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THE ESSENCE OF PROPERTY
October 17–18, 2013

CONFERENCE AUTHORS
BRIGHAM-KANNER PROPERTY RIGHTS PRIZE WINNERS

James W. Ely, Jr.
Robert C. Ellickson
James E. Krier
Thomas W. Merrill

PANELISTS

James S. Burling
Hanoch Dagan
Nestor M. Davidson
Mark D. Savin & Stephen J. Clarke
Henry E. Smith
Laura S. Underkuffler
Statement of Purpose

The Brigham-Kanner Property Rights Conference Journal was established in 2012 to provide a forum for scholarly debate on property rights issues. The Journal publishes papers presented at the annual Brigham-Kanner Property Rights Conference as well as other papers submitted and selected for publication. Our goal is to extend the debate to a wider audience.

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THE ESSENCE OF PROPERTY
OCTOBER 17–18, 2013

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In 1998 I published a short essay entitled *Property and the Right to Exclude*.¹ It appeared in an issue of the *Nebraska Law Review* honoring Lawrence Berger, a long-time property professor at Nebraska. The essay has been rather widely cited, but I have my doubts as to whether it has been widely read. A review of citations in Westlaw suggests that the essay is commonly identified as arguing that the right to exclude is the “*sine qua non*” of property, a statement that appears in the opening paragraph.² The typical citing author takes this to mean that the essay argues the right to exclude is the only relevant attribute of property, or that the right to exclude is the social goal to which the institution of property is dedicated—two propositions disavowed in the essay. The author then uses this caricatured view of the exclusion thesis as a foil against which to develop his or her more nuanced or ethically satisfying view of property.

I stand by most of what I said in the Nebraska essay, including the statement in the opening paragraph. *Sine qua non* is a Latin legal term meaning “without which it could not be.” In other words, without the right to exclude, there can be no property. None of the attacks on the right to exclude using the Nebraska essay as a foil has convinced me that this is wrong. Does the right to exclude capture every relevant attribute of the institution of property? No, but I did not argue that. I said only that it was a foundational attribute of property. Is the right to exclude the end or the ultimate value to which the institution of property aspires, a vision caricatured in one article as a society of hermits?³ Obviously not. Giving individuals

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² Id. at 730.

the right to exclude others from particular resources is a way of organizing the management and control of resources in society. As such, it is a means to promoting a variety of ends, including, I will argue, a willingness to share resources. It also has a number of drawbacks, which means there will inevitably be exceptions and qualifications to the right to exclude. But I also said this explicitly in Nebraska essay.

The present Article revisits and expands upon the Nebraska essay. I will begin by restating the argument of the Nebraska essay, which I will call the exclusion thesis. After that, I will offer some clarifications, inspired by some of the critiques as well as my own reflections in the time that has passed since the Nebraska essay was published. Building on the clarified thesis, I will highlight some of the normative pros and cons of property that flow from the right to exclude. I will then offer something new: an explanation for how the right to exclude came to be the critical attribute differentiating property from other social institutions. The explanation is grounded in the concept of possession and the information cost advantages of using possession to differentiate between things that are mine and not mine as we navigate through everyday life. Possession is based on a perception of a capacity or intention to exclude others from a thing, and insofar as the institution of property is built on or evolves from a foundation of possession, I will argue that this accounts for why property always entails a right to exclude. I will wrap up by offering a few observations about what has emerged as the dominant critique of the exclusion thesis: that it promotes an excessively individualistic conception of property and downplays the communitarian or social obligation perspective on ownership.

I. THE EXCLUSION THESIS

The exclusion thesis, as set forth in the Nebraska essay, is analytical or interpretative. It is an attempt to advance our understanding of what property means, by identifying a common thread among all the interests we call property. Although the exclusion thesis has normative implications, as I will discuss, it is not itself a normative vision. Nor does it purport to exhaust the understanding of what is entailed by the institution of property. The law of property, to state the obvious, is quite complicated, and includes much besides the right
to exclude others. What the exclusion thesis maintains is that if and when we recognize something as property, we will invariably find the right to exclude others.

Property, according to the exclusion thesis, is characterized by a triadic relationship. The triad consists of an owner, a thing, and the right of the owner to exclude others from the thing. Provided the three elements are satisfied, the owner has property in the thing. If any of the elements is missing, there is no property in the thing. The Nebraska essay said that the right to exclude is a necessary and sufficient condition of identifying something as property. A more accurate statement, although I think this was implicit in the essay, is that all three elements of the triadic relationship are individually necessary and jointly sufficient to make something property. But the critical point is that the right to exclude others from the thing is essential. Indeed, the scope of the owner’s property rights is defined by the extent of the owner’s right to exclude. For example, if someone has leased a car for a term of one year, and if being a leaseholder gives one the right to exclude others from the thing that is leased, then one has a property right in the car for one year.

The right to exclude is a right, not a duty; as such, the right to exclude can be waived. When I wrote the Nebraska essay, I assumed that the right to exclude entails the right to include, by simple operation of waiving the exclusion right. I described exclusion as a “gatekeeper” right, that is, the right to determine who can or cannot enter or touch a particular thing. For this reason, I have been surprised by articles that argue in favor of a “right to include” or “right of entrance” and juxtapose this to the exclusion thesis. Given the nature of the right, the right to exclude and the right to include are effectively the same thing. Admittedly, the only interest created by a simple waiver of the right to exclude is a license, and as Dan Kelly highlights, the law of property has given us a variety of more permanent inclusionary devices, such as easements and leases, for dividing up or sharing property. I do not dispute this, but the point

5. Nebraska Essay, supra note 1, at 740.
6. Id. at 740.
is not inconsistent with the exclusion thesis. To the extent the law permits fragmentation of undivided property into lesser property rights, each of the fragments entails a right to exclude.

Another important attribute commonly associated with property is the right to use the thing. Undoubtedly a primary reason for creating and maintaining a system of property is to promote the effective use of things. But the way we do this is by giving owners the right to exclude others from the thing. In the Nebraska essay, I argued that the right to exclude (and include) leads naturally to the right to use a thing. By giving the owner the right to determine who can enter or touch a thing, we effectively give the owner the power to determine the use of the thing. The right to exclude allows the owner to bar access to those who would interfere with the owner’s desired use, and the right to include allows the owner to call on the services of various agents and contractors who can assist in developing particular uses of the thing.

James Penner has argued that the right to exclude is grounded in our interest in the use of things. If by this he means that the exclusion right will only attach to things that have some use value, in the sense that they are scarce relative to demand for them, this is surely correct. The “things” to which the exclusion right attaches must be resources that have value, meaning they have potential use. This was mentioned in passing in the Nebraska essay, and I have made it more explicit in subsequent writing. The “things” to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want. Property does not attach to things that are so plenteous they are not scarce, or to things that no one wants.

If we go further, however, and maintain that the right to use is the defining feature of property, as opposed to the right to exclude, then I think the argument breaks down. For one thing, those who argue for the primacy of the right to use, like Eric Claeys, stipulate that this is a right of exclusive use. But how do we get to exclusive

11. Nebraska Essay, supra note 1, at 733.
use, without a right to exclude? At the very least, those who would make a right to use an essential condition of property must also add the right to exclude. For another, not everything we call property entails a right to use. Pharmaceutical companies can obtain patents to new drugs, and can thereby block others from making the drug, but may have no right to use these patents without FDA approval. The Penn Central Company had air rights above the Penn Central terminal, and could exclude others from entering this airspace, but it had no right to use this space because of a preservation order.\footnote{Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).} If the government bars the owners of a wetland from draining or filling the land, the owner still has the right to exclude others from the wetland, but the government edict may mean that there is little or nothing in the way of effective use to which the land may be put. In each of these cases—the drug patent, the air rights, the wetland—the owner still has the right to exclude others, even if the owner has no right to use the resource. Significantly, however, we still speak of the owner as having property in the resource.

Still other important attributes of property involve the right to transfer, whether by gift, sale, or inheritance. Here too we can say that the right to transfer is a primary reason for establishing a system of property. Some property, money being the clearest case, has little or no value other than serving as a medium of exchange. But again, the right to exclude is the means by which we make possible the transfer of rights in things. We need to know which objects are mine and which are yours before any transfer of rights to things can take place. This division of the world is accomplished by giving each of us rights to exclude others with respect to particular things. Without property, that is, without the right to exclude, there can be no gift-giving, no contractual exchange, or no inheritance.

As in the case of the right to use, we can see how the right to exclude easily morphs into a right to transfer.\footnote{Nebraska Essay, supra note 1, at 742–44.} Perhaps the place to start is with abandonment of property. This can be regarded as a generalized waiver of any right to exclude, typically signaled by relinquishing possession of the object. By waiving all rights to exclude, the owner signals that the object has been returned to the common pool, and is open for claiming by others. In effect, the object has been transferred from A to an unknown future B, that is, the person who takes
up possession and now exercises the right to exclude. It is but a small step from abandonment to gifts, which combine a relinquishing of any right to exclude by the owner with an intention to designate a specific other as the new owner of the thing. A gift is typically signaled by a transfer of possession from the giver to the recipient. It differs from abandonment only in that we have a transfer of the object from A to a known B. Once we recognize transfer by gift, it is yet another small step to bargained-for exchange, for example by barter. Obviously, at some point the law kicks in, dictating various formalities that must be observed to make an enforceable contract for the exchange of rights or a valid will that provides for a transfer of property on death. Nevertheless, the right to exclude is the major step that gets us started down this path.

As in the case of the right to use, one can also have property without having the right to transfer. The classic usufruct, which Bob Ellickson has described as the earliest form of property in land,\textsuperscript{16} gave the holder the right to exclude others while the land was in active use. Nevertheless, the right was neither alienable nor inheritable. In the modern world, we also find instances where property is declared inalienable for policy reasons, such as the ban on transfer of eagle feathers, made to discourage the killing of eagles for commercial gain.\textsuperscript{17} After the ban, we continue to regard eagle feathers as being owned objects, because the owner has the right to exclude others, even though the right to transfer has been taken away.

What then is the relationship between the right of persons to exclude others from particular things and the other attributes commonly associated with property, such as the right to use and the right to transfer? The right to exclude is a necessary condition, and together with the other legs of the triadic stool, the presence of a particular person and a particular thing of value, is jointly sufficient to establish something as property. The right to use is obviously very important and is nearly always associated with property, but it is not a necessary condition. It is possible to have property without having the right to use. The same holds for the right to transfer. The right to transfer increases the value of property tremendously and is nearly always associated with property, but again it is not a

\textsuperscript{17} Andrus v. Allard, 444 U.S. 51 (1979).
necessary condition. It is possible to have property without having the right to transfer.

The Nebraska essay argued that the primacy of the right to exclude finds empirical support because it is a characteristic of virtually everything that is commonly regarded as property. This includes not just tangible property like land and chattels, but also intangible rights like future interests, security interests, and stocks and bonds. In each case, the holder of the intangible right can exclude others from interfering with the right, for example by preventing others from interfering with a future interest once the condition is satisfied that allows it to become possessory. The interests we call intellectual property, including patents, copyrights, trademarks, and trade secrets, are also characterized by the right to exclude others from certain types of production, copying, or use of demarcated intellectual goods. The fact that the exclusion thesis correctly identifies as property such a broad array of interests commonly regarded as property is a strong point in its favor.

The exclusion thesis does not maintain that everything of value is property. Rights of bodily integrity and personal autonomy are, like property, good against the world, but such rights do not pertain to any particular thing separate and apart from the person. Contractual obligations that bind only the parties fall outside the thesis, since they do not create rights against the world. The same can be said of statutory entitlement programs that create a government obligation to make payments to designated beneficiaries. These confer no right to exclude others, at least not in the ordinary meaning of the term. The fact that the Supreme Court has characterized some government entitlements as “property” for procedural due process purposes reveals that there are some uses of the term property in law that deviate from the exclusion thesis. I regard these decisions as being driven by an instrumental desire to strengthen the procedural rights of entitlement holders, with the concept of property being stretched beyond its ordinary meaning to achieve this goal. My claim is that virtually everything commonly regarded as property is characterized

19. In the case of trade secrets, this consists of a Hohfeldian power to prevent others from disclosing the secret.
by the right to exclude, not that the Supreme Court has correctly used the concept of property in all its decisions.

II. CLARIFICATIONS AND NORMATIVE IMPLICATIONS

Let me turn now to some clarifications of the exclusion thesis, and, building on the clarifications, offer an outline of the normative implications, pro and con, of giving individuals the right to exclude others from things.

One important clarification about the exclusion thesis is that exclusion is not absolute. This was made explicit in the concluding section of the Nebraska essay.21 The common law recognized exceptions to the right to exclude, such as the defense of necessity to an action for trespass, and the public privilege to use navigable waters that overflow private land. The immunity of landowners for committing low-level nuisances (“live and let live”) also necessarily qualifies the exclusion rights of other owners. The modern regulatory state imposes many more restrictions, such as anti-discrimination laws.

If the right to exclude is a necessary condition of property, as the exclusion thesis maintains, how can there be exceptions to the right to exclude? These propositions can be reconciled once we recognize that the right to exclude is a residual right. Property entails having a general right to exclude after certain exceptions grounded in common law and statutes have been subtracted. There must be enough residual exclusion to be able to say that the owner exercises significant discretion about who can come and go and who can touch or use the thing. But as long as we leave enough residual discretion in the owner, we still regard the owner as having property. For example, public utility companies may be highly constrained in terms of who they must serve and at what prices. Yet they typically retain enough discretionary authority over the selection, maintenance, and operation of their equipment and transmission lines that we readily identify these things as their property. Similarly, landlords in New York City may be highly constrained in terms of what they can charge in rent and when they may terminate a tenancy. Nevertheless, they retain enough control over the selection of new tenants, determining

21. Nebraska Essay, supra note 1, at 753.
how to maintain the property, and establishing rules for the use of the rental property, that we regard them as owners.

At some point, if the discretion of a person relative to a resource becomes too constrained, we stop referring to the interest of the person as property. Consider a security guard at a factory or an attendant in a parking garage. Each of these persons has some authority to exclude others from the things in question. Yet whatever authority they have is very tightly circumscribed. The security guard, for example, is authorized only to exclude trespassers from the factory. He has no authority to determine what the factory will produce, when it will be engaged in production, who shall be included as an employee or supplier to implement these decisions, when it will be sold or leased, and so forth. The parking garage attendant is authorized to deter persons from stealing or vandalizing autos. But he has no authority to sell a car, sit in it on his lunch break, or to let anyone but the owner take the car for a joyride. We could say these persons are simply agents or bailees of owners and, in so doing sidestep any issue about ownership. But even aside from the law of agency, these sorts of “excluders” do not have enough discretionary authority over how they exercise the right to exclude to qualify as persons who exercise a residual right to exclude, that is, to qualify as owners.

Because the exclusion thesis is analytical or interpretative, it is not a normative argument about the ends of property. In other words, the thesis is not a claim that we have property because it is desirable to exclude others from things. As my frequent co-author Henry Smith has emphasized, the right to exclude is a means toward various ends, not an end in and of itself.22 There are numerous points that bear on a normative assessment of the institution of property, both good and bad. I believe that the exclusion feature is responsible for many if not most of these features. Thus, it is important to understand the exclusion thesis before rendering judgment about the normative end or ends of property as an institution.

In clarifying the role of the exclusion thesis in rendering normative judgments about property, it is helpful to consider further why the right to exclude leads to various attributes of property that are normatively relevant. Simplifying somewhat, the right to exclude confers

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two general powers on owners. First, it gives them managerial authority over the thing. It does this for the reasons previously noted with respect to the right to use things. If someone has the right to exclude (and include), they have the ability to control who enters or touches the thing. And by controlling who enters or touches the thing, this person, whom we call the owner, secures managerial control over the thing. Larissa Katz has captured this understanding in arguing that property entails the power to determine “the agenda” of the thing.23 Jeremy Waldron has said something similar. As he puts it, an owner of property is someone who has the final decision “how the object shall be used and by whom.”24 What neither has noted is that this agenda-setting or use-determining power derives from a more fundamental attribute, the right to exclude.

Second, the right to exclude gives owners accessionary rights with respect to the thing. In other words, the owner automatically captures changes in the value of the thing over time, including the fruits immediately produced by the thing. Thus, the owner of land captures the value of crops that grow on the land, the owner of a share of stock captures the dividends and any appreciation in the value of the stock due to retained earnings, and the owner of a patent captures the monopoly rents that can be generated through commercial development of the patent. These accessionary rights are again a function of the right to exclude. The owner of land can exercise the right to exclude not only to plant and till but also to harvest the crop. The same point can be made about other property rights. This feature of property requires that we develop understandings about what objects are sufficiently prominently connected with the thing to constitute a derivative or accessionary right to the original thing.25 For the most part these understandings operate intuitively and without controversy, such as the understanding that the tomato that sprouts on a plant in a garden belongs to the owner of the garden. These understandings have been supplemented by a variety of legal doctrines, such as the understanding that baby animals belong to the owner of the mother (the doctrine of increase) and minerals under the ground belong to the surface owner (the ad coelum rule).

Both managerial control and accessionary rights, consistent with the earlier clarification about the exclusion right, are residual. Thus, the right to manage a thing will be subject to various regulatory constraints imposed by common law and positive regulation. Similarly, accessionary rights to a thing are subject to various contractual obligations and taxes imposed by the state. Accessionary rights are thus also residual rights, roughly equivalent to what economists have called residual claims.

Let me briefly list some of the normative arguments that have been advanced for and against property as an institution. In virtually every case, these arguments flow either from the exclusion right or from one or both of its derivative implications, residual managerial authority and residual accessionary rights. First, on the positive side:

- Giving owners residual managerial authority over things establishes a highly decentralized mode of resource management. This draws on local knowledge, which permits a more efficient use of resources than would likely prevail if more centralized or bureaucratic modes of resource management were utilized.
- Combining residual managerial authority and residual accessionary rights creates a powerful incentive for owners to invest effort and ingenuity in the use of resources so as to maximize their value. Property, as the old saying goes, rewards labor by allowing the owner to reap what she has sown.
- Endowing owners with exclusionary rights over all things they own allows owners easily to scale up and scale down their business or residence, all the while maintaining the same degree of control and accessionary rights over the combination of things they own.
- Establishing exclusionary rights to things eliminates the problems associated with open access resources like fisheries, such as wasteful racing to grab resources, premature consumption of resources, or inadequate restocking of resources.
- Creating exclusionary rights in things establishes the precondition for engaging in exchanges of resources. Free exchange

26. The list is drawn from Property Strategy, supra note 4, at 2081–94, where the reader will find appropriate citations.
of resources allows those who value particular resources most
highly to end up with those resources, enhancing the general
welfare.

• Allowing individuals to exercise control over resources dif-
fuses power in society, thereby improving the prospects for
individual liberty, free expression of ideas, free association,
and democratic government.

• Permitting individuals to exercise exclusionary rights over
things facilitates the realization of personal goals and aspira-
rations, and hence promotes individual flourishing.

Let us now turn to the negative side of the ledger:

• Dividing up the world into separate units of discrete exclu-
sionary rights creates incentives to foist costs onto other units
of discrete exclusionary rights. Thus, although the exclusion
strategy solves some externalities—those associated with open
access regimes—it simultaneously creates the condition for
other externalities in the form of spillovers.

• Because of the exclusion feature, all property rights are
monopoly rights. When particular property rights have no
good substitutes, this allows owners to charge monopoly prices
for access to the resource they control, to the detriment of
consumers.27

• Property rights are of little value unless interlaced with net-
works of roads, markets, recreational areas and other public
rights. Paradoxically, therefore, private exclusion rights are
dependent on public rights to realize their potential. Too much
exclusion, in the wrong places, can choke off the positive bene-
fits of property rights.

• Exclusion rights not only magnify incentives but also enhance
risks. Natural disasters, criminal predation, and illness pose
great threats to those whose property is highly concentrated
in one form and place. Where insurance markets and social
safety nets are poorly developed, some form of communal shar-
ing may be necessary to reduce the risks of private ownership.

27. See Katarina Miriam Wyman, Problematic Private Property: The Case of New York
Taxicab Medallions, 30 YALE J. ON REG. 125 (2013) (recounting history of restrictions on the
number of taxi medallions in New York City and the monopoly rents this generates for
medallion owners).
Because of the accession feature, those who have property tend to get more property, often without regard to their ingenuity or effort. Insofar as the positive effects of exclusion rights are dependent on a broad diffusion of property rights, some form of redistribution may be necessary to counteract the inherent tendency of property to beget more property.

Notice that one normative implication I have not listed is the promotion of communitarian values: an impulse to share resources with others, or a sense of obligation to others. This is a rather startling omission, since the central critique of the exclusion thesis by those who wish to promote more sharing, obligation to others, or community values is that the exclusion feature works against these ends. I have my doubts about this claim, but the issue is sufficiently important that I will defer it to Part IV of the Article.

Putting aside communitarian values, the current normative debate over property largely turns on whether one is more impressed with the list of benefits or the list of costs. Those who are more impressed with the benefits would like to see exceptions to the right to exclude held in check, in order to preserve the benefits of a robust system of private property. The pro-property faction, if that is the right term, would dial up the degree of exclusion associated with ownership in different contexts, in order to secure more of the benefits of exclusion rights. Those who dwell on the costs would like to see more restrictions on the exclusion right, in order to advance competing social goals, such as environmental protection, restrictions on monopoly pricing, and a more egalitarian distribution of wealth. They would dial down the level of exclusion, in order to minimize the costs of property systems.

The exclusion thesis, as I see it, frames the debate but cannot resolve it. It all depends on what weight one attaches to the benefits as opposed to the costs of private property. My own normative preferences fall on the side of strong property rights in most contexts. But the normative case for this must be made independently of whether the exclusion thesis is correct or not.

III. THE RELEVANCE OF POSSESSION

The Nebraska essay did not address the question of causation. How did exclusion come to be the sine qua non of property, rather
than something else, like the right to use or the promotion of human flourishing or what have you? I will take a stab at answering that question here. This is the short version: Exclusion lies at the root of property because the institution of property is dependent on possession, and exclusion lies at the root of possession.

Possession plays a rather odd role in American property scholarship. Every teacher of property law spends significant time dealing with possession. The first possession cases, starring that perennial favorite, *Pierson v. Post*, are invariably granted significant class time. Adverse possession, whereby possession is transformed by the passage of time into ownership, is routinely covered. Finders cases, which confer special rights on possessors, are popular; bailments, which entail a transfer of possession but not ownership, may also make an appearance; and so forth. At some point there will almost certainly be a reference to the old saw that possession is rather more than nine points of the law.

Yet, given all this attention to possession, there is surprisingly little analysis of possession in the recent scholarly literature. Possession is clearly different than property. Possession is often said to be a fact; property is a legal right. This may be correct as a first approximation, but what is more telling, in terms of understanding the nature of property systems, is respect for possession established by others. Respect for possession of others is a social norm, or, as I will argue momentarily, an ingrained human instinct shaped by social norms. This phenomenon—respect for possession—is I believe the foundation of the legal institution of property.

What does it mean to possess a thing? Everyone agrees possession refers in some sense to control over a thing. There are longstanding debates among civil law scholars about whether the required element of control refers to actual control, an intention to control, or some of both. It may be that actual control is necessary in order to establish an initial claim of possession. In first possession cases, some courts have held that even the clearest manifestation of an intention to

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30. Indeed, this truism is repeated in the *Nebraska Essay, supra note 1*, at 732–33.
control will not suffice to establish possession, unless and until actual
control has been established. Once actual control has been established,
however, an intention to maintain control will often suffice, even if
there are lapses in actual control. In the famous case of Haslem v.
Lockwood, the plaintiff gathered droppings of manure on the road
into piles, left them for a day, and returned to find them gone; the
court held he had established possession because the gathering into
piles signaled an intention to control the manure. In the law of larceny,
some courts have gone even further and have held that a clear
manifestation of an intention to deprive someone of control is enough
to establish criminal liability, even if the thief does no more than
touch the object.

But let us put aside questions about the relative proportions of
actual control and intention to control in determining when someone
is in possession of a thing. What does control mean in this context?
It means, quite simply, that a person is in a position to exclude
others from a thing. Thus, in Eads v. Brazelton, the initial finder,
Brazelton, was deemed not to be in possession of a sunken vessel,
because he had not placed his salvage operation over the site in such
a way as to exclude Eads from gaining access to the wreck. When
speaking of an intention to maintain control, what we mean is that
the person has signaled an intention to exclude others from taking
the thing. In Haslem, putting the manure into piles signaled an in-
tention to exclude others from the manure, even if the plaintiff lost
the capacity to do so temporarily. Thus control of a thing, actual or
intended, means excluding others from the thing.

What is missing from property scholarship is the recognition that
possession plays a ubiquitous role in everyday life. Ask yourself this:
How is it possible that people can navigate through everyday life
without getting into constant disputes over who has the right to
exploit different objects of value? The answer, I submit, is a near-
universal respect for possession established by others. We ascertain
whether something is possessed based on physical cues about the

32. 37 Conn. 500 (1871).
35. See Richard A. Posner, Savigny, Holmes, and the Law and Economics of Possession,
86 Va. L. Rev. 535, 547 (2000) (characterizing Holmes as understanding possession to entail
an intent to exclude others from interfering with one’s own use of a thing).
relationship between persons and tangible things. We process this information instantaneously and unconsciously. When something is perceived to be possessed, we steer clear of it, just as we expect others to steer clear of things in our possession. The process works the same in both intimate and anonymous social settings. Even thieves are highly selective about which objects in possession of others they target for appropriation. In most of their interactions with others, even thieves respect possession established by others.

