these-tampa-bay-seniors-out-of-their-condos-20190712/ (describing Florida's condominium termination statute as "the proverbial law of unintended consequences" because it incidentally permits investors to force owners from their units).

[183] *See* FLA. STAT. ANN. § 718.117(3) (West, Westlaw through 2020 2d Reg. Sess.) ("However, if [five] percent or more of the total voting interests of the condominium have rejected the plan of termination by negative vote or by providing written objections, the plan of termination may not proceed.").

[184] *See supra* notes 91–93 and accompanying text.

disrepair which threaten the safety and welfare of the public . . . and it is the public policy of [Florida] to provide by statute a method to preserve the value of the property interests and the rights of alienation thereof."[185]

Third, the General Assembly may wish to amend O.C.G.A. section 22-1-1(9) by repealing subsection (B) to recognize that economic development is a public purpose that condominium terminations may serve. By recognizing economic development as a public purpose for taking private property, the GCA would not authorize unconstitutional takings.[186]

Fourth, O.C.G.A. section 44-3-98 should be amended to require bulk owners seeking to terminate a condominium to submit a verification that the proposed termination would support one of the General Assembly's identified public purposes. Such verifications would ensure that taken property is used for a constitutional, public purpose.

Fifth, the General Assembly could simply require that all condominium declarations include a provision that specifies whether unanimity or a lower percentage would be required to terminate the condominium. If declarations were statutorily required to provide for termination provisions, the unit owners would have no takings claim because it would be the unit owners—not the state through its default provisions—which would contractually authorize the termination of the owners' property interests. Under such circumstances, there is no government actor for there to be a takings claim.

Finally, the General Assembly should provide that when an owner seeks to terminate a condominium and partition for sale, the property may not be sold unless the winning bid would provide the minority unit owners with their shares of the appraised value calculated in O.C.G.A. section 44-6-166.1. Generally, just compensation is "the market value of the property at the time of the taking."[187] Requiring a minimum bid of the appraised value would

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[185] FLA. STAT. ANN. § 718.117(1)(b) (West, Westlaw through 2020 2d Reg. Sess.).

[186] *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 489–90 (2005) (holding that economic development is a public use that justifies an otherwise unconstitutional private taking).

[187] Olson v. United States, 292 U.S. 246, 255 (1934) (first citing Seaboard Air Line Ry. v. United States, 261 U.S. 299, 306 (1923); and then citing Jacobs v. United States, 290 U.S. 13, 17 (1933)).

ensure that objecting unit owners receive just compensation for their taken property.

V. CONCLUSION

While the private takings that the Georgia Condominium Act's termination statute authorize may not conflict with the U.S. Supreme Court's current Takings Clause jurisprudence, the General Assembly should be aware of the effects that the statute currently has on condominium unit owners. To protect the state's condominium unit owners, and to ward off potential constitutional violations, the General Assembly should amend O.C.G.A. section 44-3-98 to require the unanimous consent of unit owners prior to termination or to require a showing that condominium terminations serve a form of public use.