Take a scene with which you are all no doubt highly familiar: an airport passenger terminal. Dozens, sometimes hundreds or even thousands, of people are walking, standing or sitting in the terminal. Nearly all of them are pulling some suitcase on wheels or carrying a backpack or some other kind of satchel. Why are these people not engaged in a constant struggle to seize control of the choicest-looking suitcases or satchels? Is it because they fear the police would arrest them? Maybe, but outside the security gate, there may not be very many police around. In a busy airport it would be fairly easy to snatch a suitcase from a dozing passenger and disappear into the crowd. No doubt this happens, but it seems to be a rare occurrence. And think of the curious scene in the arrivals area, where elaborate conveyor belts spew forth dozens of suitcases to waiting passengers, and many more suitcases are often lined up on the side, awaiting the arrival of some claimant on an earlier or later flight. Remarkably, individuals arriving on flights carefully scrutinize each bag as it comes off the conveyor, taking care to claim only their own, often marked by some colored ribbon or tape, and not someone else’s. Here it would seem to be even easier to grab a choice-looking suitcase belonging to someone else and jump in a cab before being detected. Again I assume this happens, but not very often—certainly not often enough to generate a demand for systematic inspection of claim tickets by security guards.

Nor do I think we can ascribe the respect for suitcases of others to a social norm, at least not the kind of norm developed through repeated interactions of persons living in close-knit communities. When I pass through O’Hare Airport I rarely encounter another person I know, even though I lived in Chicago for most of my adult life. Nearly everyone is a stranger to everyone else, and yet the respect for possession seems secure. More strikingly still, consider that the relationship between persons and tangible things. We process this information instantaneously and unconsciously. When something is perceived to be possessed, we steer clear of it, just as we expect others to steer clear of things in our possession. The process works the same in both intimate and anonymous social settings. Even thieves are highly selective about which objects in possession of others they target for appropriation. In most of their interactions with others, even thieves respect possession established by others.

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scene I have described is virtually the same the world over. It is no different in Richmond, Virginia, than it is in Moscow, or Taipei, or Nairobi. How is it possible that expensive-looking suitcases belonging to anonymous travelers remain undisturbed, for the most part, in all the corners of the world?

The reason there is no free-for-all over suitcases in airports is that people instinctively respect possession established by others. I say instinctively advisedly. Respect for possession established by others is likely something that is hardwired in human psychology. It is a species of what Daniel Kahneman calls “thinking fast” or System 1 cognition. It occurs automatically and unconsciously, without any effort at deliberate reasoning on our part. As Jim Krier has suggested, the roots of this instinct may lie in our evolutionary past. Biologists have identified an evolutionarily stable “bourgeois game,” in which animals aggressively defend their territory from attack but retreat in the face of a defense of territory by another. The possession instinct may derive from a similar innate proclivity. In other words it is in our genes, having been selected out for its superior survival value over the millennia. Be that as it may, a virtually automatic respect for possession established by others appears to be the best explanation for how human beings navigate, without confusion or turmoil, through the everyday world filled with valuable objects.

Although the possession instinct appears to be universal throughout human societies, the particular signs used to communicate an intention to possess undoubtedly have a social element. Bob Ellickson’s well-known study of the different social norms for establishing possession among different whaling communities is an example. Depending on the species of whale pursued and its behavior, there were variations in what communicative acts were required to establish possession, for example in terms of whether a line must be maintained between the harpoon and the whaling vessel. This was clearly part

of the cultural knowledge transmitted within each whaling community. The more important point, for present purposes, is that all whaling communities followed a rule of first possession in allocating rights to particular whales among whaling vessels. The variations involved the communicative acts that signaled possession, not the basic principle of respect for possession established by others. With respect to suitcases in airports, the use of luggage tags and colored ribbons to identify suitcases possessed by others is undoubtedly learned behavior. In this case, the learning appears to have spread rapidly throughout the world and is so obvious it requires no explicit instruction. People quickly pick it up observing what other people do. The rapid diffusion of common signs is made possible, I would suggest, because the instinct for respecting possession is universally shared.

Why does possession perform the task of differentiating among objects in the everyday world rather than ownership? The reason, I believe, is that ascertaining possession, in most situations, entails very low information costs. Information about possession can be gathered at a glance and processed by our brain automatically and instantaneously. Possession is based on physically observable facts about the relationship between persons and tangible objects. Significantly, possession applies only to tangible things like land and chattels. One can possess land, cars, clothing, laptop computers, and suitcases; one cannot possess an invisible right, such as a future interest, a security interest or an intellectual property right. The evidence used to establish possession consists of physical facts about the relationship between natural persons and tangible objects. The relevant facts are those that indicate that particular persons have established control over particular objects and/or are signaling an intention to maintain control over the object. Our brain uses this evidence, quickly and reflexively, to raise inferences about whether objects are possessed or unclaimed. If possessed, we avoid interfering with the object. Others do the same. The result is that airport terminals exhibit very little discord in matching thousands of objects with thousands of persons, many of whom come from foreign cultures and nearly all of who are complete strangers to each other.

Establishing ownership, in contrast, entails much higher information costs. Establishing ownership entails ruling out any superior right in third parties, which means tracing the chain of title back in
time. Thus, ownership is established primarily by documentary evidence, such as bills of sale, deeds, certificates of title, and registries of rights. It takes time and some sophistication to uncover and interpret these documents. Ownership is often qualified by invisible rights, such as security interests and future interests, which are even more difficult to establish and interpret. And owners include not just natural persons, but also artificial entities like corporations that act through natural persons, which raises potential questions of authority and agency.41 It is conceivable that in some futuristic world persons could navigate through valuable objects using the concept of ownership. They could wear some new generation of Google glasses that would scan small bar codes on objects that embody the relevant documentary information about ownership, which information would then be processed by a computer, which would then send a verbal message to the person wearing the glasses about the ownership status of each object encountered. But think back to the airport terminal. The number of messages would be overwhelming, not to say irritating. Far better to rely on the computer that has evolved in our brains, which sends silent messages like “not yours,” “not yours,” “not yours,” “yours!”—messages that allow us to navigate successfully through the world of objects without thinking about it.

Even if possession is critical to everyday interactions among people and their objects, and perceptions of possession entail some combination of capacity to exclude and intention to exclude, why does it follow that property should similarly be anchored in a right to exclude? The answer has already been intimated. Because possession, for information-cost reasons, is the concept that dominates world of objects in everyday life, it is critical that property and possession remain synchronized. If possession were grounded in one concept (exclusion), and property in another (need, promotion of human flourishing, whatever), there would be too much incompatibility for the system to bear. This is because the system of property rights—a legal institution—presents an enormous information-cost problem, given the very large number of persons and objects covered by the system. The only way to overcome this information-cost problem is to borrow from the information-saving attributes of possession.

Consider, as one striking example of the dependence of property on possession, the use of possession as a proxy for ownership in virtually all low-valued transfers of property rights. If you buy a bottle of water from a street vendor, for example, you do not demand documentary evidence that the vendor has good title to the bottle of water sitting in his cooler. The fact that the vendor is in possession of the water bottle is taken as sufficient evidence of the vendor’s capacity to transfer title. We accept possession as evidence of title in these circumstances for the obvious reason that the transaction costs of doing a “title search” of the water bottle would be prohibitive, relative to the value of the object being exchanged. As objects become more valuable and durable, the calculus changes. Thus, we do title searches before transferring ownership of land or airplanes, and sophisticated purchasers of artwork will demand evidence of the provenance of the work before they buy. But for consumables like food and beverages, articles of clothing, and most other forms of personal property, possession functions as a stand-in for ownership. Notice that there is no bright line separating this possession proxy from title-searching as modes of establishing ownership. Purchasers of land nearly always do a title search and inspect the property for evidence of undisclosed possession. And the transfer of some expensive personal property, like antique jewelry, may also entail an investigation of provenance. Clearly, it would be awkward and confusing rigorously to separate possession and title as modes of determining ownership. Far better to synchronize the concept of ownership with possession, which means in effect that ownership, like possession, must be grounded in exclusion.

Further illustrations of dependence arise in resolving disputes between possessors and owners. Ownership trumps possession, but as previously indicated the costs of establishing ownership are much higher than the costs of ascertaining possession. Not surprisingly, therefore, when disputes break out between possessors and would-be owners, the first step in resolving the dispute is to enforce the right of possession. When the police are called to mediate a fight between a repo man and the owner of an auto, or to determine whether a landlord is entitled to evict a tenant, the police generally allow possession to remain undisturbed pending a more formalized resolution of the respective rights of the parties. Again, one can say that the concept
of possession is being deployed as a surrogate for title, given that the urgency of the situation does not permit any kind of investigation of the chain of the title before deciding who is entitled to the thing in question.

The general point is this. Respect for possession established by others is a universal attribute of human societies. Call it a social norm or an instinct shaped by social norms or whatever you want. Respect for possession operates through perceptions that individuals have either established the capacity to exclude others from things or have an intention to exclude others from things. Property is a legal institution, one that exists only in societies that have some formalized method of adjudicating rival claims to particular resources. Property, as a legal institution, is dependent upon respect for possession, and interacts with possession in many critical ways. There are probably multiple reasons for this, but a basic one is information costs: information about possession is much cheaper and quicker to process than is information about ownership. In order for this interaction to work, however, property—the legal institution—must mimic or be synchronized with the basic features of possession. This means the right to property must always include, as one critical element, the right to exclude.

IV. SHARING PROPERTY

Let me close with some brief comments about the burgeoning literature that attacks the right to exclude on the ground that it devalues the importance of community, social cooperation, and sharing of resources. Preliminarily, I would distinguish two positions.

One, which is a variant on conventional egalitarianism, wants more people to participate in the benefits of owning property. Those who espouse this view look at the list of benefits of property set forth in Part II, especially the benefits of prosperity, security, liberty and the development of personhood, and say: If property does these good things, then everyone should have some property! This was essentially the argument of Charles Reich, in *The New Property,* who worried about the proliferation of licenses, jobs, and benefits dependent on the discretion of the state. He wanted to redefine these entitlements as

“property,” in order to provide those whose livelihood was dependent on them the benefits associated with property. Another prominent voice sounding this theme is Hernando de Soto, who wants to transform informal occupancy rights in developing countries into formal property rights, in order to provide greater access to credit markets by the poor.

I think Reich was in error in thinking that discretionary government benefits can be reconceived as property. The entitlements he considered are more like revocable licenses or contracts. Otherwise, I have no particular quarrel with “more property” proposals. Indeed, there are good theoretical and empirical reasons to believe that widespread distribution of conventional property maximizes both the economic and the social and political advantages of a private property system. There are of course serious questions about how to generate or sustain a more egalitarian distribution of property. I regard expropriation as a bad idea, and pushing people to buy homes using subprime loans is not much better. Making education widely available and reducing the regulatory impediments to starting new business ventures are better ideas. In any event, I see nothing in the “more property” version of the argument for greater sharing incompatible with the exclusion thesis. The disadvantaged and disfavored who previously have had little or no property will want to be able to exercise the exclusion right once they get their hands on some property, in order to capitalize fully on the advantages of ownership.

A second variant on the need for more sharing is more problematic. This is the idea that the government should enforce greater sharing of existing property rights, by mandating access to valuable resources, restricting changes in use, imposing rent controls, compelling mediation before co-owners can seek partition, and the like. I will call this the “forced sharing” argument. Forced sharing differs

44. I cannot provide a complete bibliography of works that espouse some variant on what I have characterized as the “forced sharing” position. Prominent works that I have in mind include Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 CORNELL L. REV. 745 (2009); HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS (2011); Eduardo M. Penalver, Land Virtues, 94 CORNELL L. REV. 821 (2009); and JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY (2000). Obviously, I cannot do justice to the many subtleties in argument or variations in approach reflected in these and other related works. What generally unites them in my mind is a critique of the exclusion thesis.
from the standard arguments for restricting exclusion rights in order to limit externalities, control abuses of monopoly, or to provide public goods like roads. These standard arguments are designed to restrict the exercise of exclusion rights by some in order to enhance the value of property rights more generally. Forced sharing also differs from proposals for government insurance or social safety nets, in order to reduce the risks of private ownership, or arguments for progressive taxation, in order to mitigate the tendency of property systems to produce increasing inequalities. These programs generally proceed by taxing fungible income or wealth and do not necessarily entail modifying the traditional prerogatives of ownership. Forced sharing, in contrast, advocates tinkering with the mechanics of the institution of property itself, in order to open the gates to more widespread participation in the use and enjoyment of discrete resources. The battle stanchion of the forced sharing proponents is the New Jersey Supreme Court’s decision in *State v. Shack*,\(^\text{45}\) which suggested the right to exclude is subject to override by courts based on an ex post balancing of the interests of the owner and the parties seeking access. The ultimate vision here is imposing some kind of “just cause” limitation on the right to exclude, with courts or some other agency of government passing judgment on whether owners have sufficiently good reasons for managing their property the way they do.

One obvious concern is that too much dilution of the exclusion right will sap the engine of property of much of its vitality. Forced sharing would inevitably result in more complicated management problems, with more people demanding access to resources and more conflicts among competing claimants to sort out. Owners would worry about what the “Sharing Commission” will say about their resolution of these conflicts and consequently would have less time and energy to devote to managing the resources themselves. Larger owners would hire “sharing compliance officers,” giving corporations a comparative advantage relative to small proprietors. In order to avoid litigation, owners would tend to steer clear of decisions that might be questioned as violating the sharing principle.

coupled with an endorsement of significant governmental restrictions on the prerogatives of ownership in order to promote distributive justice goals.

\(^{45}\) 277 A.2d 369 (N.J. 1971).
Overall, greater timidity would creep into the management of property. Innovation and experimentation would decline. Idiosyncratic uses of property, including perhaps uses by dissenting religious sects or political groups, would be discouraged.

Less obviously, it is not clear to me that forced sharing would lead to more sharing. It all depends on whether people are more likely to share resources voluntarily or if sharing will be better promoted by government compulsion. It is plausible, to me at least, that people have a natural impulse toward communal engagement and that there is an “altruism instinct” to go along with the possession instinct. Secure and relatively unqualified property rights may increase the willingness of owners to share with neighbors and friends, if only because they are confident that if the sharing does not work out, they can terminate the sharing by reasserting their right to exclude. If forced to share, the natural impulse toward sociability and altruistic sharing may be extinguished. Owners may do as little as possible to comply with regulatory mandates, or may exchange their property for other resources that are easier to conceal or that can be moved to jurisdictions where sharing is not compelled.

There are unquestionably counterarguments. Regulatory mandates can change preferences. Seat belt laws have changed people’s attitudes about using seat belts; laws against smoking inside public buildings have presumably discouraged some people from smoking. Perhaps forced sharing of property would eventually shape preferences by developing a taste for sharing. I have my doubts. It would be hard to argue that there is more sharing between landlords and tenants in jurisdictions like Berkeley and New York that have rent and eviction controls than there is in jurisdictions without such controls. And I am skeptical that colleges in New Jersey are more hospitable to outsiders demonstrating on campus, where such access is mandated, than are schools in other states where access is left to the discretion of the college. But it is ultimately an empirical question.

What can hardly be doubted is that if there is no “altruism instinct,” in other words, if people are entirely self-centered and selfish, then forced sharing is unlikely to yield more sharing. Instead, questions

46. See, e.g., Nicholas R. Eaton et al., Is Altruism a Genetic Trait?, SCIENTIFIC AMERICAN (Sept. 30, 2010).
about sharing of resources would be transferred from the realm of individual discretion to the political realm. And if people are self-centered and selfish, then the outcome in the political realm will be a function of the relative power and capacity for political organization of those who have resources as opposed to those who do not. Here there can be little doubt that those who have, being a relatively more concentrated interest, will as a general matter out-organize and out-lobby the relatively unorganized set of persons who prefer more sharing. Forced sharing, on these assumptions, would simply sap the institution of property of much of its vitality with little gain, other than an increase in the size and complexity of government.

CONCLUSION

The right to exclude, I continue to believe, is an essential condition of identifying something as property. Exclusion is not the only important attribute of property. The right to include, to use, and to transfer are all obviously important, but they are dependent upon and derive from the right to exclude, which is indispensable. Exclusion is not a goal or valuable end of the institution of property. It is a critical feature that produces a variety of ends, many good, some bad. The normative evaluation of property as an institution depends on how we weigh the goods versus the bads. I have argued here that the right to exclude is an essential feature of property because exclusion of others is an essential feature of possession, and property builds on and relies continually on possession in many of its operations. As for those who argue that the right to exclude should be compromised in order to promote forced sharing of resources, I think the consequences of moving too far in this direction would be undesirable, and I am skeptical that in the final analysis forced sharing would increase the total amount of sharing we witness.
PROPERTY'S STRUCTURAL PLURALISM:
ON AUTONOMY, THE RULE OF LAW, AND
THE ROLE OF BLACKSTONIAN OWNERSHIP

HANOCH DAGAN*

It is a real privilege for me to participate in the celebration of Thomas Merrill's enormous contribution to the scholarship and jurisprudence on property, which has enhanced our understanding of property in numerous ways. His work has elucidated the rationale of seemingly puzzling doctrines, illuminated the significance of hitherto marginalized ones, and introduced a new theoretical perspective—the focus on information costs—that by now dominates much of property theory. At the center of the first panel of the Tenth Brigham-Kanner Property Rights Conference, to which this Essay belongs, is yet another of Tom's seminal contributions: his challenge to our understanding of the essence of property.

After the bundle-of-sticks picture of property endorsed by the Restatement of Property had been regarded for decades as conventional wisdom, Tom was one of the first scholars to forcefully insist that the right to exclude—in line with Blackstone's conception of property as "sole and despotic dominion"—is the most defining feature of property. While property does not always and necessarily entail unqualified dominion, "the right of the owner to act as the exclusive gatekeeper of the owned thing" is, in this view, "the differentiating feature of a system of property."  

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2. In addition to his well-known discussion of numeros clausus principle, see also, e.g., Thomas W. Merrill, Accession and Original Ownership, 1 J. LEGAL ANALYSIS 459 (2009).
5. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765–69).
This short Essay is part of my ongoing conversation with Tom on these matters. I was asked to present to this panel a structurally pluralistic perspective on property, different from both the view of property as a singular right and from its conception as a bundle of rights, and I will devote most of my efforts to this task. But I will also seek to allude to some points of (perhaps surprising) convergence between this view and at least some aspects of the way Tom conceptualizes property.

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The structurally pluralistic account of property I have developed in recent years begins with a straightforward descriptive observation. Rather than a uniform bulwark of independence, property manifests itself in law in a much more nuanced, contextualized, and multifaceted fashion. Property law, as both lawyers and citizens experience it, is rather complex, and this complexity is at odds with the attempt to formulate broad and unified theories suggesting that one animating principle, such as exclusion, shapes the entire terrain or at least the core of property.

Indeed, property law tends to set up distinct institutions, each of which covers a specific category of human situations and is governed by a distinct set of rules expressing differing underlying normative commitments. Thus, we can find side-by-side doctrines that, by and large, comply with a libertarian commitment to independence (for example, fee simple absolute) alongside other doctrines in which ownership is a locus of communitarian sharing (such as marital property) or of utilitarian welfare maximization (as with patents), as well as many other doctrines vindicating various types of balances among these (and other) property values (for example, copyright or common interest communities).

Structural pluralism takes this heterogeneity of our existing property doctrines seriously. While conceding that there is some value in looking for a rather thin common denominator in the wide terrain of legal doctrine covered by wholesale legal categories such as property, it insists that such a common denominator is not robust enough to illuminate the existing doctrines or determinative enough.

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to provide significant guidance as per their evaluation or development. Thus, as Felix Cohen demonstrated, every property right involves some power to exclude others from doing something.9 But as Cohen further emphasized, this is a rather modest truism, which hardly yields any practical implications.10 Private property is also always subject to limitations and obligations, and “the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions.”11

Conceptualizing the right to exclude as the core of property marginalizes or possibly even undermines two significant constitutive characteristics of property: governance and inclusion. The internal life of property law is often structured by a wide range of sophisticated governance regimes aiming to facilitate various forms of interpersonal relationships (consider, for example, the law of waste, landlord-tenant law, trust law, and the law of common-interest communities).

Moreover, examining the more precise scope of owners’ right to exclude shows that inclusion is sometimes inherent in property; non-owners’ rights to entry in important categories of property cases (think, for example, about the law of public accommodations; the copyright doctrine of fair use; and the law of fair housing, notably in the contexts of common-interest communities law and landlord-tenant law) are indispensable characteristics of the property institution under examination.12

Accordingly, a structurally pluralistic conception of property understands it as an umbrella for a limited and standardized set of property institutions that serve as important default frameworks of interpersonal interaction. All these property institutions mediate the relationship between owners and non-owners regarding a resource, and, in all property institutions, owners have some rights to exclude others. This common denominator derives from the role of property in vindicating people’s independence. Alongside this important property value, however, other values also play crucial roles in shaping property institutions. Property also can and does serve our commitments to personhood, desert, aggregate welfare, social responsibility, and distributive justice. Different property institutions

10. Id.
11. Id. at 357, 362, 370–74, 379.
offer differing configurations of entitlements that constitute the contents of an owner’s rights vis-à-vis others, or a certain type of others, with respect to a given resource.

The particular configuration of these entitlements is by no means arbitrary or random. Rather, it is (at least at its best) determined by the character of the property institution at issue: namely, by the unique balance of property values characterizing it. These values both construct and reflect the ideal ways in which people interact in a given category of social contexts, such as market, community, and family, and with respect to a given category of resources, such as land, chattels, copyright, and patents. The ongoing process of reshaping property as institutions is often rule-based and usually addressed with an appropriate degree of caution. And yet, the possibility of repackaging, highlighted by Hohfeld,13 makes it (at least potentially) an exercise in legal optimism, with lawyers and judges attempting to explicate and develop existing property forms by accentuating their normative desirability while remaining attuned to their social context.

Some property institutions are structured along the lines of the Blackstonian view of property as sole despotic dominion. These market-oriented property institutions are atomistic and competitive. They constitute a “sphere of freedom from personal ties and obligations,”14 thus vindicating people’s independence (or negative liberty). But property law does not allow these norms to override those of the other spheres of society. Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. Rather than imposing the impersonal norms of the market governing the fee simple absolute on these divergent spheres, property law, at least at its best, facilitates their flourishing by supplying robust default mechanisms (particularly anti-opportunistic devices) befitting their animating underlying principles.

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially

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affect its productive use. Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion. The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors’ identity. Accordingly, resources are subject to different property configurations; whereas the law vigorously vindicates people’s control of their constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner’s control.

Indeed, unlike the Blackstonian view, the structurally pluralistic construct recognizes the significant role that our social values play in our conception of property. Each of our property institutions, as noted, targets a specific set of values to be promoted by its constitutive rules in one subset of social life. Both the existing categories and their underlying animating principles are always subject to debate and reform, so that some institutions may fade away while new ones emerge and yet others change their character or split. But at any given moment, each such institution consolidates people’s expectations regarding a core type of human relationships so that they can anticipate developments when entering, for instance, a common interest community, or marriage, or invading other people’s rights in a specific form of intellectual property. Thus, a set of fairly precise rules governs each of these types of property institutions, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Furthermore, our property institutions also serve as means for expressing normative ideals of law for these types of human interaction.

Both roles—consolidating expectations and expressing law’s ideals—require some measure of stability. To form effective frameworks of social interaction and cooperation, law can recognize a necessarily limited and relatively stable number of categories whose content must be relatively standardized. The standardization prescription is particularly stringent regarding the expressive role, which mandates limiting the number of legal categories since law

15. This dynamic feature of property assures that understanding property as encapsulating ideals of interpersonal interaction is a source of critical engagement and reform.
can effectively express only a given number of ideal types of interpersonal relationships. Indeed, the structurally pluralistic conception of property justifies property’s standardization by reference to the role of our property institutions as default frameworks of interpersonal interaction, frameworks that serve to consolidate expectations and to express law’s normative ideals for core types of human relationships. This justification of the *numerus clausus* principle co-exists with a rather broad realm of freedom of contract regarding property rules (subject, of course, to the legitimate verification interest of third parties as they are affected by such opt-outs).16

On its face, such a pluralistic understanding of property may seem problematic, both normatively and jurisprudentially. Normatively, one may wonder whether it pays sufficient attention to personal autonomy, the value with which property is often (rightly) associated.17 Jurisprudentially, one may question whether structural pluralism is sufficiently attentive to the rule of law prescriptions that, again, are particularly important to property.18 These are significant concerns, but neither undermines property’s structural pluralism. In fact, they help to clarify the normative and jurisprudential underpinnings of structural pluralism and to demonstrate that, properly interpreted and refined, structural pluralism ends up superior to any alternative position on property on both fronts.

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Consider first the normative virtue of property’s structural pluralism. I argue that the multiplicity typical of property’s landscape is indispensable for people’s autonomy, at least insofar as autonomy stands for our right to self-determination: our right to be to some degree the authors of our lives, choosing among worthwhile life plans and being able to pursue our own choices.

17. This concern seems to explain Tom’s (mis)characterization of my position as one of “forced sharing.” See Thomas W. Merrill, *Property and the Right to Exclude II*, 3 Brigham-Kanner Prop. Rts. Conf. J. 1, 22–24 & n.44 (2014).
18. This concern seems to underline Henry Smith’s claim that my pluralist conception of property can hardly be distinguished from the bundle understanding of property. See Henry E. Smith, *Property as the Law of Things*, 125 Harv. L. Rev. 1691, 1705–06 (2012).
As Joseph Raz explains, autonomy requires not only appropriate mental abilities and independence but also “an adequate range of options.”19 While a wide range of valuable sets of social forms is available to societies pursuing the ideal of autonomy, autonomy “cannot be obtained within societies which support social forms which do not leave enough room for individual choice.”20 For choice to be effective, for autonomy to be meaningful, there must be, other things being equal, “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.”21 Indeed, given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life.

Ostensibly, this commitment does not require the elaborate apparatus of property’s structural pluralism. As long as property is understood as “sole and despotic dominion” and contracts are conceptualized around people’s consent, so the argument goes, free individuals can use these fundamental building blocks of private law and tailor their interpersonal arrangements so that they best serve their own utilitarian, communitarian, or other purposes.22 In fact, however, many of these frameworks cannot be realistically actualized without the active support of viable legal institutions (or law-like social conventions). To see why this is the case, we need to appreciate the insights of both lawyer economists and critical scholars.23

Economic analysis of private law, which investigates its incentive effects, forcefully demonstrates how many of our existing practices rely on legal devices serving to overcome numerous types of transaction costs—information costs (symmetric and asymmetric), bilateral monopolies, cognitive biases, and heightened risks of opportunistic behavior that generate participants’ endemic vulnerabilities in most

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20. See id. at 406.
cooperative interpersonal interactions. Merely enforcing the parties' expressed intentions would not be sufficient to overcome the inherent risks of such endeavors. If many (most?) of them are to become or remain viable alternatives, law must provide the background reassurances that help to catalyze the trust so crucial for success. Even where parties are guided by their own social norms, law often plays an important role in providing them background safeguards, a safety net for a rainy day that can help to establish trust in their routine, happier interactions.

But law's effects are not only material. Because our private law tends to blend into our natural environment, its categories play a crucial role in structuring our daily interactions. Thus, alongside these material effects, many of our conventions—including many social practices we take for granted—become available to us only due to cultural conventions that often, especially in modern times, are legally constructed. Hence, even before we consider the transaction costs of constructing these arrangements from scratch, people in a society where these notions have not been legally coined would have faced “obstacles of the imagination” that might have precluded these options. Indeed, our private law institutions play an important cultural role; like other social conventions, they serve a crucial function in consolidating people's expectations and in expressing normative ideals regarding the core categories of interpersonal relationships they participate in constructing.

Both the material and the expressive functions of property imply that freedom of contract, though significant, cannot possibly replace active legal facilitation. Lack of legal support is often tantamount to undermining—maybe even obliterating—many cooperative types of interpersonal relationships and thus people's ability to seek their conception of the good. Therefore, a commitment to personal autonomy by fostering diversity and multiplicity cannot be properly

accomplished through a hands-off policy and a hospitable attitude to freedom of contract. The liberal state should “enable individuals to pursue valid conceptions of the good” by proactively providing “a multiplicity of valuable options.”

Accordingly, a structurally pluralistic property law—the conception of property which best accounts for the property law we actually have—follows this prescription by including diverse types of property institutions, each incorporating a different value or different balance of values. This variety is rich, both between and within contexts: it provides more than one option for people who want, for example, to become homeowners, engage in business, or enter into intimate relationships. The boundaries between these property institutions are open, enabling people to freely choose their own ends, principles, forms of life, and associations by navigating their way among them. While at a certain point the marginal value of adding another distinct institution is likely to be nominal in terms of autonomy, pluralism implies that property law’s supply of these multiple institutions should not be guided only by demand. Demand for certain institutions generally justifies their legal facilitation, but absence of demand should not necessarily foreclose it insofar as these institutions add valuable options for human flourishing that significantly broaden people’s choices. Only in this way can law recognize and promote the individuality-enhancing role of multiplicity.

Because only the conception of property as institutions—alongside its attendant commitment to a broad realm of freedom of contract regarding property rules—follows these prescriptions, this is the only truly autonomy-enhancing conception of property. Indeed, as long as the boundaries between the multiple property institutions are open, the liberal commitment to autonomy neither necessitates the hegemony of the Blackstonian form of property—otherwise known as the fee simple absolute—nor undermines the value of other, more communitarian or utilitarian property institutions. On the contrary, the availability of several different but equally valuable and obtainable frameworks of interpersonal interaction makes autonomy more meaningful by facilitating people’s ability to choose and revise their

29. Cf. RAZ, supra note 19, at 133, 162, 265.
forms of interaction with other individuals respecting diverse types of resources.30

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Consider now the rule of law, which I understand to stand for two important prescriptions: that law provides effective guidance to its addressees, and that it does not confer on officials the right to exercise unconstrained power.

The first aspect starts with the proposition that the law should provide people effective guidance. Though seemingly thin, this conception of the rule of law is intimately connected with people’s autonomy (understood as self-authorship). By requiring that “government in all its actions [be] bound by rules fixed and announced beforehand,” the rule of law enables people “to foresee with fair certainty how the authority will use its coercive power in given circumstances, and to plan [their] affairs on the basis of this knowledge.”31 Only a relatively stable and predictable law can serve as a “safe basis for individual planning,” which is a prerequisite of people’s ability to “form definite expectations” and plan for the future.32 Law’s participation in securing stable “frameworks for one’s life and action” increases “[p]redictability in one’s environment,” and therefore “one’s power of action,” thus facilitating people’s “ability to choose styles and forms of life, to fix long-term goals, and effectively direct one’s life towards them.”33

The second aspect of the rule of law perceives it as the other side of the rule of man. The rule of law stands here for “the absence of arbitrary power on part of the government,”34 through the imposition of “effective inhibitions upon power and the defense of the citizen from power’s all-intrusive claims.”35 Unrestrained power is

33. Id. at 210, 220, 222.
objectionable, both because of its potential devastating burdens and because it renders us mere objects, dominated by the power-wielder.36 The rule of law addresses these grave concerns by prescribing “a particular mode of the exercise of political power: governance through law.”37 More specifically, the rule of law requires that “people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.”38

Both aspects of the rule of law imply the significance of predictability and stability, which property lawyers typically (and justifiably) embrace. Both aspects resist open-ended standards allowing judges to consult, for each individual case, the law’s underlying commitments, preferring instead clear rules that translate “the implications of normative values into concrete prescriptions,” “sufficiently determinate” to be followed by their appliers.39 To be sure, the rule of law does not always prescribe the use of bright-line rules.40 At times—especially where the alternative would be a complex set of technical and non-intuitive rules41—commitment to the rule of law implies allowing, or even preferring, that the social practice of a legal topic be formed around a vague but informative standard. The reason for this preference is that a standard which is guidance-friendly and constraining-friendly enables its addressees (or their lawyers) to figure out its intended content and thus to predict its future unfolding and realm of application, monitoring or modifying their behavior accordingly.42 Standards that refine the regulative principle governing

38. Id. at 6, 31.
a specific area of law along these lines—informative standards, as I call them—are therefore generally unobjectionable. 43 By contrast, open-ended references to justice, fairness, good faith, or reasonableness, as these are interpreted by the presiding law applier given the specific circumstances of the case at hand, fail to ensure predictability or properly constrain law appliers. They should therefore be objected to as an invitation to ad hoc discretion, which affronts the rule of law.44

Structural pluralism is not only following suit. Its adherence to the rule of law, just like its compatibility with our commitment to personal autonomy, is inherent in its most foundational features.45 The first reason for this happy proposition is already implicit in my presentation of the main tenets of structural pluralism. For structural pluralism to perform its autonomy-enhancing role properly, it must be able to consolidate people’s expectations regarding the various property institutions, conveying in credible terms the ideals of interpersonal relationships represented by each of them. Both requirements, as noted, imply some prescription of stability and predictability.46

The second reason refers to types of cases (just noted) in which bright-line rules cannot adequately serve as a guide for action, requiring law to resort to informative standards. In these problematic contexts, structural pluralism is likely to be more predictable than its monistic counterpart due to its use of multiple and relatively small categories. These categories are sufficiently distinct from one another and internally coherent, meaning each one is generally guided by one animating principle, one value, or a balance of values. Only such small categories, in sharp contrast with the broad category of property used in monist theories, can rely on animating principles sufficiently determinate to function as informative standards. As long as these animating principles are properly articulated and not

43. See HANOCCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 208–10 (2013).
44. See HANOCCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 12–18 (2004). There may be one exception to this rule: when broad social agreement prevails on the pertinent matter. See also LON L. FULLER, THE MORALITY OF LAW 50, 92 (rev. ed. 1964). In contemporary societies, however, this condition applies to very few issues.
45. The following paragraphs draw on DAGAN, supra note 43, at ch.9.
46. See supra text accompanying note 16.
too frequently revised so that they are sufficiently stable,\textsuperscript{47} legal subjects or their lawyers remain aware of the “character” of these property institutions and can form their expectations accordingly.

Finally, the commitment to multiplicity of the structurally pluralistic conception of property is particularly important for the rule of law prescription of constraining the power of lawmakers who, as fallible human beings, may make mistakes and, at times, even prefer their self-interest to the public good. I do not deny that, at moments of legal pathology—namely, litigation—the power over the litigants that a pluralistic regime assigns decision-makers is no different from that allocated by a monist system. But these endgame dramas should not obscure the significance of the \textit{ex ante} choices available to people.\textsuperscript{48} From this perspective, a structurally pluralistic property law is again superior to its monist counterpart, because it opens up options for choice rather than channeling everyone to the one possibility privileged by law.\textsuperscript{49} It allows individuals to navigate their course so that they bypass certain legal prescriptions, avoiding their potential implications and hence the power of the people who have issued them.\textsuperscript{50}

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I have discussed the commitments of property’s structural pluralism to autonomy and to the rule of law partly because Merrill’s scholarship appears to me to be largely driven by these two commitments. But recall that Tom is known for the proposition that, his many critics notwithstanding, Blackstone was essentially correct: the right to exclude is the core of property. So let me conclude with

\textsuperscript{47} Recall that “the rule of law does not require that law’s guidance never change. It requires that the prospect of change should not make it impossible to use the existing law as a guide.” TIMOTHY A.O. ENDICOTT, \textit{The Impossibility of the Rule of Law}, in \textit{VAGUENESS IN LAW} 185, 193 (2000).


\textsuperscript{49} Cf. Richard A. Epstein, \textit{Bundle-of-Rights Theory as a Bulwark Against Statist Conceptions of Private Property}, 8 ECON. J. WATCH 223, 233 (2011) (arguing “it is the unitary conception of property rights that is in fact vulnerable to creeping statism”).

some observations on the role of Blackstonian ownership within the structurally pluralist conception of property.

To begin with, my claim on the significance of multiplicity for self-authorship implies rejecting the proposition that exclusion is the essence of property. An autonomy-based understanding of property should not privilege the fee simple absolute by treating its characteristics as fundamental features of property as a whole, thus suppressing other property institutions as variations on a common theme or marginalizing them as peripheral exceptions to a robust core. Blackstonian ownership should not be conceptualized as the “core” or the “default” of our understanding of property.51

Objecting to these excesses, however, does not mean that Blackstonian ownership has no significant role. Quite the contrary: the inclusion of Blackstonian ownership in the repertoire of property law adds a crucial option, which contributes to self-authorship. Moreover, Blackstonian ownership is singular among property institutions in its zealous protection of our independence. By shielding individuals from the claims of others and from the power of the public authority, unqualified ownership guarantees the untouchable private sphere that is a prerequisite of personal development and autonomy.52

Though independence is not our ultimate value, since real autonomy requires self-authorship rather than merely independence, it is still a constitutive component of self-authorship and thus intrinsically, rather than merely instrumentally, valuable.53 Independence, then, explains the unique place of Blackstonian ownership, implying that a liberal polity must offer its members the realm of solitude that such unqualified ownership represents. This is, I argue, what makes Blackstonian ownership a particularly important property institution.

Three conclusions follow from the unique role of Blackstonian ownership. The first conclusion is that although indeed singular in its

51. Contra Merrill & Smith, supra note 7, at 1851–52, 1891–92; Smith, supra note 18, at 1706. Indeed, even Merrill’s concession that property entails exclusion only vis-à-vis “strangers”—as opposed to “potential transactors,” “persons within the zone of privity,” and “neighbors”—does not go far enough. See Thomas W. Merrill, The Property Prism, 8 ECON. J. WATCH 247, 250 (2011).

52. See, e.g., Bruce A. Ackerman, Private Property and the Constitution 71–76 (1977); John Rawls, Political Liberalism 298 (1993).

indispensability, Blackstonian ownership should not aspire to exclusivity. Indeed, it functions best as part of a liberal repertoire of property institutions conducive to self-authorship. A second, related conclusion touches on the legitimate scope of Blackstonian ownership. Insofar as the role of this property institution is to ensure individuals private sovereignty over the external resources necessary for their independence and self-determination, it can cover only the type and scope of resources needed to secure that purpose. Beyond such property-for-safe-haven rights—think about property law’s privilege of homeownership, for example—other (notably utilitarian) justifications are obviously adduced for property rights. But property rights that rely on those justifications need not, and often should not, be absolute. In these cases, and especially where the claim of non-owners to access the resource at hand is important for their own self-authorship, owners’ dominion should be subject, as it often is, to other people’s right to entry or to inclusion. Finally, grounding Blackstonian ownership on personal autonomy means that the legitimacy of this property institution does not rely on a specific event (as in Locke’s claims of labor or Hegel’s claims of occupation), but on its importance as such. This general right-based justification implies that every human being is entitled to some such property rights or, more precisely, entitled to as much Blackstonian ownership as needed to sustain human dignity. The enforcement of Blackstonian owners’ rights in property law, then, cannot be justified if the law does not simultaneously guarantee similar resources to non-owners.

55. See Dagan, supra note 8, at ch. 2.
THE AFFIRMATIVE DUTIES OF PROPERTY OWNERS:
AN ESSAY FOR TOM MERRILL

ROBERT C. ELICKSON

ABSTRACT

As a result of his ownership of property, Rip Van Winkle might have incurred a variety of criminal and civil liabilities during the course of his twenty-year sleep. Possibilities are a conviction for neglecting care of his livestock, civil liability to a neighbor for having failed to contribute to the costs of a fence along a common boundary, and forfeiture of his lands for having failed to pay local property taxes. This essay investigates the nature of these affirmative obligations of owners. Concerns about curbing information costs, a central theme in Tom Merrill’s scholarly works, underlie the structure of many of these duties, and help explain their relative paucity. The analysis illuminates several recent strands of property theory, including Larissa Katz’s notion that a state may choose to “govern through owners.” It reveals major defects in Gregory Alexander’s argument that owners should bear a generalized obligation to share their wealth. Alexander’s proposed duty would greatly increase the information costs that individuals would bear in navigating daily life, and would embroil property adjudicators in tasks far better handled by drafters of tax and welfare legislation.

INTRODUCTION

A statue of Thomas Drummond, British Under-Secretary for Ireland from 1835 to 1840, stands in Dublin’s City Hall. Inscribed on its base is a quotation from a letter that Drummond wrote to landlords vexed by agrarian uprisings: “Property has its duties as well as its rights.” Drummond was prescient. Especially since 2000, North American property scholars have been putting forth rival theories of the overarching nature and normative purposes of property institutions. The

* Walter E. Meyer Professor of Property and Urban Law, Yale Law School. This essay expands on remarks presented on October 18, 2013, at the 10th Annual Brigham-Kanner Property Rights Conference, William & Mary Law School, Williamsburg, Virginia.

1. R. BARRY O’BRIEN, THOMAS DRUMMOND, LIFE AND LETTERS 284 (1889) (Letter to the Tipperary Magistrates).
issue that Drummond highlighted—the duties of property owners—is central in three emerging clusters of property theory.

This essay is written in honor of Tom Merrill, the imminently deserving recipient of the most recent Brigham-Kanner Prize for property scholarship. Influenced by the law-and-economics approach, Merrill, both by himself and in works co-authored with Henry Smith, has emphasized the merits of arranging property institutions with an eye to reducing the informational burdens and other transaction costs of resource management. Merrill, however, has yet to systematically address issues of owners’ duties. I contend that Merrill’s information-cost perspective helps illuminate the nature of the duties that legal systems impose on owners of property. For example, when an owner has pertinent “local knowledge”—a favorite phrase of Tom’s—lawmakers are more likely to impose a duty that exploits that comparative advantage.

Larissa Katz, a participant in this conference, is a pioneering member of what might be called the Canadian school, currently a smallish cluster of theorists. Katz contends that an owner commonly should be conceived as holding an “office” that carries with it certain affirmative responsibilities to provide services to the state. Katz and kindred analysts thereby feature an aspect of property law that law-and-economics scholars have seldom explored.

Gregory Alexander is perhaps the most conspicuous member of the self-styled Progressives, a third pertinent cluster of property law scholars. Alexander contends that an owner of large amounts of property is obligated, or at least should be, to share that wealth to enhance the capabilities of others who are less well-endowed. I argue, contrary to Alexander, that property law seldom in fact imposes this duty, and indeed should not. My claim is not that redistribution from rich to poor is inappropriate, but that it is better pursued by means of broad tax and welfare programs, as opposed to tinkering with the rules of property law. Merrill’s emphasis on information costs supports this view. To help individuals navigate the world, the law should

define entitlements in particular assets as simply as possible.\textsuperscript{5} Redistributive efforts require determinations of the wealth and capabilities of specific individuals. To make these determinations, tax officials and welfare workers are better situated than judges, not to mention people navigating everyday life.

\textbf{I. TOM MERRILL: THE NATURAL}

I first met Tom Merrill when he was a student in one of my courses. I wish I could say that the course was Property, but actually it was Torts. Tom has deep roots in Iowa, and law school enrollments have a regional tilt. After a stint in Oxford on a Rhodes scholarship, in fall 1974 Tom chose to matriculate at the University of Chicago Law School. As it happens, during the 1974–1975 academic year I was a visiting professor at Chicago. During the winter and spring quarters, I was originally scheduled to teach Property to half the first-year students. In October, however, Harry Kalven unexpectedly died of a heart attack at age 60. Kalven had traditionally taught Torts to Chicago’s entire first-year class. At Dean Phil Neal’s request, I agreed to switch from Property to Torts, a course that I had taught several times.

The Torts class included about 170 students. Tom was a bit older than most, and one of the most memorable members of an exceptional group that included a half-dozen budding talents who would later win acclaim in legal academia. I included in my assignments and lectures large doses of Calabresian analysis, the cutting edge of Torts theory at the time.\textsuperscript{6} Calabresi stressed the relevance to law of asymmetries in actors’ information, a theme that Tom likely found congenial.

After Tom entered teaching, we gradually rekindled our relationship. Particularly memorable was a 2001 conference on “The Evolution of Property Rights” that Henry Smith and Tom organized at Northwestern Law School. During 2008–10, Tom’s overly brief stint on the Yale Law faculty, we enjoyed regular Friday lunches. It of course helped that our wives, Kim and Lynn, hit it off.

\textsuperscript{5} Merrill’s contribution to this volume stresses the benefits of enabling individuals to quickly “differentiate between things that are mine and not mine as we navigate through everyday life.” Thomas W. Merrill, \textit{Property and the Right to Exclude II}, 3 Brigham-Kanner Prop. RTS. CONF. J. 1, 2 (2014).

Tom is, without question, one of the leading property theorists of our era. He works ceaselessly and produces more high-quality work in an hour than many of us can produce in three. And he possesses exceptional analytic abilities and expository skills. Aware of these comparative advantages, Tom, when turning to a fresh topic of law, typically starts by laying out, with enviable clarity, both the issues and the landscape of the current scholarly debate. These attributes have enabled him to become a central figure in two relatively disparate fields—property law and federal administrative law.

Carol Rose and I twice co-edited editions of a reader entitled *Perspectives on Property Law.* These editions included excerpts from about 50 articles and books, each followed by our own notes and questions. Partly to control a shameful tendency to include our own writings in the reader, Carol and I imposed a ceiling of three on the works of any individual author. The primary author to bump up against this ceiling was Tom Merrill. In the second edition, published in 1995, Carol and I included excerpts from Tom’s articles on adverse possession and the trespass/nuisance distinction. When preparing the third edition, which appeared in 2002, Carol and I were committed to including lengthy sections of two articles that Tom had published in 2000. One addressed the political economy of tradable emissions permits. The other was the classic article on the *Numerus Clausus* principle, the maiden effort of the team of Merrill and Smith. To enforce our ceiling of three, Carol and I had to excise from the reader one of Tom’s worthy earlier works.

Few legal casebooks achieve major conceptual advances. In the field of property, an exception was the Dukeminier and Krier casebook of 1980. In 2005, Merrill teamed with Smith to produce a casebook that represented another quantum leap in property theory.

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Among their many innovations, Merrill and Smith folded landlord-tenant law and trust law into an overarching conception of “entity property,” and placed the takings issue under the broad heading of “government forbearance” in the altering of property rules. Unlike many awardees of the Brigham-Kanner prize, Tom also is a master lawyer. His name has appeared on 91 briefs filed in cases before the United States Supreme Court. While his three-year stint as Deputy Solicitor General accounted for most of these, 24 of the 91 either preceded, or followed his work in that role. In the famous *Kelo v. City of New London*, Merrill’s brief, written with John Echeverria to defend the constitutionality of the city’s condemnation, was one of 42 submitted on the merits. Tea leaves suggest that it was influential. Justice Stevens’s majority opinion cites an obscure Supreme Court precedent, *O’Neill v. Leamer*, a case mentioned in only 2 of the 42 briefs: Merrill and Echeverria’s and one other. Besides analyzing law, Tom has directly contributed to its making.

II. OWNERS’ DUTIES, NEGATIVE AND AFFIRMATIVE

As Thomas Drummond contended, property owners indeed have both entitlements and obligations. When examining obligations, legal analysts conventionally distinguish between negative duties—that is, obligations to refrain from certain behaviors—and affirmative duties—that is, obligations to act. This distinction appears, for example, in the law of covenants, which traditionally has been particularly hostile to requiring a transferee of land to assume the burdens of an affirmative covenant.

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12. This number was the product of a search, conducted on November 11, 2013, of Westlaw’s SCT-BRIEF-ALL database.
13. Tom signed 8 of the 24 in his capacity as a supervisor of Yale Law School’s Supreme Court Clinic.
15. 239 U.S. 244 (1915).
16. *Kelo*, 545 U.S. at 483 n.11.
18. See, e.g., Eagle Enterprises, Inc. v. Gross, 349 N.E.2d 816, 820 (N.Y. 1976) (stating that an “affirmative covenant is disfavored in the law because of the fear that this type of obligation imposes an ‘undue restriction on alienation or an onerous burden in perpetuity’” (quoting Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832, 835 (N.Y. 1959))). Roman jurists similarly were averse to the running of burdens of affirmative covenants. *See BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW* 142–43 (2008).
The distinction between negative and affirmative duties is slippery, and partly for that reason, controversial. The duty of the owner of a cement plant to control the emission of particulates, for example, could be characterized as a negative duty to avoid acts of pollution, or as an affirmative duty to install abatement technologies. Because both tort and criminal liabilities are presumptively thought to be imposed for wrongful acts, as opposed to failures to act, scholars in those two fields have been the primary analysts of the propriety of liabilities for omissions.19

A. The Negative Duties of Owners

Although the bulk of this essay focuses on owners’ affirmative duties, a preliminary summary of their negative duties is appropriate. In a society with private property, the owner of a resource typically has broad powers to: (1) determine its use; (2) transfer it by sale, gift, or otherwise; and (3) exclude others from it.20 Nonetheless, it is old hat that the law circumscribes in many ways an owner’s exercise of these three powers. In an introductory course on property law, a student encounters an array of doctrines and statutes that impose civil and criminal penalties on owners who misbehave. Nuisance doctrines and zoning ordinances, for example, limit a landowner’s choices of uses, and traffic laws constrain the choices of the owner of a motor vehicle. Limits on owners’ powers of alienation also are common.21

And, as Merrill himself has stressed, an owner’s right to exclude is

19. See, e.g., Arthur Leavens, A Causation Approach to Criminal Omissions, 76 CAL. L. REV. 547, 559–61 (1988); Ernest J. Weinrib, The Case for a Duty to Rescue, 90 YALE L.J. 247 (1980). Weinrib offers a distinction between a “real nonfeasance” and a “pseudo-nonfeasance.” In an instance of the latter type, the duty-bearer would have participated in some fashion in creating the risk that performance of the duty would have mitigated. Id. at 254–58. Christopher Serkin, Passive Takings: The State’s Affirmative Duty to Protect Property, 113 MICH. L. REV. (forthcoming 2014), provides a valuable review of sources that explore the act/omission distinction.

20. Compare Merrill, supra note 2, at 2068:
[What is often loosely described as the “right to exclude” can be characterized with greater precision as twin rights of residual managerial authority and residual accessionary rights. Give someone the right to exclude the world from some thing, and, almost without exception, that person will have residual managerial authority and residual accessionary rights over the thing. The right to exclude is critical not for its own sake, but because it yields these two further attributes.

hardly unfettered. For instance, a stranger may have a right to enter private land for reasons of private or public necessity, and the owner of a public accommodation presumptively must serve all comers.

Property scholars have devoted little attention to a particular set of negative duties that are pertinent to my later discussion of Gregory Alexander’s claim that property law inherently has a redistributive thrust. Some legal systems have directed an owner of rural lands to refrain from impeding entries by individuals searching for food. Among the relevant passages in the Hebrew Bible is Leviticus 19:9–10:

When you reap the harvest of your land, you shall not reap to the very edges of your field, or gather the gleanings of your harvest. You shall not strip your vineyard bare, or gather fallen grapes of your vineyard; you shall leave them for the poor and the alien.

The Deuteronomic Code employs more sharply edged categories—“the alien, the orphan, and the widow”—to identify the beneficiaries of rights to enter fields. In ancient China, a similar crop-sharing norm seems to have been honored. In Europe during the Middle Ages, poor residents of open-field villages customarily were entitled to glean crop remnants after a harvest. Venerable American decisional law similarly recognized the rights of hunters and fishers to enter unenclosed and uncultivated private rural lands to search for

22. See, e.g., Merrill, supra note 5, at 8–9; see also Thomas W. Merrill & Henry E. Smith, Property: Principles and Policies 399–449 (2d ed. 2012) (on “exceptions to the right to exclude”).
23. See infra text accompanying notes 81–113.
25. The classic collection of ancient Chinese poetry, comprising works dating from the 11th to 7th centuries B.C., includes the following verse:
   There stand some backward blades that were not reaped,
   Here some corn that was not garnered,
   There an unremembered sheaf,
   Here some littered grain.
   Gleanings for the widowed wife.
THE BOOK OF SONGS 171 (Arthur Waley trans., 1937). I thank Shitong Qiao for providing this source.
With the rise of the welfare state, these legal rights to enter private lands to obtain food have mostly been eliminated.\textsuperscript{28}

\textbf{B. The Affirmative Duties of Owners}

Property scholars, although conscious of many of the negative limits on an owner’s use, transfer, and exclusion rights, have devoted little systematic attention to owners’ affirmative duties.\textsuperscript{29} Most of what follows is a foray into this underexplored terrain. Because the negative/affirmative distinction potentially is elusive, for clarity I invoke the legal situation of a property-owning Rip Van Winkle who has fallen into a 20-year slumber.\textsuperscript{30} The affirmative duties of owners are revealed by the civil and criminal liabilities that Van Winkle might incur while asleep.\textsuperscript{31} As we shall see, these might include a criminal conviction for neglecting care of livestock, civil liability to a neighbor for having failed to contribute to the neighbor’s costs of fencing a common boundary, and forfeiture of Van Winkle lands for failure to pay local property taxes.

Although affirmative duties of this sort are hardly unknown, for three reasons lawmakers tend to be reluctant to impose them. First and foremost, an affirmative duty typically impinges on an individual’s freedom and self-actualization more than a negative duty does.\textsuperscript{32} A homeowner is apt to resent a city ordinance that orders a homeowner to keep an abutting public sidewalk in good repair more than an

\textsuperscript{27} See, e.g., VT. CONST. ch. II, § 67 (entitling hunters to enter unenclosed lands); McKee v. Gratz, 260 U.S. 127 (1922) (Holmes, J.) (recognizing customary rights to enter unenclosed and uncultivated land to hunt or fish, until the owner sees fit to prohibit entries); McConico v. Singleton, 9 S.C.L. (2 Mill) 244 (1818) (affirming a right to hunt on unenclosed and uncultivated private land).

\textsuperscript{28} See infra text accompanying notes 110–12.


\textsuperscript{30} In 1819, Washington Irving first published the short story that featured this character.

\textsuperscript{31} By this test, the duty of a rural landowner to allow entries by hunters and gleaners is negative, not affirmative, because those entrants would be able to walk past a sleeping Van Winkle.

\textsuperscript{32} See Oskar Liivak & Eduardo M. Peñalver, \textit{The Right Not to Use in Property and Patent Law}, 98 CORNELL L. REV. 1437, 1466–67 (2013); Weinrib, \textit{supra} note 19, at 268. A lyric from \textit{Me and Bobby McGee}, a Kris Kristofferson song most famously sung by Janis Joplin, expresses an owner’s possible reaction to the legal imposition of excessive affirmative duties: “Freedom is just another word for nothing left to lose.”
ordinance prohibiting raucous late-night parties. A government that compels an owner to act takes command of a portion of the owner’s resources, and, when duties are non-delegable, time. By contrast, a negative duty limits an owner’s set of choices but does not impinge on the freedom to select from the options that remain.

Second, affirmative duties have a disproportionate tendency to add complexity to property law. Two owners of abutting lots can readily understand a rule negating any legal duty to contribute to the costs of a unilaterally built party wall. By contrast, if the law were to impose a duty to contribute, the owners would be more likely to consult attorneys and become embroiled in litigation.

Third, the legal imposition of an affirmative duty is particularly likely to diminish intrinsic motivations to act in the same manner. Compared to a person who has altruistically refrained from acting, a person who has committed a helpful act is more likely to feel a warm glow of self-satisfaction and to anticipate status rewards from others. Because the legal compulsion of an act typically diminishes these intrinsic rewards, the creation of a new affirmative legal duty tends to be less successful in altering behavior than would otherwise be expected. There is little evidence, for example, that a law mandating rescues by bystanders actually increases the incidence of bystander rescues. Similarly, a law requiring an abutting owner to contribute to the costs of a party wall might do little to increase cost-sharing between neighbors.


35. Few American states impose a duty on a bystander to rescue a stranger even if the rescue would be virtually costless. See EPSTEIN & SHARKEY, supra note 17, at 511–23. In these situations, the bystander has superior information and superior ability to act, conditions commonly found in contexts where affirmative duties are imposed. The results of an empirical study of rescue situations, however, suggest that creation of a duty to rescue would not noticeably increase the incidence of Good Samaritan behavior. David A. Hyman, Rescue Without Law: An Empirical Perspective on the Duty to Rescue, 84 TEX. L. REV. 653, 712 (2006).
III. THE AFFIRMATIVE DUTIES OF AN OWNER WHO IS A CHEAPEST SERVICE PROVIDER

I now offer a selective overview of the affirmative legal duties of owners. This Part reviews owners’ obligations to provide in-kind services. Parts IV and V turn to the obligations of owners to contribute funds to help finance the provision of public goods.

A. Governing Through Owners Who Have Special Information

Owners and other decentralized actors commonly have fine-grained information that a government agent could not readily obtain. As Merrill has emphasized, a system of private property takes advantage of this local knowledge by, for example, giving an owner wide latitude to choose among alternative uses of a resource.36 Many of the affirmative duties of owners are similarly based on the likelihood that they have special knowledge. In contexts where they do, a government may decline to engage staff or contractors to provide a particular service but instead call on owners to provide it.

This possibility brings to mind Guido Calabresi’s pioneering emphasis on the relevance, in tort law, of asymmetries in information and ability to act. Calabresi urged the imposition of tort liabilities on “cheapest cost avoiders.”37 Property law, for its part, tends to require an owner to affirmatively provide a service only when the owner is the “cheapest service provider,” that is, the party most likely to both possess pertinent information and be in the best position to act on that knowledge. To borrow Larissa Katz’s locution, when these conditions are met, a state understandably may choose to govern through owners.38 Examples follow.

B. Duties of Owners of Animals and Custodians of Children

Responding to people’s altruistic feelings about some members of the animal kingdom, governments seek to protect domestic animals

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36. See, e.g., Merrill, supra note 2, at 2081.
37. Writing with Hirschoff, Calabresi urged lawmakers to allocate the risks of accidents to the party “in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made.” Guido Calabresi & Jon T. Hirsch, Toward a Test for Strict Liability in Torts, 81 YALE L.J. 1055, 1060–61 (1972).
38. See Katz, supra note 3.
from abuse and neglect. To accomplish this goal, governments conscript the services of animals’ owners and custodians. An owner who has failed to feed or otherwise care for a pet or farm animal risks a criminal conviction,\(^{39}\) forfeiture of the neglected animal,\(^{40}\) and perhaps an injunction against future possession of similar animals.\(^{41}\) Transaction cost considerations underlie this assignment of responsibility. The owner of a domestic animal typically is physically proximate to it and has special knowledge of both its condition and its likely response to various forms of care. The provision of care to an animal also tends to enhance its value, a fact that enhances the political legitimacy of a legal obligation of animal care.

Few of us will assume an affirmative legal duty more momentous than that of care for a child. A child, of course, is not conventionally considered a proper object of ownership. Indeed, to refer to a child as someone’s “property” is to dehumanize the child. Nonetheless, the considerations just identified help illuminate why legal systems impose duties of child care on parents and custodians and also why these obligations enjoy virtually universal political support.\(^{42}\) Love impels much of the care that parents and other custodians bestow on children. But family law serves as a backstop. Failure to provide care to a child may give rise to a variety of state interventions. These

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39. See, e.g., ALA. CODE § 13A-11-14(a)(2) (2014) (criminalizing the “cruel neglect” of an animal in custody); IND. CODE ANN. § 35-46-3-7(a) (West 2014) (criminalizing the reckless, knowing, or intentional abandonment or neglect of a vertebrate animal in custody); People v. Riazati, 129 Cal. Rptr. 3d 152 (Cal. App. 2011) (affirming convictions for neglect of various animals); Andrew N. Ireland Moore, Defining Animals as Crime Victims, 1 J. ANIMAL L. 91 (2005).

40. See, e.g., State v. Sheets, 677 N.E.2d 818 (Ohio Ct. App. 1996) (affirming orders that defendant surrender neglected horses and not own horses in county during probationary period). In a number of other contexts, legal rules incentivize owner care by authorizing forfeiture of the neglected asset. A landowner who fails to police against entrants, for example, may forfeit ownership to a long-term adverse possessor. And the owner of a trademark who has failed to detect and prevent misleading uses of the mark may be held to have forfeited it to the public domain. See, e.g., Dawn Donut Co. v. Hart’s Food Stores, Inc., 267 F.2d 358, 366 (2d Cir. 1959).


42. Merrill and Smith are willing to apply property concepts to claims to things, but not persons. See MERRILL & SMITH, supra note 22, at 19. I take a more expansive view of the potential applications of property theory. See Robert C. Ellickson, Two Cheers for the Bundle-of-Sticks Metaphor, Three Cheers for Merrill and Smith, 8(3) ECON. J. WATCH 215, 219 (Sept. 2011); cf. JOHN LOCKE, 2 TWO TREATISES ON CIVIL GOVERNMENT § 27 (Peter Laslett ed., Cambridge Univ. Press 1988 (1690)) (famously asserting that “every man has a property in his own person”).
range from the mild, such as a visit by a representative of a child protection services agency, to the major, such as loss of custody of the child. Less commonly, a guardian’s neglect of duty to a child might trigger prosecution for a crime and, conceivably, tort liability to the child. The typical superiority of both a guardian’s knowledge of a child’s condition and special capacity to act on that knowledge makes these sanctions uncontroversial.

C. Affirmative Duties to Neighbors in Time

An owner of a time-limited interest in a tangible asset typically has a variety of affirmative obligations to provide services to owners of prior and subsequent interests. Consider a residential tenant who has leased a top-floor apartment for a term of years. The tenant has a present interest in the leased premises, and the landlord, a reversion. Broadly accepted legal rules impose affirmative duties, perhaps unalterable by contract, on both parties to the lease. The rules of permissive waste require the tenant to affirmatively care for the apartment, for example, by closing windows during a violent rainstorm. Again, this rule rests on asymmetries in information and capacity to act. The tenant typically would have unrivaled knowledge of what windows are open, and would be in the best position to close them.

A landlord’s duties to a residential tenant under the implied warranty of habitability rest on a similar transaction-cost asymmetry. Adopted most famously in Javins v. First National Realty Corporation, this immutable warranty compels a landlord to repair


46. See Liivak & Peñalver, supra note 32, at 1461–62.

47. 428 F.2d 1071 (D.C. Cir. 1970).
certain defects in a leased abode, such as a roof leak. Although Judge Skelly Wright’s opinion in Javins includes passages that suggest that distributive-justice considerations influenced his thinking, the opinion stresses transaction-cost considerations. Judge Wright observes that landlords typically have better knowledge than tenants about how to repair building defects, better access to repair sites, and better incentives to consider the long-run benefits of repair options. In these instances they are, in short, cheapest service providers.

D. Affirmative Duties to Neighbors in Space

According to Mancur Olson, even a state functioning as a “stationary bandit” would choose to provide public goods that its citizens would value. Economists define a public good as a service that is either non-rivalrously consumed, such as national defense, or a service, such a local playground, for which a provider could not readily collect fees from entrants. Because a private entrepreneur typically cannot make a profit when providing a public good, these services are natural candidates for governmental undertakings.

Although a government commonly provides public goods through its own employees or those of private contractors, in some contexts it may conscript property owners, particularly landowners, to labor for public ends. Katz, a pioneering analyst of these practices, invokes as her central example the affirmative obligation, in some cities, of a landowner to clear snow from an abutting public sidewalk. Some cities have ordinances that subject an owner who has failed to shovel

48. Judge Wright quotes a New York decision that asserts that landlords are wealthier than tenants and have superior bargaining power. Id. at 1079–80. Other passages in Javins, however, downplay poverty as a factor. See, e.g., id. at 1074: “[w]hen American city dwellers, both rich and poor, seek ‘shelter’ today . . . .”

49. Id. at 1078.

50. Mancur Olson, Power and Prosperity 6–12 (2000). In Governing Through Owners, supra note 3, at 2030–35, Katz envisions state leaders and landowners as rivals for power, as they indeed may be. But in many contexts, a government may be more plausibly viewed as an institution that residents and owners voluntarily establish to provide public goods that they would not otherwise enjoy.

51. See Katz, supra note 3, at 2031, 2048–51 (observing that the benefits of many government services are territorially limited).

52. Id. at 2031–32, 2051. Katz stresses the affirmative duties of landowners to provide in-kind services to neighbors, not their duties to contribute to the funding of services that others provide (the subject of Parts IV and V of this Essay).
to a fine or other criminal sanction. Tort law also may serve as a prod. At least one state supreme court has held that an owner of a commercial property has a duty of care to pedestrians who might slip on ice on an abutting public sidewalk.

A municipality that orders landowners to shovel snow from abutting sidewalks takes advantage of their local knowledge. Katz quotes an excerpt from an opinion of the New York Court of Appeals: “It is not expected, and cannot be required, that the [city] shall itself forthwith employ laborers to clean all the walks, and so accomplish the object by a slow and expensive process, when the result may be effected more swiftly and easily by imposing that duty upon the citizens.” It is significant that a shoveling ordinance imposes on a landowner the duty to shovel an abutting sidewalk, and not, for example, an equivalent stretch located directly across the street. A shovel-your-own-sidewalk policy eliminates a variety of transaction costs. The distance of a shoveler’s walk to the task is slightly reduced. Far more important, a shovel-your-own-sidewalk policy takes advantage of local knowledge. The owner of a lot knows best, for example, which of its shrubs can best withstand a pile of deposited snow. In addition, because an owner uses an abutting sidewalk more often than the sidewalk across the street, the owner is more sharply incentivized to perform the task well. This increases the likelihood of voluntary compliance with an imposed duty to shovel. And again, when the performers of a duty reap some benefits from performance, political opposition to imposition of the duty is lessened.

A frontier issue is the legal duty of an owner of land to affirmatively groom the premises for the benefit of neighbors. An owner who fails to attend to the appearance of an abandoned building increasingly risks nuisance liability to neighbors, imposition of a municipal fine, and government condemnation of the structure. Some

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53. See id. at 2032 n.7 (citing various ordinances, some of them likely imposing criminal sanctions).

54. See Mirza v. Filmore Corp., 456 A.2d 518, 521 (N.J. 1983). This decision is an outlier. Most state courts adhere to the traditional common-law rule that an abutting owner has no such duty. See, e.g., Wiseman v. Hallahan, 945 P.2d 945 (Nev. 1997) (reviewing decisional law).


56. Katz’s discussion of the allocation of responsibilities for suppressing a fire in a theater implicitly recognizes the importance of economizing on information costs. See Katz, supra note 3, at 2041–43.

57. See, e.g., Freeman v. City of Dallas, 242 F.3d 642 (5th Cir. 2001) (rebuffing owner’s constitutional challenge to city’s demolition of two vacant and deteriorated apartment buildings);
legislatures and courts similarly have overturned the traditional rule
that a landowner has no duty to abate hazards posed by the growth
of natural vegetation.\textsuperscript{58}

In exceptional circumstances, a government may require a land-
owner to erect a structure on a vacant parcel. In ancient Rome, an
owner who had demolished an apartment building (\textit{insula}) had a duty
to immediately replace it, a policy likely motivated in part to assure
lateral support of adjoining structures.\textsuperscript{59} Some governments in early
Colonial America required landowners, at pain of forfeiture to the col-
lectivity, to improve lots that had been allocated to them.\textsuperscript{60} To perfect
claims under the Homestead Act of 1862, owners similarly had to im-
prove their lands.\textsuperscript{61}

All of the affirmative duties discussed in this section are far more
politically contested than, say, the affirmative duty of a guardian to
care for an animal or a child. Many cities, for example, do not re-
quire an abutting owner to clear snow from a public sidewalk, and
some state legislatures and local governing bodies have enacted laws
that limit the tort liability of an abutter to a sidewalk pedestrian.\textsuperscript{62}
In addition, in most jurisdictions, a landowner has no affirmative
duty to control natural conditions or build a structure.\textsuperscript{63} And, to the

\begin{footnotesize}
\textsuperscript{58} See, e.g., City of Montgomery v. Norman, 816 So. 2d 72 (Ala. Crim. App. 1999) (rejecting


\textsuperscript{60} See John F. Hart, \textit{Colonial Land Use Law and Its Significance for Modern Takings

\textsuperscript{61} Act of May 20, 1862, ch. 75, § 2, 12 Stat. 392, 392 (repealed 1976).

to exempt owner of two-family home from duty of care); Divis v. Woods Edge Homeowners’
Ase’n, 897 N.E.2d 375 (Ill. App. Ct. 2008) (construing Illinois statute that requires abutter’s
misconduct to be willful or wanton).

\textsuperscript{63} See Jones, supra note 58, at 1270–77; Joseph William Singer, \textit{Property as the Law of
Democracy}, 63 DUKE L.J. 1287, 1319–24 (2014) (describing negative impacts of empty lot in
downtown Boston).
\end{footnotesize}
consternation of some observers, the owner of a patent has no duty to use it. Affirmative legal duties have downsides—in particular, loss of liberty, added legal complexity, and the devaluation of intrinsic motivation. In some contexts, lawmakers seem to consider these decisive.

IV. THE DUTIES OF AN OWNER TO CONTRIBUTE TO THE COSTS OF PUBLIC GOODS

A government, instead of commanding an owner to render a valued service, may order the owner to pay money to compensate another party that has rendered the service. A landowner thus might be legally required to bear a portion of the costs of a party wall that a neighbor has built or the costs that a municipality has incurred to repave a street. Because a duty to contribute funds does not commandeer an owner’s time, an affirmative duty of this sort impinges less on liberty interests than does a non-delegable duty to perform a service.

Legal duties to contribute to project costs vary, primarily according to the number of parties benefiting from the project. To distinguish the range of contexts, I employ three adjectives. When the beneficiaries of a project are few, as in the case a party wall, the unilateral builder of the wall is conferring private benefits. In contexts where beneficiaries are more numerous, the law of special assessments provides pertinent adjectives. In special assessment law, the repaving of a minor street or other improvement that benefits a few dozen or hundred landowners is said to confer special benefits on them. By contrast, the building of a new city hall or other broadly beneficial project is said to confer general benefits. A local government traditionally has been entitled to impose special assessments on landowners to recoup special benefits, but not general benefits.

64. See Liivak & Peñalver, supra note 32 (asserting that a duty to use a patent would deter creation of blocking patents).

65. See supra text accompanying notes 32–35.

66. The owner of a patent typically has special information about the patent and is best situated to provide it. One commentator therefore has proposed that a patent holder have a duty to disclose patent information to other researchers. See Lisa Larrimore Ouellette, Do Patents Disclose Useful Information?, 25 HARV. J.L. & TECH. 531, 586–96 (2012). When considering this proposal, lawmakers should also give weight to the downsides of affirmative duties.

A. Restitutionary Obligations to Private Benefactors

Owners of land and other resources of course may succeed in contracting with one another to finance a boundary fence or other mutually beneficial private project. Even when parties are few, however, transaction costs may thwart contracting. In such an instance, the legal imposition of an affirmative duty to contribute is a possible alternative. Perhaps to deter free-riding, in some instances judges have held that the law of restitution requires an urban landowner to defray part of the costs that a neighbor incurred to improve a party wall.68 And a few state statutes require, in some situations, a rural landowner to partially reimburse an immediate neighbor for costs incurred to fence a common boundary.69

In small-number contexts, however, this legal approach is unusual. In the absence of a contract, in most jurisdictions there is no common-law duty to share the costs of a party wall.70 The co-owner of a condominium unit similarly is not unilaterally entitled to redo the kitchen and force the other co-owners to contribute to the costs of the renovation.71 Some state courts have even held that a statute mandating the sharing of fence costs between abutting neighbors violates constitutionally protected property rights.72 In contexts where benefits are private, lawmakers typically conclude, on balance, that it is better to force the potential beneficiaries of a project to contract ex ante. They may sense that this approach not only is less legally

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68. See, e.g., Campbell v. Mesier, 74 Johns. Ch. 333 (N.Y. Ch. 1820) (Kent, Ch.).
71. See MERRILL & SMITH, supra note 22, at 640. In the co-ownership context as well, parties are highly unlikely to turn to formal law when resolving disputes. See ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 120–23 (2008).
72. See, e.g., Sweeney v. Murphy, 334 N.Y.S.2d 239 (N.Y. App. Div. 1972) (holding that statute that required owner who had no livestock to share fencing costs was unconstitutionally “oppressive”); Choquette v. Perrault, 569 A.2d. 455 (Vt. 1989) (endorsing Sweeney outcome). But see, e.g., In re Petition of Bailey, 626 N.W.2d 190 (Minn. App. 2001).
complex than a rule that compels cost-sharing ex post but also is less likely to sap intrinsic motivations to cooperate.

B. Restitutionary Obligations to Governments or Associations That Confer Special Benefits

Especially between 1850 and 1930, local governments in the United States commonly imposed mandatory special assessments on private landowners to help finance street and utility improvements. Special assessment law permitted this practice only when the improvement in question could be characterized as a “local” one that would confer “special benefits.” Whatever its shortcomings, this financing system created political pressure against the installation of wasteful local improvements.

Special services to discrete territories commonly continue to be financed in similar fashion. In the twenty-first century, numerous special government districts, such as business improvement districts, provide ongoing services to discrete territories and primarily finance their operations by taxing owners of benefited lands. A developer who requires land purchasers to become members of common interest community, such as a condominium association, uses an analogous institutional arrangement. A member who fails to pay the community’s periodic assessments typically risks loss of the unit through a foreclosure proceeding. When a developer has neglected to empower the association’s governing board to impose mandatory assessments, some courts have held that this power is inherent.73 These rulings recognize that, as the beneficiaries of a project or service grow in number, the necessity of deterring free-riding swamps the downsides of imposing affirmative legal duties.

C. Duties to Pay General Taxes to Finance General Governmental Operations

A municipality cannot feasibly finance all of its operations by means of special charges on benefited landowners. To defray the local share of the costs of, for example, policing services, building a new city hall, and providing services to the homeless, a municipality tends instead to levy general taxes, most pertinently, ad valorem taxes on owners of real and (perhaps) personal property.

In the distant past, a government instead might require a landowner to contribute specific tangible inputs, not money, to the general public fisc. In the ancient Near East, the owners of large estates commonly were obligated to provide soldiers to the monarch.\(^\text{74}\) In early feudal England, an owner who held land by military tenure similarly was compelled to provide knights to the king.\(^\text{75}\) Compared to a monetary obligation, a duty to contribute a good or service in-kind is costly to administer and also intrudes more on taxpayer autonomy. As time has passed, these obligations therefore have mostly been cashed out. In England, for example, the feudal duties of landowners to provide knights to the king typically were eventually converted into obligations to pay money.\(^\text{76}\)

In the twenty-first century, a landowner’s most financially burdensome affirmative obligation typically is the duty to pay general property taxes to units of local government.\(^\text{77}\) These taxes have become major sources of local revenue, partly because the immobility of land makes them hard to evade.\(^\text{78}\) On awakening, Van Winkle likely would find that he had forfeited ownership of all his lands to the highest bidders at government tax sales.

V. AN OWNER’S DUTIES TO CONTRIBUTE TO THE COSTS OF SOCIAL INSURANCE

Progressive theorists of property law stress the importance of distributive justice and would employ doctrines of property law to advance that objective. In this Part, I contest not the Progressives’ goal,


\(^\text{76}\) See MERRILL & SMITH, supra note 22, at 502–03.

\(^\text{77}\) Governments also commonly tax property transfers and income that owners receive from property.

\(^\text{78}\) The benefits of a local government’s general activities within its boundaries tend to be positively capitalized into value of land. The property tax thus can be conceptualized as a lumpy benefits charge that a municipality imposes in return for conferring general local services. See WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 5–8 (2001).
but rather their choice of instrument. The provision of social insurance rightly has become one of the central functions of governments. Property doctrine, however, is an ill-suited means to that end.

A. The Inevitability of a System of Social Insurance

Virtually every human society develops institutions to transfer resources to those who have unusual difficulty in providing for themselves. In a hunter-gatherer band, for example, a successful hunter typically has a duty to share the carcass of a large animal with other band members. Some doctrines of property law have had a similar thrust. As noted, especially prior to the twentieth century, many societies have required owners of rural land to allow entry by hunters, gleaners, and others likely to be short of food. Over many millennia, hierarchical institutions typically have evolved to supplement, and perhaps even supplant, these more decentralized systems of social insurance. Prior to the twentieth century, the roles of religious and fraternal organizations commonly rivaled those of governments.

During the twentieth century, of course, governments in the United States, like those in other developed nations, greatly expanded their efforts to provide a safety net to those who might fall on hard times. Partly because a household can more easily move to a new locality or new state than to a new nation, the federal government has financed most of these efforts, primarily by drawing on revenues raised by means of payroll taxes and the progressive income tax. In many contexts, these welfare-state programs have crowded out more traditional methods of social insurance.

B. Gregory Alexander’s Conception of the Duty of a Property Owner to Share

A self-conscious school of Progressive property scholarship first surfaced in 2009. Merrill has plausibly identified “forced-sharing” as the

80. See supra text accompanying notes 24–27.
core principle that unites this scholarly cluster. The Progressives plainly vary in their views. To simplify, I focus on the work of Gregory Alexander, one of the most visible members of this loose alliance. Alexander asserts that an overarching “social-obligation norm” should govern, and to some extent already does govern, legal definitions of property rights. In Alexander’s words, “the state should be empowered and may even be obligated to step in to compel the wealthy to share their surplus with the poor.”

Alexander’s analysis of *Jacque v. Steenberg Homes, Inc.* suggests that he regards a routine property dispute to be an appropriate setting for the application of this sharing principle. Merrill and Smith start their casebook with *Jacque*, a controversy that arose out of events in a snowy field in rural Wisconsin. In that instance, the Supreme Court of Wisconsin reinstated a jury’s award of $100,000 punitive damages against a small corporation whose employees had failed to honor a retired farmer’s insistence that they not transport a mobile home across a field that he co-owned with his wife. Because the mobile home company had no plausible claim of necessity, Merrill, who favors a robust right to exclude, endorses the outcome in *Jacque*.

Alexander ultimately agrees that *Jacque* was correctly decided. But his approach requires him to determine whether his forced-sharing principle would justify a trespass in this instance. Alexander thus is compelled to assess the worthiness, as a matter of distributive justice, of the parties involved in the dispute. This requires him to determine how alternative outcomes would have affected the parties’ relative “capabilities” to achieve “human flourishing.”

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82. Merrill, *supra* note 5, at 23–24.
85. 563 N.W.2d 154 (Wis. 1997).
89. Alexander derives these conceptions from the works of Amartya Sen, Martha Nussbaum, and Aristotle. *Id.* at 749–51, 760–72.
occurred, he concludes that the trespass had jeopardized the Jacques’ “capability of sociality.” Turning to the mobile home company and its shareholders, Alexander declines to adopt a rule that corporations and shareholders inherently lack interests in human flourishing. He implies that their stakes instead are fact-sensitive. If denial of entry across the Jacques’ field would have affected the “economic viability” of Steenberg, the case might be difficult to resolve. But the interests of Steenberg and its shareholders were minor and “purely economic.” Alexander concludes, “Whatever flourishing interest of either Steenberg or its shareholders was implicated, then, paled in comparison with the Jacques’ interest in maintaining the security and safety of their family home.”

This approach places significant additional informational burdens on actors. Imagine that the Jacques, upon learning of Steenberg’s intentions, had telephoned an attorney for advice. A responsible attorney would then have had to anticipate how a judge ultimately would decide the matter if litigation were to ensue. If Alexander’s principles were to have been in effect, the attorney, among other tasks, would have had to quiz Harvey and Lois Jacques about their current levels of capability, determine the effects of an entry on their sense of security in their home, and assess the financial viability of the Steenberg firm.

Some devotees of the sharing principle might be willing to make lumpier decisions about the relative merits of distributive claims. The Deuteronomic Code entitled “aliens, orphans, and widows” to enter fields for food, even though some aliens, for example, certainly would not have been impecunious. This sort of class-based approach to the making of redistributive judgments likely would reduce informational burdens, but at the sacrifice of precision. Alexander, when analyzing Jacques, shows some willingness to generalize, for example, about homeowners’ needs for security. But, as noted, he is unwilling to conclude that a corporation and its shareholders inherently lack protectable capabilities. His sharing principle apparently requires parties

90. Id. at 816–17.
91. Id. at 817.
92. See supra text at note 24.
94. If property law were to systemically discriminate against corporations, the creator of a small business would have an additional incentive to select another business form.
to a property dispute to make individualized assessments of their respective circumstances.\(^{95}\)

To Merrill and other scholars intent on limiting the information costs of property rules, Alexander’s legal approach is, to put it gently, a non-starter. Many everyday property disputes involve strangers thrown together in brief encounters. A Starbucks patron doing work on a laptop benefits from the existence of a rule that entitles a laptop owner flatly to refuse, without further discussion, a stranger’s request to borrow the device. Would it be better to require the laptop owner and its would-be borrower to enter into a discussion about their relative wealth and capabilities?

C. The Advantages of Redistribution by Means of Broad Welfare Programs Financed Through General Taxes

Virtually all legal commentators regard the pursuit of distributive justice to be a legitimate concern of lawmakers. This generalization applies not only to Progressives, but also to law-and-economics scholars. Tom Merrill, who plainly gives weight to considerations of economic efficiency, has repeatedly urged lawmakers to attend to a variety of other values, including distributive justice, individual freedom, personhood, and communitarianism.\(^{96}\) Louis Kaplow and Steven Shavell have prominently acknowledged that policies that maximize welfare may fail to satisfy concerns about distribution.\(^{97}\) And so have Richard Posner and many others.\(^{98}\)


96. Merrill, supra note 2, at 2081–94; see also Merrill, supra note 5, at 11–13, 23–24; Merrill & Smith, supra note 87, at 1850, 1857. For doubts that any version of utilitarianism can capture the moral basis of private property, see id. at 1850–51, 1867.

97. The opening paragraph of Louis Kaplow & Steven Shavell, Fairness Versus Welfare, 114 HARV. L. REV. 961, 966 (2001), reads:
The thesis of this Article is that the assessment of legal policies should depend exclusively on their effects on individuals’ welfare. In particular, in the evaluation of legal policies, no independent weight should be accorded to conceptions of fairness, such as corrective justice and desert in punishment. (However, the logic leading to this conclusion does not apply to concern about equity in the distribution of income, which is often discussed under the rubric of fairness.)

98. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 344 (8th ed. 2011) (recognizing distributive justice as a distinct concern); see also ARTHUR M. OKUN, EQUALITY AND EFFICIENCY:
But most law-and-economics scholars, including Merrill, conclude that distributive goals are better pursued by means of broad tax and welfare programs than by the introduction of distributive considerations into the rules for resolving ordinary private law disputes. Considerations of efficiency, horizontal equity, and relative institutional competence all support this stance.

First, as noted, the harnessing of private law doctrine to the cause of redistribution would greatly increase the amount of information individuals would need to navigate the world. Determinations of the relative neediness, or capabilities, of parties to a property dispute commonly are complex. In a welfare state such as the United States, the staffs of tax and welfare agencies and private charities typically have better information pertinent to the pursuit of distributive justice than do ordinary citizens, attorneys, and judges.
Second, the principle of horizontal equity—that is, the like treatment of persons situated alike—typically supports placing burdens of providing aid to the poor on taxpayers generally, as opposed to concentrating those burdens on members of smaller subgroups, such property owners involved in private-law disputes. Alexander and Peñalver themselves recognize the importance of horizontal equity. They highlight a decision of the Constitutional Court of South Africa that dealt with a corporation’s petition to evict tens of thousands of squatters from its lands. Alexander and Peñalver applaud the court’s decision not only to delay the eviction but also to order the government of South Africa to compensate the corporation for damages arising out of the squatting. Why this expression of concern for a corporation, an unlikely object of Progressive sympathy? Alexander and Peñalver conclude that, at least in this instance, the duty to share surplus property was “an obligation that falls on all property owners, and therefore should not be imposed on just one property owner.” In this particular case there also was a horizontal equity issue on the receiving side. The court’s decision transferred resources to the squatters involved in the litigation, ultimately at the expense of the government of South Africa. Might not other poor and landless households in South Africa have been just as deserving of aid? Because tax and welfare programs typically have broader reaches, their effects tend to be more even-handed than the effects of judicial rulings in particular property disputes.

Third, in developing his conception of a duty to share property, Alexander gives little weight to the relative legitimacy and competence of alternative institutions. His lengthy discussions of judicial decisions such as Jacque and the New Jersey beach access cases imply that he sees state judges as major architects of redistributive efforts. Virtually all citizens, however, have a stake in redistributive


103. See Kaplow & Shavell, supra note 100, at 823.
106. Id. at 160.
107. Alexander, supra note 4, at 815–17 (discussing Jacque); id. at 801–07 (discussing
questions, and these issues are deeply contested. In a democracy, legislators, not judges, typically are the more legitimate framers of social-insurance policy. Moreover, Alexander implicitly would enhance the relative prominence of states, the primary makers of property law in the United States, in redistributive policy. This also is dubious. As noted, because households are mobile, redistributive policy generally is best fashioned at the national level.

**D. The Waning of Rural Landowners’ Obligations to the Poor**

Alexander asserts that the legal duties of owners generally have been proliferating. In important respects, however, the trend is otherwise. The duties of an owner of an orchard or farm to provide access to the needy have ebbed. In the United States, rights to enter private lands to hunt, fish, or glean received greater legal protection in 1800 than in 2014. When Britain enacted a “right to roam” statute in 2000, it forbade a roamer from hunting on private land and refused to authorize roaming on plowed land. With the growth of the welfare state, lawmakers have largely cashed out the social-insurance duties of rural landowners—that is, converted them into obligations to pay general taxes to the state.

It is notable that in pocket after pocket of property law, including, for example, adverse possession, inheritance, nuisance, and takings, formal legal doctrine does not ask a judge to give weight to the relative deepness of the pockets—or, to use Alexander’s preferred term, capabilities—of the contesting parties.

Matthews v. Bay Head Improvement Ass’n, 471 A.2d 355 (N.J. 1984) and Raleigh Avenue Beach Ass’n v. Atlantis Beach Club, 879 A.2d 112 (N.J. 2005)).

108. Cf. Logue & Avraham, supra note 93, at 253–57 (analyzing, but not endorsing, this argument).


110. See, e.g., Alexander, supra note 83, at 453: “As society has grown more complex and more interdependent, the obligations [of owners] have thickened.”


112. See Jerry L. Anderson, *Britain’s Right to Roam: Redefining the Landowner’s Bundle of Sticks*, 19 GEO. INT’L ENVTL. L. REV. 375, 407–08 (2007). On the scope of rights to roam in other European nations, see Sawers, supra note 111, at 684–89. Few of these nations authorize a roamer to hunt or fish, but some recognize a right to gather berries and mushrooms. Id.

CONCLUSION: CONFINING PROPERTY LAW TO WHAT IT DOES BEST

Lawmakers at times assign to a property owner affirmative duties to provide specific services, such as providing care to a domestic animal and clearing snow from an abutting city sidewalk. In these instances, the owner typically both benefits personally from performing the service and also has special pertinent knowledge and ability to act on that information. The increasing specialization of labor and capital suggests, if anything, that the scope of owners’ duties to provide these sorts of in-kind services will tend to contract. In many contexts, an owner lacks the skills and equipment to provide a service as capably as a specialist hired by a government agency could provide it. Until a century ago, many states called on adult males to contribute stints of road duty.114 None continue to enlist amateurs in this fashion.

To marshal resources, governments instead are inclined to impose on owners obligations to make monetary payments such as benefits charges and general taxes. A duty to pay burdens individual autonomy less than does a duty to serve. But even a duty of an owner to pay increases the informational complexity of the property system. In some contexts, this consideration, coupled with the risk that imposing a legal duty will crowd out intrinsic motivations to contribute funds, counsels against the creation of a duty to pay.

Distributive justice is a worthy goal. With the rise of the welfare state, however, landowner duties to aid the poor rightly have declined. As Tom Merrill has stressed, simple rules of property law enable individuals to navigate a world full of strange objects and unfamiliar people. Gregory Alexander’s wish to burden owners with a generalized legal duty to share would greatly complicate this navigation. A legal institution, even one as fundamental as property law, should not be asked to do too much. In Henry Smith’s words:

To assert that doctrines are part of an issue-by-issue balancing of values like community, autonomy, efficiency, personhood, labor, and distributive justice is to commit the fallacy of division. These are all important values for the system to serve, but the bundle

picture [of property rights] creates the expectation that the pieces of the system will serve these values individually and separably as well as collectively. Little attention is directed toward the possible specialization of the parts in achieving the goals of the whole.115

In a nation with a full-fledged welfare state, putting issues of distributive justice into play in a routine trespass dispute would be a grave mistake.

LOST VISIBILITY AND THE RIGHT TO EXCLUDE: HOW MERRILL’S SINE QUA NON OF PROPERTY COMPELS JUST COMPENSATION IN TAKINGS CASES

MARK D. SAVIN* & STEPHEN J. CLARKE**

I. THE RIGHT TO EXCLUDE AND LOSS OF VISIBILITY DUE TO GOVERNMENT TAKEINGS

In 1998, Thomas W. Merrill, one of the great modern property law scholars, published an article in the Nebraska Law Review that has since framed much of the scholarly discussion on the nature of property rights.1 Now, fifteen years after it was published, Merrill’s essay, Property and the Right to Exclude, still compels those looking to understand the fundamental nature of property to address his famous assertion: “[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the sine qua non.”2

In this Article, we propose to connect Merrill’s observation about the supremacy of the right to exclude among the “bundle of sticks” that is commonly thought of as property to a specific aspect of property law: the question of what should constitute a taking of property

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2. Merrill, supra note 1, at 730. A recent search using Westlaw reveals more than 175 law review and journal articles which cite to Merrill’s essay. Citing References for 77 Neb. L. Rev. 730 (1998), Westlaw, http://www.westlaw.com (search “77 Neb. L. Rev. 730”; then follow “Citing References” hyperlink). While much of the scholarly debate has centered on whether the right to exclude reigns supreme over all the other rights which collectively comprise property, it is important to note that Merrill was not advancing the argument that the right to exclude is the only relevant attribute of property. Rather, his contention is that without the right to exclude, there cannot be property. Taken on its face, this claim should be non-controversial: the Supreme Court has called the right to exclude “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979); see also Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (same); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1044 (1992) (same); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 831 (1987) (same).
for purposes of compensation in eminent domain cases. In particular, the right to exclude has significant implications for courts seeking to determine whether a change in visibility as the result of a taking of property for public use should be a compensable element of just compensation. As we argue here, a property owner’s right to exclude others necessarily means that when a government actor wielding the power of eminent domain uses that power to intrude upon this fundamental owner’s right, a taking has occurred. Specifically, when eminent domain is used to overcome an owner’s right to exclude in such a way that the owner’s control over the visibility of his property is lost, compensation is required equivalent to the value of that which has been lost. As straightforward as this proposition seems, it has been disregarded by numerous courts that have lost sight of this foundational right to exclude. Professor Merrill, both in his 1998 article and in his more recent remarks at William & Mary Law School, reminds us that if we misunderstand the place of the right to exclude, we misunderstand property.

In Part II of this Article, we will trace and consider the history of the law regarding takings of visibility in the context of eminent domain, pointing out three approaches that have been used by the courts which have considered the issue. In Part III, we will offer an argument regarding the analytical approach found in the better reasoned of these cases—that an owner’s right to exclude others requires that a condemning authority must compensate the owner for lost visibility as a result of the project when the authority uses its extraordinary power to overcome an owner’s fundamental right.

II. THE EVOLVING CASE LAW INVOLVING THE COMPENSABILITY OF LOST VISIBILITY IN EMINENT DOMAIN CASES

Until as recently as the 1940s, there existed very little appellate law regarding takings of visibility within the law of eminent domain.3

3. LEXIS Advance database, search for “Eminent Domain and Visibility” showing 0 cases between 1900 and 1910; 2 cases between 1910 and 1920; 9 cases between 1920 and 1930; 5 cases between 1930 and 1940; 7 cases between 1940 and 1950; 16 cases between 1950 and 1960; 39 cases between 1960 and 1970. Using the same search and database, eminent domain cases between 2000 and 2010 constituted about 1% of all civil actions; between 1900 and 1910 eminent domain cases were about 3% of all civil actions. Ben Tozer at Fredrikson & Byron constructed the searches that provided this data and that found in note 6, infra.
The reason for this absence likely reflects changes in American life and commerce that are now so pervasive that we have lost sight of them. When shopping was done principally in downtown and neighborhood shopping districts, “visibility” meant shoppers looking in store windows from adjoining streets and sidewalks. In such instances, visibility might be obstructed on occasion, but such obstructions were typically temporary and infrequent. But with the advent of the modern freeway, and particularly with the development of grade separated interchanges that simultaneously change traffic flow and obstruct visibility, the law regarding visibility became—and continues to be—an important and developing issue within the law of eminent domain.

Until the spring of 2012, however, when the Utah Supreme Court published its decision in Admiral Beverage, changing the law of eminent domain in Utah to allow compensation for the taking of visibility, no state supreme court had ever made a decision regarding the

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6. Claims for loss of visibility appear to be occurring with significantly increased frequency since the late 1980s. While the absolute number of claims remains relatively low compared, for example, to claims for lost or impaired access, the correlation between visibility issues and eminent domain cases involving freeways shows a fourfold increase between the 1950s and the 2000s. The table shown below, based on case information in all U.S. jurisdictions obtained through LEXIS Advance, indicates that visibility now appears as an issue in more than three-quarters of cases involving freeway takings. This suggests that an increased number of jurisdictions will be faced with considering or reconsidering visibility issues.

7. Utah Dep't of Transp. v. Admiral Beverage Corp., 275 P.3d 208 (Utah 2012). The Utah court released its decision in the fall of 2011, but the decision was not published until the following year.
compensability of visibility and then revisited and re-examined that decision in light of the actual consequences of its prior decision. The Utah court’s decision in Admiral Beverage to review sua sponte its holding of fewer than five years prior in Ivers may signal a change in the way in which appellate courts will consider the issue of what constitutes a property right for which compensation must be paid in a takings case. More significantly for property owners, the Utah Supreme Court’s decision to expressly overrule the holding of Ivers as it relates to visibility and to hold that “when a landowner suffers the physical taking of a portion of his land, he is entitled to severance damages amounting to the full loss of market value in his remaining property caused by the taking" represents a noteworthy development in that court’s approach to takings of visibility. It may also suggest how other courts will begin to approach this issue. It is a decision that, even if not followed, cannot be ignored. A key premise underlying the Admiral Beverage court’s analysis is that an owner has a fundamental right to exclude from his own land that which interferes with visibility, and while the owner may be forced to surrender that right in face of eminent domain, the right to be fully compensated for that taking is retained. This premise suggests how deeply Merrill’s thinking has pervaded modern property theory. Though Merrill’s name is never invoked, his analysis is echoed.

While there are cases in numerous jurisdictions regarding the compensability of loss of visibility, fundamentally there are three approaches to the taking of visibility that have been used by the courts: (1) an often amorphous “easement” analysis based on borrowings from the older law of implied easements of light, air and view; (2) a state

8. Ivers v. Utah Dep’t of Transp., 154 P.3d 802 (Utah 2007).
10. See Tracy A. Bateman, Annotation, Eminent Domain: Compensability of Loss of Visibility of Owners Property, 7 A.L.R. 5th 113 (collecting and summarizing cases); James L. Thompson & Joseph P. Suntum, Compensation for Loss of Visibility to and View from the Owner’s Property, A.L.I.–A.B.A. COURSE OF STUDY ON EMINENT DOMAIN & LAND VALUATION LITIG. (2006) (discussing legal principles and cases and law on loss of view); 4 NICHOLS ON EMINENT DOMAIN §§ 13.21, G9A.04[4][c][iii] (3d ed. 2000). In more than half of the states there appears to be no dispositive law on the compensability of visibility in eminent domain. Approximately a dozen states now allow claims for loss of visibility; approximately nine do not.
11. For a discussion of background principles, see generally J.A. Robinson, Implied Easements of Light and Air, 4 Yale L.J. 190 (1895). A grantor of land who subdivided land and sold a portion of that land to another was deemed to have created by implication reciprocal easements such that neither buyer or seller could unreasonably interfere with light or air serving
constitutional analysis based on loss of market value before and after the taking, particularly in jurisdictions where owners are protected by state constitutional language against “damaging” of their property; and (3) an analysis based on the landowner’s lack of any property interest in the traffic flow passing the land taken. Cases finding visibility to be compensable will typically look to the first and second approaches; cases denying compensability will typically employ the first and third approaches. This Article argues that a fourth approach based on an owner’s right to exclude provides a superior means of analyzing such cases.

A. Visibility Takings: Recurring Fact Patterns

Talking about takings of visibility in the abstract tends to be confusing, uninteresting, and insufficiently detailed to either follow or test the legal analysis of most court decisions. When the properties described in the cases can be examined,12 however, the decisions can be more readily analyzed and three common fact patterns emerge:

**Pattern I:** There is no taking by eminent domain, either permanent or temporary, but the property that was visible before
the project has now lost visibility. Since, in most of these cases, there is no direct use of eminent domain, they must necessarily proceed as tort or inverse condemnation matters. The law is generally unfriendly to property owners making such claims. See, e.g., Randall v. City of Milwaukee, 249 N.W. 73 (Wis. 1933) (finding no taking where shelter at entrance to subway obstructed visibility of store owner’s property because implied easement of light and air overcome by doctrine of proper street use). But see Sinsheimer v. Underpinning & Foundation Co., 165 N.Y.S. 645 (N.Y. App. Div. 1917) (holding obstruction by builder of Lexington Avenue subway for impairment of abutter’s rights when cribbing used for construction temporarily blocked storefront windows and obstructed light and visibility to constitute a taking of easement rights without just compensation).

Pattern II: There is a taking by eminent domain and that which impairs visibility is built in part within the parcel subject to the taking. See State v. Strom, 493 N.W.2d 554 (Minn. 1992); see Colorado Department of Transportation v. Marilyn Hickey Ministries, 159 P.3d 111 (Colo. 2007). In both of these cases, the condemning authority did not dispute that visibility from the adjoining roadway was impaired. Compensation was awarded in the Minnesota matter; compensation was allowed by the Colorado Appellate Court but denied by the Colorado Supreme Court in Hickey Ministries.

Pattern III: There is a taking by eminent domain and that which causes the actual loss of visibility is not actually built within the parcel taken, but the property taken was either (1) essential to the completion of the project; or (2) integral and inseparable from the project. See Ivers v. Utah Department of Transportation, 154 P.3d 802 (Utah 2007) (finding that taking for U.S. 89 overpass was essential to completion to project but denying compensation for loss of visibility). But see Admiral Beverage, 275 P.3d 208 (Utah 2011) (finding that taking for I-15 project was essential to completion of project and, overruling Ivers, allowing compensation for loss of visibility).

B. The Ancestral Split in the Analysis of Visibility:
People v. Ricciardi

The most important early case concerning the compensability of visibility comes in 1943, predictably enough from California. In People
v. Ricciardi, the California Supreme Court held by a 4–3 majority (with Justice Shenk authoring the opinion) that both loss of direct access and loss of visibility were compensable; three justices including Justice Traynor joined in a furious dissent. Rehearing was sought by the State a year later and denied on the same split.

The case is an early and landmark freeway case involving what is now known as the I-10, the San Bernardino Freeway. The fact pattern, even though 70 years past, is precisely that which gives rise to most modern cases: the creation of a limited access interchange based on a separation of grade—in this case Rosemead Boulevard, the north-south cross street, was lowered by about 17 feet so as to pass under the new Ramona Boulevard freeway. The Rosemead underpass obstructed visibility to the Ricciardi property (a retail meat market and “modern slaughterhouse”) located at the northeast corner of Ramona and Rosemead.

At its essence, the dissent’s position was (1) that the majority was adopting a before and after rule not previously accepted in California; (2) that the new overpass was a “proper street use” and thus, if there was an easement for view and if that easement was obstructed, then it was not compensable; and (3) most importantly, that the property owner was being compensated for loss of traffic flow to which he had no legal right and that, as a matter of public policy, recognizing the loss of visibility would have a “prohibitive effect . . . upon the construction of increasingly necessary arterial freeways, without grade crossings,” identifying in particular the then contemplated Bayshore Freeway in San Francisco and San Fernando Freeway in Los Angeles. In retrospect, the dissent’s prediction about the importance of freeways appears prescient, but its concern about stunting California freeway growth is, at best, wishful thinking. Nonetheless, the fundamental argument that would be repeated by condemning authorities in every jurisdiction thereafter where this issue was litigated had been set: abutting owners have no property rights in traffic flow and allowing compensation for takings of visibility takes

14. Id. at 806.
15. Id. at 807–18.
16. Id. at 801.
17. Id.
18. Id. at 816.
19. Id.
money away from transportation departments and constrains highway growth.  

The *Ricciardi* majority’s analysis concluded from the older street easement cases that “an abutting owner . . . on a public highway has an easement of reasonable view of his property from the highway,” and then relied on a different public policy interest than the cost of highway construction to support its conclusion: “The courts have the burden and responsibility . . . of safeguarding the constitutional rights of private parties on the one hand and on the other hand of seeing to it that the cost of public improvements . . . not be unduly enhanced.”

The majority could not avoid the fact that the underpass constructed using *Ricciardi’s land* left the Ricciardi property with little or no visibility from Rosemead, which would cause a loss in the post-taking market value that had to be regarded as “damage” under the California Constitution. These antipodal public positions, protection of the government’s interest in controlling the cost of property acquisition for an expanding roadway system on the one hand, and protecting the individual’s right to compensation from disproportionately burdensome market value losses on the other, underlie the split that is at the core of most visibility cases and that is ultimately seen in *Admiral Beverage’s* overruling of *Ivers*. The *Ricciardi* decision does not explicitly address the right to exclude in the context of visibility, instead relying largely on the property owner’s “easement of reasonable view of his property from the highway.” Nonetheless, analysis of the majority’s opinion shows that the critical aspect of *Ricciardi* was that the improvement which obstructed visibility was itself constructed on the property taken. Seen in that light, *Ricciardi’s* right to exclude the State of California from his property absent the state’s use of its power of eminent domain is a dispositive fact. A prudent *Ricciardi* would only willingly convey the land needed for the new interchange if he were compensated for the loss of a right that he controlled. The state could choose to locate its interchange elsewhere, but if it chose to locate the new structure on land over which

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22. *id.* at 802.
23. *Ricciardi* thus falls squarely into Pattern II of the familiar fact patterns that arise in visibility cases, as the improvement which eliminated the visibility of the *Ricciardi* property from the roadway was built, at least in part, on land actually taken from *Ricciardi*.
24. *id.* at 806.
Ricciardi held a right to exclude, it must purchase the land from him. Or, it could use its power of eminent domain to force an exchange, and, in doing so must compensate the owner for the value of overcoming the right to exclude.

C. The Alaska Court Thinks About Visibility: The Dimond D Case, “8,960 Square Feet”

In the Dimond D case, the Alaska Supreme Court considered two different fact patterns of visibility loss within the same condemnation and found one compensable and one not. In reaching these conclusions, the Alaska court provides one of the few post-Ricciardi decisions which actually analyzes the issues involved rather than simply coming down on one side or the other of the Ricciardi split. Recognizing that the compensability of visibility was for it an issue of first impression, the Alaska court reviewed cases from numerous jurisdictions (including Ricciardi) in reaching its conclusion, looking with some care at the rationales provided in the cases it reviewed. The project at issue involved widening Dimond Boulevard from two lanes to six lanes and providing an overpass across Dimond Boulevard for the Alaska Railroad. As a part of the widening of Dimond Boulevard, and in conjunction with the railway overpass, Dimond Boulevard was lowered between five-and-a-half and seven feet as it passed by the adjoining Dimond D property. In addition, earthen berms were constructed within the Alaska Railroad right-of-way in order to further elevate the tracks as they crossed over Dimond Boulevard. The court ultimately concluded that loss of visibility was compensable where the loss results from changes made on the parcel taken for the road widening but found that the loss of visibility caused by the construction of the railway trestle within existing and legally separate Alaska Railroad right of way was not compensable.

While the case’s holding is clear, its consequence is difficult to comprehend without understanding the physical layout involved. Prior to the project, the Dimond D parcel had clear visibility from a large shopping center property to the east. This borrowed visibility was lost when the railroad overpass was constructed. The Alaska court reasoned that because the Alaska Railway had the right to change the

26. Id. at 845.
27. Id. at 846.
elevation of its tracks at any time that there could be no reasonable expectation by Dimond D, and certainly no legal right, to control what would occur on that parcel. In other words, key to the Alaska court’s decision was that Dimond D had no right to exclude with regard to the railroad property. Accordingly, with regard to that particular claim for damages—the loss of visibility caused by the Alaska Railroad trestle—compensation was denied. The logic of the Court’s argument, however, requires the conclusion that compensation for loss of visibility would have been due if a new elevated structure had been built by the condemnor on land owned by Dimond D.

With regard to the loss of visibility caused by the change in grade directly in front of the Dimond D parcel caused by the taking from Dimond D’s property, the court found it to be compensable. In reaching this conclusion to allow claims for impaired visibility resulting from work done on property taken from the landowner for the project, the Alaska Supreme Court considered and rejected the dissent’s argument in *Ricciardi* and its progeny in Missouri and elsewhere that “since landowners have no right to traffic flow, they cannot have a right to be seen by traffic.”28 The defect in the traffic flow argument identified by the *Dimond D* court is that “as long as there is a road adjacent to the taken property,” the owner of that property possesses a valuable right “to control the visibility of land further away from the road.”29 “The state must compensate the owner for the loss of the right to control the visibility of the remaining parcel.”30

In analyzing the problem in this way, the Alaska court avoided the morass of much of the implied easement analysis: an owner has the right to control any use of its own property against a detrimental use. A rational owner would not convey part of its property to another for a use that would diminish the value of the owner’s remainder without exacting a cost sufficient to compensate for any such diminution. Such must also be the case when a conveyance is compelled through eminent domain.31

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28. *Id.* at 847.
29. *Id.* at 847, 848.
30. *Id.* at 846.
31. *Id.* In footnote 6 of *Dimond D*, the court considers the problem where the condemnor takes a parcel yet does not immediately cause a loss of visibility. This is the “later project” problem where the subsequent project does not occur until after the current eminent domain proceedings are over. “To protect the owner of the remaining parcel from such an occurrence, we believe that . . . an easement of visibility across the taken parcel is reserved to the owner of the remaining parcel. If and when the state causes a loss of visibility to the remaining
As a coda to the Dimond D decision, the Minnesota Supreme Court in considering the compensability of loss of visibility a year later—again as an issue of first impression—observed that “the reasoning we find most persuasive is that of the Alaska Supreme Court.” The court then followed the holding of the Alaska court that loss of visibility was compensable where the obstruction resulted from the condemnor’s use of property within the parcel taken for the project.

D. Regression to the Mean—Two 2007 Cases Return to the Lost Traffic Analysis: Ivers and Hickey

In the first six months of 2007 two cases were decided in two neighboring Western states regarding the compensability of visibility: Ivers v. Utah Department of Transportation, filed February 6, 2007, and Colorado Department of Transportation v. Marilyn Hickey Ministries, filed May 29, 2007. Both cases adopted what each characterized as a property rights analysis and concluded that because there was “no right to passing traffic, an impairment of the visibility from the traffic is not compensable.” Both cases rest principally on the lost traffic parcel through a change on the taken parcel, then this constitutes a separate taking.” Id. at 846 n.6. The court’s proposed solution reflects its knowledge of eminent domain and transportation projects. Termining the preserved right an “easement,” however, suggests the imprecision with which courts sometimes use this term, and further muddies the waters with regard to the “implied easement of visibility” noted in Ricciardi and other cases.

32. State v. Strom, 493 N.W.2d 554 (Minn. 1992). Strom is another freeway case arising from the conversion of U.S. 12 (a major at grade intersection highway connecting Minneapolis and its western suburbs) to Interstate 394, a grade-separated freeway. There is a Ricciardi-style dissent by Justice Tomljanovich.

33. Id. at 561. Minnesota follows the inseparability doctrine set forth in City of Crookston v. Erickson, which provides that “where the use of the land taken constitutes an integral and inseparable part of a single use... the effect of the whole improvement is properly to be considered in estimating the depreciation in value of the remaining land.” City of Crookston v. Erickson, 69 N.W.2d 909, 914 (1955). Under this analysis, it should make no difference whether the taking is permanent or temporary so long as the land taken is essential to the project and, but for the taking, under the control of the owner. The issue of project inseparability (or the parallel doctrine of “essential to completion”) with regard to the relationship between the railroad overpass and the street project was apparently not raised in the Dimond D case, but it lies at the crux of the Utah Supreme Court’s subsequent holding in Admiral Beverage.

34. 154 P.3d 802 (Utah 2007).
35. 159 P.3d 111 (Colo. 2007).
37. Hickey, 159 P.3d at 114 (describing the holding of Ivers).
flow theory that had been considered and rejected by the Alaska and Minnesota courts; *Hickey* notes *Dimond D* only in passing and the Utah court notes that the Alaska court found loss of visibility compensable where the obstruction was constructed on land taken from the claimant and then found that such was not the case in *Ivers*. The *Ivers* decision includes no discussion of the significant difference between the Alaska Railroad configuration and the *Ivers* configuration or of the controlling principle for the decision in *Dimond D*.

The fact patterns for the two cases are similar, but not identical. In *Hickey* the Department of Transportation condemned a lengthy (650') but narrow strip from the easterly edge of the Hickey property (a former shopping center, now used as a religious school, house of worship, and ministry center) to construct a new light rail line. Construction occurred on land taken from Hickey and completely cut off visibility of the church property from I-25, the adjacent roadway. Prior to the taking, the church owned the property at issue and had the absolute right to control what structures could be built upon it. It is safe to assume that the church would not have conveyed this strip to any acquiring entity without either protection of its visibility or compensation for the loss of such visibility. Though the owner’s right to control use of its own land is a key point made by the Alaska court in analyzing the relevant rights where a taking from the owner’s property results in the obstruction of visibility, this issue is not addressed by the Colorado court.

In his discussion of the *Hickey* case in the *Transportation Law Journal*, Kurtis T. Morrison notes that the Colorado Department of Transportation (“CDOT”) argued that a ruling allowing compensation for visibility “would unleash ‘a great financial burden’ on state transportation authorities.” CDOT’s argument, of course, repeats

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38. Id. at 114 n.4.
39. In fact, the *Ivers* decision refers obliquely to the *Dimond D* decision as reflecting the decisions of “some states [which] recognize an easement of visibility where an obstruction is built on the condemned land.” *Ivers*, 154 P.3d at 805 & n.3. This is a mischaracterization of the holding of *Dimond D*, which relied not on the implied easement of visibility found in *Ricciardi*, but rather on a landowner’s right to limit obstructions from being placed on his or her land. See *Dimond D*, 806 P.2d at 846. This mischaracterization, however, allowed the *Ivers* court to frame its decision in terms of a landowner’s right (or lack thereof) to traffic flow past his or her property as opposed to confronting the issue of the landowner’s right to exclude.
40. *Ivers*, 154 P.3d at 805.
41. *See Dimond D*, 806 P.2d at 846.
the damper on new freeways argument employed by the dissent in *Ricciardi*.43 Recognizing a taking that causes a loss in visibility as compensable, argued CDOT, could have “potentially staggering costs and adversely affected or altered future transportation planning.”44 While Morrison notes that a different policy consequence of the Court’s decision “may be to spur reticence by private actors seeking to locate business interests along transportation corridors,”45 the Colorado court’s opinion reflects no public policy analysis other than increased cost as stopping transportation growth.

Ultimately, the *Hickey* court held that “there is simply no inherent property right to continued traffic or visibility along the I-25 transit corridor” and characterized the church’s claim of lost visibility as “nothing more than an access claim.”46 Given that starting point, it was easy for the Colorado Supreme Court to conclude that the church had not suffered a substantial (and therefore compensable) limitation or loss of access. By focusing on the claim as one for lost access, the *Hickey* court circumvented the need to address the right which formed the basis for the holding in *Dimond D*: the right of the landowner to exclude a private entity from constructing an elevated highway on its property unless the owner is appropriately compensated.

In *Ivers*, the Utah court faced a slightly different fact pattern. U.S. 89 in Farmington, Utah was being converted to a limited access highway and what had previously been an at-grade intersection was being converted to an elevated interchange, which would reduce visibility of an Arby’s restaurant on the *Ivers* property. Property was taken by eminent domain from Ivers for part of a new service road to be constructed as part of U.S. 89 project. Unlike *Hickey*, where the LRT viaduct was constructed on land taken from the church, in *Ivers* the actual elevated highway was constructed on land adjacent to Ivers’s, but not on property taken from Ivers.47

Ivers made claims for both loss of view and loss of visibility. The court held that loss of view (not visibility) was a “property right,”

43. 144 P.2d 799, 816 (Cal. 1943).
44. Morrison, supra note 36, at 158.
45. Id.
47. Thus *Ivers* falls into Pattern III of the typical fact patterns found in loss of visibility cases, as set forth in Part II.A, supra, in that the improvement which actually obstructed visibility to the property was not constructed on the property taken from Ivers, but the taking of Ivers’s property was essential to the completion of the project which, as a whole, resulted in the loss of visibility.
citing an earlier decision that found that an “easement of view” was a protectable property interest.\footnote{n} To address the objection of the Department of Transportation that the improvement which obstructed the view was not built on the Ivers property, the Utah court then further held that land taken in Ivers was “essential to the completion of the project”: 

When land is condemned as part of a single project—even if the view impairing structure itself is built on property other than that which was condemned—if the use of the condemned property is essential to the completion of the project as a whole, the property owner is entitled to severance damages.\footnote{1}

When it came to claims for loss of visibility, however, the Utah court simply followed the “no right to traffic flow” position and thus, for the claim of lost visibility, it was irrelevant that the Ivers land was essential to the project. Its simplistic position on this point, as well as its choice to avoid the contrary position taken in the Alaska and Minnesota cases, may explain the attractiveness of Ivers to the Colorado court in Hickey. It may also explain the dissatisfaction that caused the Utah court to revisit this identical issue in Admiral Beverage only four years later.

\section*{E. Admiral Beverage: The Utah Court Changes Direction}

Although the Utah Supreme Court issued its opinion in Admiral Beverage\footnote{2} in October 2011, the decision was not actually released for publication until May 9, 2012.\footnote{3} There has been some speculation that the seven-month delay in publication reflected uncertainty in the

\footnote{48. Ivers v. Utah Dep’t of Transp., 154 P.3d 802, 806 (Utah 2007).}
\footnote{49. Id. at 807. The court considered and did not adopt the “inseparability” analysis employed by the Minnesota Court in Crookston, 69 N.W.2d 909, 914 (1955), suggesting that it considered the “essential to completion of the project standard” narrower than the “inseparability” standard. Implicit in the “essential to the project” standard is that the condemnor has made a considered and intentional decision to take the owner’s property and, with it, responsibility for any severance damages.}
\footnote{50. \textit{See generally} Richard E. Danley, Jr., \textit{Severance Damages Take a Sea-Change with Admirable Beverage}, 25 UTAH BAR J., May/June 2012, at 42. Danley’s title suggests the significance of the change in the Utah court’s position. This change in position is especially striking because the composition of the court was largely unchanged; four of the five justices who participated in Ivers also participated in Admiral Beverage. The new justice on the court, Justice Thomas Lee, took the seat left by Justice Wilkens, the author of Ivers. Admiral Beverage is authored by Justice Parrish.}
\footnote{51. \textit{See} Utah Dep’t of Transp. v. Admiral Beverage Corp., 275 P.3d 208 (Utah 2012).}
Utah Supreme Court about a decision that reversed the analytical direction of eminent domain law in Utah. Any such speculation must now be dismissed in light of the Utah court’s even more recent decision in *Utah Department of Transportation v. FPA West Point, LLC*, in which it expressly relied on the compensation principles established by *Admiral Beverage* in rejecting the so-called “unit-rule” and instead adopting a position intended to indemnify all holders of an interest in property taken against actual market-value loss.

The fact pattern in *Admiral Beverage* is, as the court itself notes, “strangely similar” to that in *Ivers*. In connection with the massive reconstruction of I-15 through Salt Lake City, land was taken by eminent domain for expansion of a frontage road necessary to accommodate one of the I-15 ramps; the actual new elevated I-15 roadway, ramp and flyover which obstructed visibility was not constructed on the land taken from *Admiral Beverage* but on land which abutted the new frontage road for which property was taken from *Admiral Beverage*. Both the Department of Transportation and the owner agreed that the property taken from Admiral was “essential to completion of the project.”

The most salient part of the *Admiral Beverage* decision is the court’s choice to reject the mechanistic notion of “recognized property rights” theory it held to in *Ivers* by allowing compensation for lost view, but not for lost visibility (a distinction the Court could not justify). Rather, the court premised its approach on indemnification of actual market value lost, which the court found comported with both its obligations under the Utah Constitution and common sense. 

52. 304 P.3d 810 (2012).
53. *FPA West Point* is itself an important decision in the law of eminent domain, rejecting the so-called “unit rule” and holding instead that the value of each interest condemned must be valued under an “aggregate-of-interests” approach.
54. Counsel for *Ivers*, Donald J. Winder and John W. Holt, participated as amicus in the briefing of *Admiral Beverage*.
55. In this regard, *Admiral Beverage* is, like *Ivers*, a Pattern III case. See supra Part IIA.
56. The Utah Constitution, like a majority of state constitutions, provides for compensation when property is taken “or damaged.” Utah Const. art. I, § 22. *Admiral Beverage* contains a careful exposition of the importance of this language to its analysis. *Admiral Beverage*, 275 P.3d at 215–16. See also *People v. Ricciardi*, 144 P.2d 799, 804 (Cal. 1943) (discussing “damage” under the California Constitution).
57. *Admiral Beverage*, 275 P.3d at 211.
Procedurally, the case is remarkable because while the court initially granted review only on the issue of severance damages for loss of view, after hearing oral argument the court *sua sponte* issued an order for supplemental briefing and re-hearing on the issue of whether *Ivers* should be overruled with regard to damages for loss of visibility.58

The Utah court recognized that overruling its recent decision in *Ivers* with regard to the compensability of lost visibility was not something to be undertaken lightly,59 but concluded both that its earlier rule was “originally erroneous” and failed to “comport with a constitutional right.”60 The court specifically noted that its holding in *Ivers* that a person whose property was taken by the Utah Department of Transportation could only recover for damages to “recognized property rights” was at odds with the constitutional obligation that severance damages are to be measured by the diminution in market value of the remainder property.61 In assessing fair market value, the court explained “we have *always* allowed evidence of all factors that affect market value.”62 Although such statements of broad admissibility are not uncommon within the law of eminent domain, the willingness of the Utah court to tie this evidentiary standard to a meaningful constitutional requirement for compensation is unusual.63

*Admiral Beverage* holds that when “a landowner suffers the physical taking of a portion of his land, he is entitled to severance damages amounting to the full loss of market value in his remaining property caused by the taking.”64

58. *Id.* at 212.
59. *Id.* at 214–15.
60. *Id.* at 215.
61. *Id.*
62. *Id.* at 214 (emphasis in original).
63. Indeed, instead of focusing on the public policy arguments raised by the dissent in *Ricciardi* and by condemnor in the *Hickey* matter, the Utah Supreme Court focused instead on the fundamental constitutional right of a property owner to be made whole by a just compensation award. In light of the overarching policy in favor of allowing evidence “of all factors that affect market value,” the Utah court had no trouble finding that a rule excluding from compensation damages attributable to loss of visibility would be nearly impossible to implement and would deprive property owners of the protections guaranteed them under the Utah Constitution.
64. *Id.* at 214. The line drawn by the Utah court requires that there must be an actual taking from the property in question, though it is not necessary that the obstruction to visibility be constructed on the land taken, so long as the land taken is essential to the project. This is the threshold that must be crossed. Once crossed, however, the measure is loss in market value. Allegations of damages not connected to a physical taking will only be sustained if there is damage to “protectable property rights.” A landowner under the Utah analysis does not have a protectable property interest in a particular flow of traffic past his property—a change in the
If *Ivers*’s constitutional infirmity provided the initial reason for its rejection by *Admiral Beverage*, it is clear from the supplemental briefing and the court’s opinion that when the court found itself immersed in the practical issues of valuation, it found the sorting of severance damages into compensable and non-compensable elements to be unworkable as a practical matter. In particular, the court found it would be “rank speculation” for an appraiser to attempt to exclude from a property’s post-taking value the amount attributable to loss of visibility. 65 The court’s pragmatic conclusion was that: “Not only is there no factual basis for such speculation, but requiring it would result in an increase in unnecessarily complex drawn out litigation involving valuation of partially condemned property. In contrast, using market value as the measure of severance damage is relatively simple and fact-based.” 66

The *Admiral Beverage* court’s analysis ends with a common sense notion that is familiar to all whose work engages owners whose property is taken by eminent domain:

>The average landowner assumes that the value of his land is equal to the amount that a willing buyer would pay for it. And the average landowner ought to be able to expect that he will be compensated for any reduction in that amount that results if the state takes part of his property. 67

### III. THE RIGHT TO EXCLUDE REQUIRES THAT PROPERTY OWNERS BE FULLY COMPENSATED FOR THE MARKET VALUE OF THEIR PROPERTY TAKEN AND THE MARKET VALUE OF SEVERANCE DAMAGES CAUSED BY THE TAKING

None of the state supreme courts to have addressed the issue of the compensability of loss of visibility in the context of an eminent traffic flow under Utah law does not create a taking—but once there is an undisputed physical taking the owner is then entitled as a constitutional matter to be put in the same place he would have been economically but for the taking. *Id.* at 216. What would constitute a “protectable property right” remains generally undefined.

65. *Id.* at 220.
66. *Id.* The briefing in *Ivers* and particularly an amicus brief submitted by Ivers’s counsel appears to have sharpened the court’s focus on these pragmatic appraisal issues. In particular, the court recognized problems in jury instructions relating to market value as the measure of just compensation if visibility, a key component of market value, could not be considered by the jury.
67. *Id.*
domain case have explicitly referred to Merrill’s *Property and the Right to Exclude* to support their holdings. Nonetheless, at the core of the approach adopted by the Utah Supreme Court in *Admiral Beverage*, the Alaska court in *Dimond D*, and the Minnesota court in *Strom*, is the concept that a property owner possesses the right to exclude a third party from his or her property. Therefore, if even a tiny taking or a temporary taking of a landowner’s property is deemed necessary for the completion of a public project, and such taking both overcomes the owner’s fundamental right to exclude and results in the remainder of the landowner’s property having reduced visibility which affects the market value of the remainder, the landowner logically must be compensated for that diminution in market value caused by the reduction in visibility.

Merrill directly touches on this in his seminal essay in defending the “logical primacy of the right to exclude.” Constructing a hypothetical in which A is the owner of the proverbial Blackacre, Merrill pointed out that “A has the power to act as the gatekeeper of Blackacre. A can forbid other persons from entering onto Blackacre or from causing structures or objects to encroach on Blackacre; alternatively, A can consent to other persons entering onto or encroaching on Blackacre. As Blackacre’s gatekeeper, A has the power to determine who has access to Blackacre and on what terms.”

Using the right to exclude as his touchstone, Merrill then proceeds to set out how the rest of A’s rights in Blackacre flow from his right to serve as its gatekeeper. For example, Merrill notes that “no one other than A or those given permission by A may enter onto Blackacre or encroach on Blackacre.” If B owns Greenacre, adjacent to Blackacre, A can prevent B from building a billboard (or any other improvement) that encroaches on Blackacre and hinders its visibility from the adjoining public street because A has the right to dictate whether B can enter upon Blackacre and under what terms. Similarly, A may sell to B the right to construct a billboard that encroached on Blackacre, but will demand that price which fully compensates A for the expected loss in the value of Blackacre, including that loss attributable to Blackacre’s loss of visibility from the public street.

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68. This should not be surprising, as many of the decisions, including, significantly, *Dimond D* and *Strom*, predate the publication of *Property and the Right to Exclude*.

69. Merrill, *supra* note 1, at 740.

70. *Id.* (emphasis added).

71. *Id.* at 741.
Now, consider a slight change to the scenario, in which Greenacre is not owned by B, but rather by the local municipal government, G. Instead of proposing a billboard which will be partially built on Blackacre, G plans to construct a highway overpass with sound walls and needs a small portion of Blackacre in order to build the project. If G did not possess the power of eminent domain, a prudent and reasonable A would prevent G from acquiring a portion of Blackacre, unless G were willing to pay A an amount equal to and commensurate with the harm caused by the taking, including specifically the diminution in value to the rest of Blackacre from the loss in visibility due to the highway overpass. If, on the other hand, G does possess the power of eminent domain, A cannot prevent G from taking a portion of Blackacre, but compensation for this substitute forced exchange should be no different than it would be in an unforced market transaction with a reasonable and prudent seller.

It is the landowner’s right to exclude which forms the basis for the landowner’s right to be justly compensated for the conveyance of that right. In the first hypothetical, A may exercise A’s right to exclude in order to prevent B from constructing the billboard that encroaches on Blackacre, or A may allow B to construct the billboard on the condition of appropriate compensation. In the second hypothetical, A’s right to exclude is subservient to G’s power to take property for public use, and therefore the taking of A’s right to exclude must be matched with the payment of just compensation, the “full and perfect equivalent” in money.72

To the extent that the billboard proposed by B is to be built entirely or mostly on Blackacre, such that the portion of the billboard which blocks visibility is itself located on Blackacre, then the hypothetical falls squarely within Pattern II of the recurrent fact patterns seen in those cases considered by the courts as noted in Part II of this Article. But if the only part of B’s proposed billboard that encroaches on Blackacre is a small piece of a footing that is located entirely below ground level, then the hypothetical falls into Pattern III, in which the part of the improvement that causes the loss of visibility is not

72. See, e.g., United States v. Miller, 317 U.S. 369, 374 (1943) (“The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken.”).
actually constructed on the property in question, but is nonetheless integral to the operation of the billboard itself. The analysis does not change if the taking is temporally limited, rather than limited in area.

Turning to the scenario in which G is constructing a highway overpass with sound walls, if the only portion of G’s public road improvement that is actually built on what was formerly part of Blackacre are some underground storm drainage pipes, is A entitled to receive compensation for the loss of visibility to rest of Blackacre caused by the overpass and sound walls themselves? Or to put it another way, even though those parts of the project which actually block the visibility of Blackacre from the public street are not built property taken from A, should A receive compensation for the loss of visibility as part of the just compensation award?

Analyzing this scenario through the lens of A’s “easement of visibility,” as set forth in *Ricciardi*, it is not immediately clear that G has taken or impinged upon A’s easement rights by constructing visibility-blocking improvements offsite. Indeed, this is the crux of the now rejected *Ivers* holding—even though the Utah Supreme Court found that the use of the condemned property was essential to the completion of the project, it nonetheless held that the landowner was not entitled to compensation for lost visibility because he had no property right in the flow of traffic.73

Yet considering the scenario through the rubric of A’s right to exclude (as opposed to A’s “easement of visibility”), the compensability of G’s taking, which causes a loss of visibility to the remainder of Blackacre, is readily apparent. Just as A has an absolute right to prevent B from encroaching upon Blackacre for even the slightest portion of an underground footing for a billboard, A also has the right to permit B to build the billboard footing on Blackacre, and will demand in exchange for that right the appropriate amount of compensation for the loss of visibility caused not merely by the footing itself, but by the entire billboard, for which the footing is an integral part. And a prudent A’s right to extract from B the appropriate amount of compensation for all of the negative aspects of B’s billboard is entirely analogous with a prudent A’s right to extract from G the full measure of just compensation for all of the negative aspects of G’s overpass and sound wall, including the loss of visibility, so long as the

73. *Ivers v. Utah Dep’t of Transp.*, 154 P.3d 802 (Utah 2007).
underground stormwater drainage pipes are essential to the completion of G’s road project.

Although not termed as such, it is clear that the Alaska Supreme Court in *Dimond D* relied upon the landowner’s right to exclude others from its property in holding that a public improvement that obstructs visibility and is built, at least in part, on property taken from the landowner by eminent domain, is compensable:

Ownership of land gives the owner the right and ability to limit any obstructions from being placed on that land. In particular, ownership of land abutting on a road gives the owner the right to control the visibility of all adjoining land further off the road. This obviously can be an important commercial asset. Thus when the state takes a parcel which abuts the road, it also takes the potentially valuable right to control the visibility of the remaining parcel. For this reason, we believe that the best rule in light of reason and policy is that loss of visibility to a remaining parcel is compensable where that loss is due to changes made on the parcel taken by the state.  

Indeed, a landowner’s “right and ability to limit any obstructions from being placed on that land” flows directly from the landowner’s right to exclude others from encroaching on his or her property. It follows, then, that the taking of the “potentially valuable right to control the visibility of the remaining parcel” must be compensable. Thus, the *Dimond D* court’s recognition of this right in the context of the loss of visibility in an eminent domain context serves as an example of the proper application of Merrill’s thesis on the right to exclude to a real-world scenario involving the constitutional right to just compensation.

In reversing the holding of *Ivers*, the Utah Supreme Court in *Admiral Beverage* took the *Dimond D* court’s analysis to the next logical level.  


75. *See Utah Dep’t of Transp. v. Admiral Beverage Corp.*, 275 P.3d 208 (Utah 2012).
project. Given the primacy of the right to exclude among all the rights in the “bundle of sticks,” and especially in light of Merrill’s pronouncement that the right to exclude is the *sine qua non* of property, this is the necessary result for both Pattern II and Pattern III cases. Of course, analyzing a Pattern I case under the right to exclude framework will generally result in a finding of no compensability, unless the landowner has some specially defined right to visibility, such as an easement of visibility,

Indeed, although the application of the landowner’s right to exclude as a basis for analyzing loss of visibility in condemnation cases often focuses on those takings in which the remainder of the landowner’s property is negatively impacted (“damaged”) as a result of the lost visibility, the principle has equal application to those cases in which visibility is not a valuable attribute of the property before the taking. Consider the scenario of a single family residence located on property that backs up to a busy highway. Should the local government acquire a small strip of land along the rear of the property for expansion of the highway and construction of a sound wall, the landowner would likely look favorably on the opportunity to have his or her backyard shielded from the view of every passing motorist.

The landowner’s right to exclude the local government from constructing such a sound wall without being appropriately compensated still remains. However, the amount of appropriate compensation for a public improvement which enhances the owner’s privacy while diminishing the property’s visibility could be zero. The landowner’s right to exclude still exists, but its value under that particular circumstance may be minimal or zero. In the end, however, employing the landowner’s right to exclude as an analytical tool permits the

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76. See Merrill, *supra* note 1, at 730.
77. This is the holding of the Alaska Supreme Court in *Dimond D* with regard to the loss of visibility resulting from berms built within the Alaska Railway right-of-way. 806 P.2d 843, 845–46 (1991).
78. There is some argument to be made that Pattern I cases, in which there is no taking of property, either permanent or temporary, but an improvement is constructed which results in a loss of visibility, should still result in compensation for loss of visibility, especially in jurisdictions in which just compensation must be paid for the taking “and damaging” of private property for public use. However, that argument is beyond the scope of this Article.
79. Or it could be negative, as the landowner’s remaining property may be enhanced in value by the addition of the sound wall. Whether this enhancement is compensable will often depend on whether the jurisdiction in which the condemnation matter is proceeding follows the “state rule” or “federal rule” on calculation of just compensation.
full consideration of all the impacts of the condemnation while pre-
venting a landowner from reaping a windfall award for lost visibility 
if visibility was not a valuable attribute of the property before the 
condemnation.

CONCLUSION

Sometimes the most important legal principles are the most diffi-
cult to identify because they are so fundamental that we lose sight of 
their foundational position. Such is the case with the right to exclude. 
While the case law often struggles to understand exactly what rights 
are at issue when property is taken, Professor Merrill’s statement 
that the right to exclude is the sine qua non of property provides a 
clear and practical tool for establishing when compensation must be 
paid. This is especially so when visibility, often a key attribute of value 
in real property, is lost as a result of a condemnor using its power of 
condemnation to overcome an owner’s fundamental right to exclude. 
Merrill’s principle used as an analytical tool allows us to logically 
resolve when compensation should be paid for lost visibility.
THE THING ABOUT EXCLUSION

HENRY E. SMITH*

INTRODUCTION

The right to exclude is a *sine qua non* of debates over property. No one has been more persistent than Tom Merrill in promoting the idea that the right to exclude is “the *sine qua non*” of property itself.¹ As reflected by the contributions to this conference in honor of the many achievements of his in the area of property, few positions provoke such strong and varied reactions as the placement of the right to exclude at the center of property.

As someone who is often considered to be an “exclusion theorist”—whatever that means—I will take this occasion to offer an account of what the right to exclude does—and does not—offer to property theories, especially those, like Merrill’s, that aim for description and explanation. Merrill is right that the bundle of rights picture is ultimately unsatisfying because it offers no account of any the unifying threads in property law. For Merrill, the right to exclude serves the unifying role not just by being present wherever there is property, but by serving as the source out of which other features typically flow. In this Article, I will show that these derivations of the features of property from the right to exclude are not really derivations but symptoms: although the right to exclude plays an important (if not omnipresent) role in property, it does not have the ontological status attributed to it by Merrill. Even drawing out the implications of the right to exclude, there is still a hole in property where the connective tissue should be. Quite simply, the missing thing in Merrill’s account, as in most current accounts, is the *thing* of property.

Property is the law of things.² This proposition, accepted throughout most of recorded history, in most of the world’s legal systems,

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and by lawyers and laypeople alike, is precisely what American commentators on property deny. As Merrill correctly notes, the contrary proposition, that property is not about things, is the one point of consensus among American commentators, despite their diversity of views on other matters—like the importance to property of the right to exclude.

I will argue that the right to exclude is important in property—even if it is not quite a *sine qua non*—precisely because of its association with the definition of the legal things over which property rights are delineated. Trespass and other doctrines that track the boundaries of land or the outer contours of objects loom large in property because of the central role that thing-definition plays in property. Property relies on legal things when it defines what counts as a violation of a right and how duty bearers are expected to respect property rights. While rights in property, like all other rights, avail between right holders and duty bearers, in property they are typically mediated by the thing. The nature of that thing goes a long way toward determining what kinds of rights one can have and how they work. Land, cars, water, and inventions all may be things subject to property rights, but their very different qualities determine what it means to have property in them.

In this Article, I will show how an account of property as the law of things completes the picture of property, putting the right to exclude in proper perspective. I will argue that Merrill is right to search for a unifying theme in property and that the right to exclude is in the ballpark. Nevertheless, as a candidate for the role of linchpin in property it does not quite fit, and the strain shows. Instead, at the heart of property is the thing. Private law deals with the complex interactions of members of society, and a first cut at managing potential conflict is to carve the world into modular things and associate them with people. The *things* that property law sets up gather together attributes that “belong” together and allow them to interact intensely, while keeping the interface between these legal things and the outside world relatively less intense. They are modules. The innards of the thing are semi-opaque to those outside, most

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prototypically in rem duty holders. The proverbial pedestrian in the parking lot need know nothing about the owner of any car he doesn’t own—whether it is leased, whether the owner is virtuous, and whether the car is borrowed from the driver’s sister-in-law, or even stolen.4 The duties are simple: don’t take, keep out, don’t damage. The thing and its boundary make it easy to use exclusion strategies and to enrich the interface with governance strategies when needed: those contracting over a car know what the subject matter is.

In Part I, I show that the right to exclude on Merrill’s account is of unclear ontological status. Perhaps this lack of clarity can be attributed to the outsized role it has to play in Merrill’s account. He attempts to derive other important rights, like the right to transfer, from the right to exclude. These derivations do not work on their terms, but they do point to the need for thing definition. Part II explores some of the limits of the right to exclude when it is taken to be the *sine qua non* of property. Intangible property is an uncomfortable fit, and we can find examples of property that do not feature the classic right to exclude. These include powers of appointment and (to some extent) even familiar interests like easements. The right to exclude is either absent or highly attenuated here, or we have to water down the notion of the right to exclude in order to accommodate them. By the same token, isolating the right to exclude threatens to atomize property along the lines of the bundle of rights in a fashion that Merrill rightly wants to avoid. Part III shows how possession is indeed, as Merrill’s more recent work shows, associated in important ways with exclusion, but possession too requires crucially the definition of a thing that can be possessed, which makes exclusion less than the central player even here. In Part IV, I show that many of the advantages of focusing on the right to exclude follow from a theory of property based on the need to define modular things in order to obtain the benefits from—and manage the costs of—complexity of the interactions among private parties, as well as their property relations with the state. Property as a law of things suggests why exclusion is important but not fully a *sine qua non* of property. The article concludes with some thoughts on why thinghood helps us understand the attractions of the right to exclude and yet points to a spectrum of property-ness that captures a fuller picture.

I. THE STATUS OF THE RIGHT TO EXCLUDE

The right to exclude sounds reassuringly concrete, but is it? In his writings on the right to exclude, Merrill uses a range of metaphysical and logical terminology of unclear import. In this Part, I first consider the plausibility of the right to exclude as a leitmotif for property. To follow through on making the right to exclude the thread that keeps all of property together, Merrill’s analysis casts the right to exclude in metaphysical and logical sounding terms, even though the theory is primarily a functional one. The unclear status of terms like “sine qua non,” “essence,” and “derive” are, I will argue, a symptom of the problem—asking the right to exclude to do too much work, including work that the “thing” of property could do better.

At the outset, let’s start with the phrase “right to exclude.” Exclude from what? Merrill endorses the “consensus” that property is not about things. In this, he joins many other exclusion theorists in not foregrounding the thing of property.5 In the Nebraska essay,

5. This was certainly true of the exclusion theorists from the Realist era. See infra notes 49–53, 77–92, and accompanying text. More recently, exclusion theory in North America includes strands emphasizing Kantian mutual freedom and owner control. Arthur Ripstein argues that exclusion is not just crucial to the working of property but is normatively central—that exclusion is normatively prior to use. Arthur Ripstein, Possession and Use, in PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 156 (James Penner & Henry E. Smith eds. 2013). Things play a role here but the emphasis is on the “authority structure.” Theorists who emphasize exclusive control over things tend not to let the thing play a large role in the theory; control does most of the work. See, e.g., JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 31 (1988) (stating that “[t]he concept of property is the concept of a system of rules governing access to and control of material resources.”); id. at 32 (“The concept of property does not cover all rules governing the use of material resources, only those concerned with their allocation”); Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. TORONTO L.J. 275, 289–90 (2008) (distinguishing exclusivity of control from the right to exclude). See also Shyamkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 HARV. J.L. & PUB. POL’Y 593, 593 (2008) (arguing that the right to exclude is not to be identified with the availability of injunctive relief, which points to the primacy of the right to exclude in property). English exclusion theorists emphasize things in property to a greater degree. For example, Harris takes the role of a thing more seriously than do most American theorists. J.W. HARRIS, PROPERTY AND JUSTICE 30–32, 119–61 (1996). For Harris, the “essentials of a property institution are the twin notions of trespassory rules and the ownership spectrum.” These trespassory rules make reference to things, id. at 5, or “a resource,” id. at 25, and “purport to impose obligations on all members of society, other than an individual or group who is taken to have some open-ended relationship to a thing, not to make use of that thing without the consent of that individual or group,” id. at 5. James Penner is thought of as an exclusion theorist, but for him things are central and he emphasizes the importance to property of his Separation Thesis just as much as the Exclusion Thesis. PENNER, supra
Merrill notes with apparent approval under a heading titled “Points of Consensus” that “[f]irst, nearly everyone agrees that the institution of property is not concerned with scarce resources themselves (‘things’), but rather with the rights of persons with respect to such resources.”6 In his follow-up article in this Volume, he notes the necessity of the “triad” of a “an owner, a thing, and the right of the owner to exclude others from the thing.”7 What is a thing? For the updated Merrill, “[t]he ‘things’ to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want.”8 Not much content there. So as before, resources are the assumed backdrop of property, with the right to exclude doing the interesting work.

There is a great deal of plausibility in a focus on the right to exclude as the *sine qua non* of property. But I will argue that this plausibility derives not from the right to exclude itself being the “*sine qua non*” or “essence” of property, but rather from the “thing” that the consensus would have us downplay.

Before turning to the positive role of things, let us diagnose the problem with the relatively free-floating right to exclude as a *sine qua non*. The Nebraska essay adopts a philosophical-sounding terminology. The article starts with a conceptual analysis, as reflected in the term “*sine qua non*” and “necessary and sufficient condition,”9 and that

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7. Thomas W. Merrill, *Property and the Right to Exclude II*, 3 Brigham-Kanner Prop. RTS. Conf. J. 1 (2014). Merrill takes a similar “triadic” approach in other recent work. Thomas W. Merrill, *The Property Strategy*, 160 U. Pa. L. Rev. 2061, 2061 (2012). After discussing the wide variation in what counts as a thing in different societies and difficulties with marginal cases like bank accounts, he goes on to claim that the “crux of the property strategy lies in the concept of ownership,” which is identified with the “nature” of the prerogatives of the owner; these prerogatives, he says, are “often . . . described in terms of the right to exclude others.” *Id.* at 2066. Merrill then reaffirms that “[a]s I have previously written, the owner’s right to exclude is a necessary condition of identifying something as being property.” *Id.* at 2066–67 (citing Merrill, *supra* note 1, at 731).
the right to exclude is the “essence” of property and “essential” or “central” to “our understanding of property.” He heads up his discussion with the heading “The Logical Primacy of the Right to Exclude,” and the discussion is replete with invocations of logic. More substantively, Merrill claims to be able to “derive” other rights and attributes of property from the “core” right to exclude.

There is a category mistake here. Whatever the right to exclude might have in the way of importance to property, logic has nothing to do with it. One could argue, as have Kantians like Arthur Ripstein, that the right to exclude is central to property because the very nature of the property relationship is based on an authority relation that relies on location and exclusion. For Ripstein, exclusion has normative value that inheres in the nature of the relationship. This is not Merrill’s claim, and in his Article for this volume, he endorses the view that the right to exclude is the means to the end. In this Merrill accords with Penner, for whom exclusion is “the formal essence of the right” and the interest in use serves to justify it. Indeed, Merrill endorses Penner’s “exclusion thesis: the right to property is a right to exclude others from things which is grounded by the interest we have in the use of things.” For Merrill, it is not exclusion all the way down.

If so, we should be skeptical of Merrill’s a priori approach that derives one aspect of property from another. These derivations do not work. Take the derivation of the right to use from the right to exclude. Merrill claims that, in general, the right to exclude “entail[s]” or “leads directly” to the right to use. But a true right to use cannot be derived in this way. With the right to exclude and the background
liberty in everyone to use, the owner can exercise that (general) liberty without interference from others who would, but for the right to exclude, act on their similar liberty. These background liberties or privileges of use need no separate delineation because they are indirectly protected—and bolstered in their exercise—by the right to exclude. This is a subtle distinction, much emphasized by Hohfeld, and in many situations we speak, sometimes correctly and sometimes incorrectly, of a right to use. And courts will sometimes afford an injunction or damages against one interfering with an owner’s use, as in the law of nuisance. Easements, to which I return shortly, would be a more explicit example of a true right to use. But there is no “derivation” here. It is true, as I and others have argued, that the law of nuisance is more based on boundaries and invasions than in the usual characterization of nuisance law as a formless jumble. But note well: any robust right to use here tracks the boundaries and invasions that are keyed to the land as a thing. Even here, the right to exclude shines with the borrowed light of the thing.

We can also see that the notion of “derivation” here is slippery, because it is not the one-way road Merrill portrays it as. The theorists of “exclusive use” make a move that is in some sense the opposite of Merrill’s. That is, an owner’s rights to use a resource require robust protection that leads to something like a right to exclude, as implemented in the law of trespass and the like. For many uses of tangible things we need robust protection, which the right to exclude affords. In particular, if the law protects a wide (and open) set of uses, the uses in some loose (non-logical) sense “add up to” a right to exclude. What’s really going on here is that the very fact that the right to exclude does not make direct reference to use or particular uses

is what makes it a strong device for protecting those uses. If trespass, for example, does not require a showing of interference with use, it is all the more attractive to an owner as a potential plaintiff.

So much for the right to use. How about the right to transfer, either during life or upon death? Here Merrill admits the need for a “relatively modest clarification about the domain of the right to exclude.” 23 Here’s how the derivation is supposed to work. For transfer during life to be a right, the owner must have the right to include others and “also to exclude him or herself.” 24 So if A exercises the right to include B, B has a panoply of use rights, and if A excludes himself (whatever that means), A cannot enter. Transfer complete. Or is it? Why doesn’t A still have the gatekeeper role? The derivation is missing something: A must also give up the power to alter these relations. Moreover, as James Penner has shown, the transfer of a right is the transfer of the very right: When A transfers her property right to B, B has the very right A had. 25 It is true that the set of duty bearers is different (minus B, plus A), but that happens automatically in the transfer. Some have argued that for this shift in right holders and duty bearers to occur, we need an “office” of ownership: A leaves the office and hands it over to B, but the rights and duties avail between the officeholder (whoever that is) and the duty bearers. 26 I will suggest that the solution to the problem Merrill’s account faces does not require that much extra machinery. All we need is a relatively depersonalized thing in terms of which rights and duties can be couched. Then, a transfer of property rights from A to B involves the transfer of the legal thing and the automatic (because depersonalized) change in the set of rights and duties surrounding that legal thing.

Similarly for transfers upon death. Merrill says that “the right to exclude entails the right to devise upon death,” 27 with the mere specification that the owner’s directions about the disposition of property will be respected for a certain period after death. This “modest extension” is couched in terms of letting the owners decide “who shall be included

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23. Merrill, supra note 1, at 743; see also Merrill, supra note 7, at 5–6.
24. Merrill, supra note 1, at 743.
27. Merrill, supra note 1, at 743–44.
and excluded upon the death of the owner.”28 But as with other transfers, what we need is not just inclusion and exclusion but a shift in the powers and other incidents of ownership, which can be framed in terms of the legal relations surrounding the legal thing. There is no logical entailment here; it is simply that for legal systems that do respect testators’ wishes, owners can set in motion a transfer (of the very right to the thing) that occurs at or shortly after death (the executor may have temporary rights).

Even if logic does not get us very far here, Merrill is right that the various rights and duties (and, I would add powers, liabilities, immunities, and so forth) do hang together. The reason for this is not that the right to exclude is the basis for derivations or modest clarifications, but rather the thing of property—the depersonalized subject matter of the legal relations—provides the glue holding it all together.

II. THE RIGHT TO EXCLUDE AS A NON SINE QUA NON

The right to exclude is often present in property. And because exclusion is a low-cost strategy for protecting property rights, it is almost ubiquitous in some form or other, especially in modern property systems. It is, as I will argue, especially tied to things and possession. As resource conflicts become more important we should expect it to be modified more and more by detailed governance strategies.29 These can take the form of contracts and servitudes, nuisance law, zoning, and other land-use regulation. Indeed, because much of the focus is on particular problems, it is easy to overlook the important role that exclusion and the right to exclude still play in property law and norms.

A sine qua non is something different. Can we find property without exclusion? The balance between exclusion and governance can be struck differently in different systems. Think of indigenous property systems, in which one person might have the right to pick berries in a given location and another the right to hunt birds.30 What is the

28. Id. at 743.
exclusion and what is the thing here? Yes, the tribe or clan might be excluding other groups from the area. I think, though, that we are inclined to say that the individuals with the berry-picking or bird-hunting rights have a kind of property. It is basically a usufruct, and Merrill notes that Ellickson hypothesizes that this is the oldest type of property right.\(^{31}\) This may be, but in what sense is there a right to exclude as opposed to a right to use?

The same might be said about easements. They are, if anything is, robust rights to use. And yet along with the usufruct Merrill claims that an easement affords its holder a right to exclude simply because the use right can be enforced against the owner of the servient estate.\(^{32}\) The problem with the right to exclude, then, becomes one of dilution: any right is a right to exclude. For a right to exclude to have any content beyond that of a generic right, the “exclude” has to have some bite.

I would argue that usufructs and easements are property, but they are less property-like because their definition is more focused on use than on a thing. Nevertheless, the thing is not out of the picture altogether. With the traditional usufruct, the thing is the group’s land or the berries and birds, but individuals’ and families’ rights are not primarily delineated in these terms. Rather, the rights are indeed couched in terms of uses and use-oriented activities, which shade off into the law of torts or unfair competition.

The right to exclude as a *sine qua non* of property runs into further trouble when it comes to intangibles. Is there a right to exclude from intangibles? There is no question that intangibles present special challenges for theories of property that emphasize exclusion or things. Previously, I have argued that it makes sense to talk about exclusion strategies and things in the case of intangibles.\(^{33}\) The violation


\(^{32}\) Merrill, *supra* note 1, at 744. He states: And what is the defining difference between use-rights in the form of licenses and use-rights that are considered nonpossessory property rights? The difference is that the holder of a nonpossessory property right can exclude others (including but not limited to the grantor) from interfering with the exercise of the use-right, whereas the holder of a license lacks such a right. In other words, the feature that makes nonpossessory property rights property is the right to exclude others, and the right to exclude cannot be derived from the right to use.

of the right is framed in terms of an on/off signal that is not keyed to harm or uses. On this scale—and it is a scale—patent law is more property-like than is copyright. Patent law defines inventions as things—although with great effort and less than ideal effectiveness—and one violates the right if one “without authority makes, uses, offers to sell, or sells” the patented invention. “Use” is part of the formulation but in a generic, metaphorically boundary-crossing kind of way. By contrast, copyright law sets out a laundry list of use rights, and spends very little effort defining the thing (the protected expression), compared to patent law.

When we come to choses in action, things are even more ethereal. In German law and among some commentators, such as Douglas and McFarlane, property is limited to rights in tangible things (excluding even IP), but Merrill, rightly in my view, does not limit property in this way. So how does the right to exclude relate to intangibles? Penner analyzes them in terms of both his exclusion and separation theses. It is important to note that separation plays an especially big role here because the things involved are quite artificial. Justice Holmes, sometime hero to the Realists and no friend of legal fictions for their own sake, gives a succinct account of how contracts are treated as things when it comes to assignability:

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. Arkansas Valley Smelting Co. v. Belden Mining

34. Id. at 1799–1819.
35. 35 U.S.C. § 271 (2012). Importation into the United States is also covered. Id.
37. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] Aug. 18, 1896, BUNDESGESETZBLATT [BGBl.] I 1600, § 90 (Ger.), available at http://www.gesetze-im-internet.de/englisch_bgb /englisch_bgb.html#BGBengl_000P90 (“Only corporeal objects are things as defined by law.”); BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 100, 106–07 (1962) (stating that Roman jurists regarded property as a relation of a person to a thing and that they regarded only corporeal objects as the objects of property rights); BEN MCFARLANE, THE STRUCTURE OF PROPERTY LAW 4 (2008); Douglas & McFarlane, supra note 5. Bentham and Austin were skeptical about talk of property in intangibles as “fictitious’, ‘figurative’, ‘improper’, and ‘loose and indefinite.’” WALDRON, supra note 5, at 35 (quoting Bentham and citing Austin).
38. Penner, supra note 4, at 115–22.
Co., 127 U.S. 379. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a res incorporalis, it is not illogical to apply the same rule to a debt that would be applied to a horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure, the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt is to be regarded as a thing, and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal. Civ. Code, §§ 954, 711. The debtor does not complain, but stands indifferent, willing that the common law should take its course.39

This is all the more remarkable because in contract in general, Holmes does not take a proprietarian view but stresses the remedy of damages.40 In Portuguese-American Bank, not only does Holmes see that conceiving of a contract right as a thing promotes alienability, he hints at why this is.41 Precisely because the debt is treated as a thing, general rules apply to it regardless of the personal identity of the debt holder, and therefore the debtor can regard much of it as a modular black box, “stand[ing] indifferent” to the identity of the debt holder. In general, as Merrill and I have argued, when contracts are treated as property, they tend to be more standardized; and when they become partway in rem on account of a large number of duty bearers (mass contracts), the law tends toward partway standardization.42 And to the extent that there is property-style protection of contract interests, they tend to be standardized.43 None of this is to say that

41. 242 U.S. at 11–12.
depersonalization is always a good idea or that it always works, but Holmes here captures how it is supposed to work in the first place. One could say that intangible property, along with nonpossessory rights like easements, do have the *sine qua non* of the right to exclude because the owner can sue someone else. But then the right to exclude again collapses into any old right. It is not at all clear that the right to exclude gets us very far with property in intangibles.

The lesson from property in intangibles, and for that matter in fugitive resources like water, is that property and ownership lie along a spectrum. Resource conflicts can be dealt with using a wide variety of institutions. To the extent those institutions rely on the definition of relatively impersonal things to mediate rights and duties, the more we have property. The right to exclude often pops up here, but not in the sense of a *sine qua non*.

The danger is that the right to exclude, as it covers more territory, will become thin to the vanishing point. It is but a short step from there to the bundle of rights, which is Merrill’s main foil and which he often calls “nominalism.” Nevertheless, and as Merrill recognizes, the right to exclude is often coupled with the bundle or nominalist view. The Supreme Court, in its frequently (self-)cited formulation from *Kaiser Aetna v. United States*, avers that the “right to exclude others” is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.” Critics of theories, like Merrill’s, that give a central place to the right to exclude, argue that doing so treats the right to exclude as just another stick. The

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44. P.G. Turner, *Degrees of Property* (Univ. of Cambridge Faculty of Law Research Paper No. 01/2011, 2011), available at http://ssrn.com/abstract=1735953; *see also Harris, supra* note 5, at 5–6 (introducing the “ownership spectrum”).

45. Merrill, *supra* note 1, at 737–39.

46. Id. at 736–37 (describing “multiple-variable essentialism”; *see also id.* at 735 (discussing Felix Cohen’s views).


48. Claeys, *supra* note 22, at 24–25 (critiquing Merrill’s theory); Mossoff, *supra* note 22, at 390 (“Linguistically, exclusion plays a role largely as an adjective of the rights of acquisition, use and disposal, and substantively, exclusion is, for the most part, only a corollary of the more fundamental premises that focus on the possessory rights.”). Claeys sees notes that he “disagree[s] with Merrill and Smith that thing-ownership may be reduced to an owner’s right to exclude others from his thing.” Eric R. Claeys, *Property 101: Is Property a Thing or a Bundle?*, 32 SEATTLE U. L. REV. 617, 631 (2009) (reviewing Thomas W. Merrill & Henry E. Smith, *Property: Principles and Policies* (2007)). I would argue that Claeys is reading too much from the Nebraska essay into our casebook.
Realists were fond of the bundle, because it led to the dethroning of property and removed a perceived obstacle to social engineering, but as Adam Mossoff has argued, many of the Realists were quite fond of the right to exclude as a *sine qua non* of property. Thus, Felix Cohen, whom Merrill invokes, emphasizes the right to exclude, but was in general no friend of traditional notions of property or received concepts in general. 

Thing ownership in particular was a prime example of “transcendental nonsense” for Cohen. The danger (or welcome feature, depending on your point of view) is that the right to exclude leads to the bundle picture and all of its inadequacies.

In contrast to the bundle picture, Merrill rightly seeks an account of the holism of property. What the owner owns is more than a bundle of sticks. As William Markby said, ownership “is no more conceived as an aggregate of distinct rights than a bucket of water is conceived as an aggregate of separate drops.” Exclusion is an important cross-cutting theme in property, but it is not the glue that holds it together. That is why Felix Cohen and the Realists could adopt the right to exclude as a *sine qua non* of property without missing a beat. The glue we need, and the aspect of property the Realists really did deny, is the important role of the *thing* in property.

### III. Exclusiveness and Possession

Before turning to the role that things play in property, consider one last aspect of property that is closely related both to exclusion and to things—the law and norms of possession. The right to exclude is closely associated with possession, as Merrill’s new article explores at length. Consistently with some of our joint work, he notes that possession is a low information cost method of establishing property claims. This is true, although I will argue that like the right
to exclude itself, much of the importance of possession to property is attributable to its role in defining the basic things of property.

Possession and accession—another interest of Merrill’s—help get the basic ontology of property law started. Property may well have its origins, as Hume and Sugden would have it, in an emergent convention based on salience. The basic ontology requires the definition of persons, things, and relations between persons and things. De facto possession is very intuitive, and possessory custom is quite close to everyday notions of possession. Custom tends to be simplified and formalized as it applies beyond its community of origin. Thus, customs that need to apply to large and impersonal audiences of duty bearers (they are functionally in rem) cannot presuppose a lot of community-specific information. Title and ownership rules are layered on top of this stratum of possession. Custom, and especially this more generally applicable law of possession and ownership, is feasible because it relies on the thing. Possessors and duty bearers relate to each other through the thing. Exclusion strategies are closest to this: keep out of and keep off the thing, unless you have my permission. When title rules are layered on top of possession, they further work out what the thing is. Rules like good faith purchase get us further from possession. And a set of surveys and title records define the legal thing that parallels a physical plot of land in a more articulated fashion than do laws or norms of possession.

Instead of taking possession as a given, what we need is a bottom-up theory of possession in order to understand the role it plays in the architecture of property. Elsewhere I argue that a combination of the convention-based theories of David Hume, Robert Sugden, and David Friedman coupled with Barzel’s theory of property rights helps explain the most basic level of property. Conventions are regularities

59. Smith, supra note 56; see also YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY
in behavior that people adopt in preference to alternatives as long as others do the same. The idea is that people will come to recognize that mutually respecting each other’s possession will lead to peace. Such a convention can emerge out of pairwise interactions, based on what strikes actors as salient—such as proximity and potential control. As Friedman emphasizes, the norms of possession do not emerge because people conclude they are efficient overall, but rather they reflect an individually advantageous strategy in small-scale interactions. Whether the morality and efficiency scale up to the level of society as a whole is an open question, or rather the extent of yes relative to no is disputable. But one can see here how possession gets property going without ambitious assumptions or deep claims of justification.

To get anywhere with possession, we—and the members of society—have to know what goes with what. This is the same question as in accession, and it is no accident that Hume pays great attention to accession. Hume, Sugden, and Friedman emphasize the psychological aspect—that relations like closeness and attachment strike people as prominent and form noticeable patterns. More recently Sugden and co-authors have explored how salience can emerge from inductive reasoning (another concern of Hume’s). Part of this learning process can involve usefulness. This is where Barzel’s theory of property rights is helpful. According to Barzel, we should expect an actor to have property over collections of attributes over which that actor has a special ability to affect its mean return. Barzel disclaims any attempt to explain the origins of property, but his theory does dovetail with the convention-based accounts of Hume, Sugden, and Friedman: actors will perceive groups of attributes as things and assign them to possessors based in part on who can most effectively use them as such a unit. Salience and conventions may or may not be associated with “system 1” or instincts, as Merrill would have it, but they are indeed

Rights (2d ed. 1997); David D. Friedman, A Positive Account of Property Rights, 11 Soc. Phil. & Pol’y 1 (Summer 1994); Hume, supra note 57; Sugden, supra note 57.
61. Friedman, supra note 59, at 3–4, 12, 14.
64. Barzel, supra note 59.
65. Merrill, supra note 7, at 17; Thomas W. Merrill, Possession and Ownership, in The Law and Economics of Possession (Yun-chien Chang ed., forthcoming, Cambridge University
easy to use and allow for quick on-the-spot judgments. Nevertheless, automatic judgments can incorporate acquired information and skills. Thus, whether features of a resource are grouped into a thing is based on some combination of proximity, potential controllability, and usefulness. Thus accession also has a customary base upon which the law builds. Possession and accession go hand in hand and are closely involved in the delineation of the legal things of property.

A prime example of all these processes at work is the *pedis possessio* doctrine from mining law. Originally it was a possessory custom among miners, which afforded a miner working a “spot” some protection against interference by other miners, as long as he worked that spot. When this custom was taken over into the law of mining, the spot was replaced by the claim, a legal thing that has clearer boundaries, especially for third parties. Whereas a “spot” was probably abundantly clear to miners in a given camp, the same cannot be said for outsiders, including purchasers and officials. Here, contra Merrill, prelegal possession needs to be stripped down in order to keep information costs manageable for larger groups of (in rem) duty bearers. The claim is a legal thing that serves this purpose better than the spot. More recently, the uranium mining industry, for which the standard size claim is too small for exploratory purposes, wanted to spread the work requirement (on pain of loss) over several claims, but courts have largely rebuffed them. The legal thing associated with a mining claim (complete with designated boundaries) has a strong attraction in this context, for information cost reasons.

Merrill asserts that title rules cannot get too far from possession without raising information costs to intolerable levels. There is some truth to this, but distance is not the main issue. As we just saw, possessory norms may need formalizing in order to apply in rem.

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66. Id.
68. Union Oil v. Smith, 249 U.S. 337 (1919); Smith, supra note 58, at 200–02.
69. Geomet Exploration, Ltd. v. Lucky Mc Uranium Corp., 601 P.2d 1339 (Ariz. 1979); Smith, supra note 58, at 201–02.
70. Merrill, supra note 7, at 19–21.
and thing definition is often part of that process. Whether title rules cannot get “too far” from possession is an empirical question, turning in part on the ease of defining legal things. As Merrill notes, technology has some role to play here. The increasing prevalence of smartphones may make more detailed information about title more readily available. For example, Richard Hynes proposes that posting laws should be modified so that the owner’s wishes are recorded and available over the Internet.71 Hunters planning a trip or even those on the spot could tell instantly where they are and are not allowed to go. The legal things defined in the land records can be used for more purposes now and in the future.

Let me end this discussion of possession on a comparative note. In the civil law, property is the law of things. Consistent with that notion, property in civil law is defined much more directly in terms of ownership (dominion) over a thing, and derogations from this unitary ownership are grudgingly permitted. By contrast, the common law system of estates grew out of possession and can be thought of as “possession plus,” which brings us toward ownership. As Yun-chien Chang and I have argued, ownership in the two types of system is structurally and functionally quite similar in terms of the rights and duties, liberties, and powers, etc. they afford, but the “style” of getting there differs.72 The common law style emphasizes the connection to possession much more than does the civil law. To be sure, possession plays an important role in civil law in terms of the architecture of the system,73 and commentators on the civil law have noticed how possession as a social fact forms the foundation of property, upon which the law is layered.74 But when it comes to defining the things of property, this can be done very explicitly as in the civil law, or more implicitly, with a lot of talk about possession at the same time. This should not be surprising because possession and accession are often ways of getting at thing definition, even if it is only implicit. Again, possession, accession, and the right to exclude are closely tied to prelegal and legal things, the objects of the rights.

74. See Heinrich Dernburg & Johannes Bierman, 1 PANDERKEN, pt. 2, at 1–7 (6th ed. 1900); Philipp Heck, Grundriß des Sachenrechts §§ 1, 3 (1930).
IV. THE MISSING THING

The problem with focusing on the right to exclude as the *sine qua non* of property is that it does not sufficiently challenge the post-Realist de-emphasis of property as a law of things. Recall that Merrill cites with approval the “consensus” that the institution of property is not concerned with “things” themselves. I say: not so fast. It is true that property is not just about things and that it does concern rights of one party against many other duty bearers (other persons), with respect to things. But these truisms don’t exhaust the role that things play in property. As I have argued before and will elaborate further in this Part in connection with the right to exclude, the thing plays a crucial role in property in mediating the rights (and other legal relations) availing between owners, possessors, and others with property interests on the one hand and duty bearers (and so on) at large on the other. The legal thing defined over the actual thing serves an important function in the delineation of legal relations. In particular, the legal thing allows property rights to be simple enough and impersonal enough to reach an in rem set of duty bearers and to be more easily transferable from one party to another.

So it is not out of naiveté or lack of sophistication that courts and commentators in Commonwealth and civil law jurisdictions (and, it would seem, other legal systems untouched by American Legal Realism) characterize property as the law of things. Property as being thing-based has been more or less true through large swaths of history throughout the world. Indeed in modern times, the American legal academy and its followers (to the extent it has followers) are the only ones denying the importance of things to property. People in everyday life, for whom Merrill has an appropriately high regard,

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75. Merrill, supra note 1, at 731–32.
76. See, e.g., Smith, supra note 2.
77. See, e.g., NIGEL FOSTER & SATISH SULE, GERMAN LEGAL SYSTEM AND LAWS 493 (4th ed. 2010) (explaining *Sachenrecht* in accordance with its name as the law of things); 1 ISAAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW (THE LAW OF PROPERTY) 69–136 (2d ed. 1965) (analyzing the notion of a thing implicit in Jewish law and noting differences from civil and common law, including with respect to air space and to leaseholds); 2 A.N. YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE: PROPERTY §§ 12, 15 (4th ed. 2011) (stating the role of the thing in the civil law of property in Louisiana); Chang & Smith, supra note 72, at 40–44 (discussing how property in civil law systems depends on the notion of a “thing”).
78. See Merrill, supra note 7; see also Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 WM. & MARY L. REV. 1849 (2007).
see property as crucially involving things. I will show how lay intuition is even more important than Merrill acknowledges, and that we need not over-privilege “scientific policymaking.”

The downplaying of things is closely associated with Legal Realism, which Merrill is right to be dissatisfied with. The bundle of rights picture of property is one of Realism’s most enduring legacies. But it is no accident that the Realists downplayed things and embraced the bundle picture: the two fit neatly together. The Realists were intent on disparaging the role of things in property, not the right to exclude per se. (Indeed, as Merrill notes, arch-realist Felix Cohen was a fan of the right to exclude, and he was not alone. The most famous modern formulation of the post-Realist position is Tom Grey’s:

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as things that are owned by persons. To own property is to have exclusive control of something—to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one’s property are conceived as departures from an ideal conception of full ownership.

By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. Consider ownership first. The specialist fragments the robust unitary conception of ownership into a more shadowy “bundle of rights.” Grey takes square aim at the idea of property as being a right to a thing:

What, then, of the idea that property rights must be rights in things? Perhaps we no longer need a notion of ownership, but surely property rights are a distinct category from other legal

79. Bruce A. Ackerman, Private Property and the Constitution 26–31, 97–103 (1977) (contrasting the “scientific” perspective that views property as a bundle of rights with the “layman’s” perspective that persists in thinking of property as rights to things).

80. Cohen, supra note 51, at 374; Merrill, supra note 1, at 735; see also Mossoff, supra note 50.

rights, in that they pertain to things. But this suggestion cannot withstand analysis either; most property in the modern capitalist economy is intangible.82

Giving up on the centrality of things is what has wider significance:

The substitution of the bundle-of-rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory. This in turn has political implications . . . . The legal realists who developed the bundle-of-rights notion were on the whole supportive of the regulatory and welfare state, and in the writings that develop the bundle-of-rights conception, a purpose to remove the sanctity that had traditionally attached to the rights of property can often be discerned.83

He goes on to state his conviction that this process is not really ideological in any mystifying sense but is simply the inevitable development of capitalism. There is no talk here of the right to exclude. In taking aim at things, rather than the right to exclude, Grey is following in the footsteps of the Realists themselves. Felix Cohen saw the right to exclude as the *sine qua non* of property, but he deplored “the ‘thingification of property,’” which made possible a pretense that “courts are not creating property, but are merely recognizing a pre-existent Something.”84 Indeed, property as a right to thing was Exhibit A for Cohen of what he derided as “transcendental nonsense.”85 Nor was Cohen alone among the Realists in downplaying the thing in property. Arthur Corbin famously stated that “[o]ur concept of property has shifted . . . . [P]roperty’ has ceased to describe any *res*, or object of sense, at all, and has become merely a bundle of legal relations—rights, powers, privileges, immunities.”86 Morris Cohen sounded a similar theme when he stated that “a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always

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82. *Id.* at 70.
83. *Id.* at 80.
85. *Id.* at 809. See Mossoff, *supra* note 50, at 2013–18; see also Smith, *supra* note 2.
against one or more individuals."87 For this very reason, he disclaims
the traditional view of property as a right to a thing in favor of the (in
his view) correct analysis in which the right to exclude is primary:

The classical view of property as a right over things resolves it
into component rights such as the *jus utendi, jus disponendi*, etc.
But the essence of private property is always the right to exclude
others. The law does not guarantee me the physical or social
ability of actually using what it calls mine. By public regulations
it may indirectly aid me by removing certain general hindrances
to the enjoyment of property. But the law of property helps me
directly only to exclude others from using the things which it
assigns to me.88

The contrast between the bundle of rights and the right to a thing
goes all the way back to the first instance of the bundle picture in
John Lewis’s treatise on eminent domain:

We must . . . look beyond the thing itself, beyond the mere
corporeal object, for the true idea of property. Property may be
defined as certain rights in things which pertain to persons and
which are created and sanctioned by law. These rights are the
right of user, the right of exclusion and the right of disposition.89

Lewis then goes on to specify how these rights are limited and how
they are supplemented in the case of real property by rights of lat-
eral support, riparian rights and the like.90 When it comes to the
Constitution, Lewis acknowledges the unreflective identification of
property with things but asserts that “[t]he dullest individual among
the people knows and understands that his property in anything is
a bundle of rights.”91 Like Merrill and the Realists, Lewis sets up two
choices: identifying property with things or accepting that property
is a bundle of rights, which in Lewis’s hands leads to an expansive

89. John Lewis, *Treatise on the Law of Eminent Domain in the United States* § 54,
at 41 (1888).
90. Id. at 41–43.
91. Id. § 55, at 43.
version of takings law. Lewis and the others are right that property consists of rights in things—even a bundle, if you will—but what these discussions leave out is the key role of the thing itself in delineating the right and its consequent role in mediating between the owner and duty bearers.

In keeping with the consensus, Merrill in his first essay studiously avoided the word “thing,” preferring (starting with the passage quoted earlier) the more neutral and economic-sounding “resource.” Later, Merrill starts bringing the thing back into the picture when he says that property requires a triad of a person a thing and a right of the person to exclude from the thing. Still, the right to exclude takes center stage, and “[t]he ‘things’ to which property attaches are scarce resources that humans find valuable, and they are valuable because they are things people want.” But again, the thing does no work other than to be scarce. Most importantly, the definition of the thing plays no crucial role in Merrill’s account—only the right to exclude does. Again, this is not wrong, but incomplete.

What’s missing is the thing. Frederick Pollock defines a legal “thing” as “some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.” This foreshadows Penner’s separation thesis. He then notes how central to holism in property a thing is:

[O]n the whole perhaps we have good ground for saying that the “thing” of legal contemplation, even when we have to do with a material object, is not precisely the object as we find it in common experience, but rather the entirety of its possible legal relations to persons. We say entirety, not sum, because the capacity of being conceived as a distinct whole is a necessary attribute of an individual thing. What the relations of a person to a thing can be must depend in fact on the nature of the thing as continuous or discontinuous, corporeal or incorporeal, and in law on the

92. Id. § 56, at 45 (“If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property, and hence, that his property may be taken in the constitutional sense, though his title and possession remain undisturbed.”). Reminiscent of this approach is Epstein’s pro-bundle argument. See Epstein, supra note 22. The Realists employed the bundle to minimize takings. Mossoff, supra note 50.

93. Merrill, supra note 7, at 4.
character and the extent of the powers of use and disposal which particular systems of law may recognize.94

Although property is not a thing, the nature of the thing in the world helps determine what kind of legal thing it can correspond to.

In recent times, Penner has taken up the strands of theorizing about intangible property by Pollock and others at the end of the nineteenth century and has explored how central the objects of property—things—are to the concept of property. Thus, while Merrill focuses on Penner’s exclusion thesis, equally important for Penner is his separability thesis, which is a theory of the “thinghood” of objects of property:

Only those “things” in the world which are contingently associated with any particular owner may be objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another.95

Separability is a necessary condition for legal thinghood in property.96 Depersonalization is important for transfer. Separation and exclusion also go hand in hand: a non-personal thing can be the basis for sending a relatively simple signal of keep off or don’t touch.

Thing definition is particularly tied to exclusion through boundaries. The thing ties together the separability and exclusion theses. By being a separate thing in the eyes of the law, it can be subject to the rights employing exclusion (and governance) strategies. Conversely, as the first cut at defining property, an exclusion strategy sometimes helps define the thing. Where the thing requires some delineation, the process of thingification is partly one of drawing boundaries. In the case of land, a parcel is not a separate thing until we draw a boundary, which is used to define trespassory rules.

94. Frederick Pollock, What Is a Thing?, 10 L.Q. REV. 318 (1894). See also Frederick Pollock, A First Book of Jurisprudence 121 (1896) (“A thing is, in law, some possible matter of rights and duties conceived as a whole and apart from all others, just as, in the world of common experience, whatever can be separately perceived is a thing.”); id. at 105 (“possible objects of common or conflicting interest”).

95. Penner, supra note 4, at 111.

Modular thinghood plays an important role in capturing many of the characteristic features of property, which I have elsewhere classified as basic, secondary, and higher-order.97 None of these features can be derived logically from thinghood (or the right to exclude), but thinghood is a central part—a linchpin—of a theory that captures them. We have already seen how the basic features of property—in rem status, the right to exclude, and the residual claim—are associated with thinghood. By separating out and depersonalizing a chunk of the world, thinghood makes much easier the sending of an in rem message and the assertion of a right to exclude to that audience. Merrill is right that the residual claim is related to the right to exclude, but this happens through thing-definition: the outer boundary of the thing serves as the starting point from which specific rights and claims are subtracted. What’s left over depends crucially on the definition of the extent of the thing.

As for secondary features—alienability, persistence, and compatibility—we have already seen how the depersonalization made possible by thingification promotes alienability. The same goes for the features of persistence and compatibility. Relatively simple interfaces between things and the rest of the world make it easy to trace rights to things though remote hands (persistence). And things with stripped down interfaces are more compatible. Just as in the rectangular survey, rectangular plots have the same features as they are divided and combined, so too when interests in property, from the estates to covenants, are defined in terms of modular things, they are more compatible as they interact and combine.

Finally high-level features of property—recursiveness, scalability, and resilience—receive an explanation based on the role of things in property. First, the things of property are recursive (nesting). The rules for forming things out of things can be applied over and over. For example, the process of breaking a life estate into another life estate and a reversion or remainder can iterate, as can the process for forming subsidiaries of nested business entities. This recursivity makes a system with a small set of basic thing types (numerus clausus) a highly generative one: complexity can be managed through the use of these modular things.98 Second, the things of property are

98. Merrill & Smith, supra note 43, at 36 (recursiveness of estates); Smith, supra note 2, at 1713 (recursiveness and modularity).
scalable: larger parcels and aggregates of rights inherit many of the features, including the right to exclude, from their smaller constituents. Likewise, when property rights are divided, many of the features persist. Not only are smaller parcels like mini versions of the larger ones they are carved out of, from a legal point of view, but the possessory actions protecting a lesser possessory interest will be very similar to those protecting a full fee simple, and so on. Finally, modular things lend property a resilience it would not otherwise possess. Recall that the basic problem in private law is the complexity of the horizontal interactions among private actors. By organizing these interactions in a first cut through modular things, many of the interactions between pairs and small groups of these actors can be cabined and made irrelevant to others. Not every problem should be treated as affecting everyone. The distinction between in rem and in personam sorts problems into those that require a widespread but cruder treatment and the ones that need more intensive but less widespread attention.

Even within property, the definition of things is just the beginning. All sorts of contractual and off-the-rack governance regimes, from covenants to nuisance to zoning, extend and modify the basic set-up of modular legal things. The same can be said for equity, in its supply of the device of the trust and its set of safety valves keyed to bad faith and disproportionate hardship. Nevertheless, all this superstructure rests on thing definition: nuisance tracks invasions of boundaries to a remarkable degree, and even the mildest remedy for building encroachments kicks in when the boundary is violated. For problems that do not sort themselves in this way we have reason to question whether the employment of things really helps us deal with them. And indeed for the conflict between general activities we have the law of tort, which manages information in its own way.99

Because the distinctness of a thing and the thing’s importance in defining rights are both a matter of degree, property falls on a spectrum. As we get further from the thing of property and deeper into the overlapping realms of contract and tort, we can say that the regime is less property-like. This is not a criticism or a celebration but a description. I suspect that we do have intuitions about which aspects of law and social norms governing private interactions, with

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respect to things, are more property-like and which are less. Thus, borderline cases like choses in action and equitable rights are borderline because they deal with legal objects that are thing-like but less thing-like—less separable and depersonalized—than legal things that correspond more straightforwardly to tangible objects. The thing of property is not a *sine qua non* but the strength of its presence is an indicator of whether we are deep in Propertyland, in its borderlands, or somewhere else altogether.100

Looking beyond private law, the interface between property and public law can be understood better when things are brought back into the picture. This is reflected in Merrill’s pathbreaking work on Constitutional property.101 Merrill argues that property under the Takings Clause, which is keyed to the common law, requires a right to exclude from a “discrete asset,”102 whereas property for substantive due process requires only a right to wealth. (Procedural due process is the broadest, and embraces any entitlement, with no requirement of a right to exclude, a discrete asset, or wealth.) As Merrill’s review of the case law reveals, the “discrete asset” test helps limit the reach of the Takings Clause and allows for greater scope for due process.103

Definitionally, he states, that

[by discrete asset, I mean a valued resource that (1) is held by the claimant in a legally recognized property form (for example, a fee simple, a lease, an easement, and so forth), and (2) is created, exchanged or enforced by economic actors with enough frequency to be recognized as a distinct asset in the relevant community.104

Thus, the notion of “discrete asset” in turn rests on concepts like “resource,” “property form,” and “asset.” Merrill notes the perils of defining property for substantive due process as a right to exclude without a discrete asset, which the Supreme Court has come close to doing.105

100. I borrow the term “Propertyland” from Carol Rose. See, e.g., Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 Geo. L.J. 2409, 2411 (1994), and note that the theory offered here can help locate the fuzzy border of Propertyland itself.


102. *Id.* at 964.


Let me suggest that “discrete asset” is getting closer to the notion “thinghood,” and that a theory of legal thinghood would flesh out what a discrete asset is. Although it goes beyond the scope of the present Article, let me propose that a return to the importance of the thing in property would help define “discrete asset” for Merrill’s purposes. Indeed, Leif Wenar has argued that the failures of the bundle theory in takings law should cause us to return to the importance of property as a law of things for takings.106

Thus, organizing relations through things, as property does, is far from the only solution to private law problems, and does not exhaust the interface between private and public law. Focusing on thinghood does help us see what property is good at and where it runs out. None of the features captured on such a theory is derived logically from thinghood (or the right to exclude). Instead, a good theory of things serves as the core of a theory of property that explains these important features of property.

CONCLUSION

The right to exclude is an important feature of property, albeit not a sine qua non. Merrill has provided a real service and an important contribution with his promotion of the importance of the right to exclude.107 Merrill is right to look for some connecting tissue or glue holding property together—indeed this is a quest I share and one that prompted us to write our casebook.108 I would argue that one can understand the right to exclude better by asking: exclude from what? The answer to this question points to an aspect of property that explains how the right to exclude—and many other features of property—are important and when they’re not. Once the thing is in the picture, it is probably true that exclusion from a thing makes a package of entitlements more property-like, for many of reasons that dovetail with Merrill’s account. And it is also true that property

107. And not, as he notes with characteristic wryness, as a foil for others who have not read the article. See Merrill, supra note 7.
is not to be identified with a thing. Nevertheless, the definition of a thing and its role in mediating private interactions lie at the heart of property. The thing of property is a linchpin in the overall architecture, and as we get away from tangible things, we get further from property and into adjacent areas—contract, tort, unjust enrichment—not that that’s a bad thing. Private law is a whole, and property is a crucial but incomplete part of that system. Property also furnishes a prominent interface between private and public law, notably in the law of takings. And at the heart of that part of private law we call property is the thing.
GOVERNMENTAL FORBEARANCE: MYTH OR REALITY?

JAMES W. ELY, JR.*

In their thoughtful book, *Property*, Thomas W. Merrill and Henry W. Smith posit that various factors induce governments to forbear from unduly undermining the expectations of property owners and, as a result, operate to safeguard the security of property rights. This Essay seeks to explore this hypothesis, and questions whether one can realistically expect governmental forbearance to provide meaningful support for the rights of individual property owners.

Can modern government be induced to forbear from making policy changes that unreasonably and unpredictably impair the value of property? Or to quote the Georgia Supreme Court in 1851, is the security of private property “confined to the uncertain virtue of those who govern?”1 I submit that the answer is far from obvious. There are, of course, a number of constitutional restraints on government, such as the Contract Clause,2 the Takings Clause,3 and the due process requirement.4 These are important provisions, but they have received such checkered enforcement in modern law that they can hardly be expected to compel governmental respect for the rights of property owners.5

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4. In fact, it is debatable whether property owners always receive even rudimentary procedural due process when their property is acquired through eminent domain. A number of states permit quick-take condemnations that allow the immediate acquisition of title and possession by the condemning agency before a hearing. Not only are procedural safeguards bypassed, but quick-take condemnation hampers an owner’s ability to challenge a taking. Such expedited takings are particularly prone to abuse. See 6A-28 NICHOLS ON EMINENT DOMIN, § 28.02 (3d ed. 2013).

Merrill and Smith view Chief Justice Roger B. Taney’s famous opinion in *Charles River Bridge v. Warren Bridge* (1837), which denied a Contract Clause challenge to the state-authorized construction of a free bridge to compete with an existing toll bridge under a prior charter, as striking a good balance between the need for change in the face of technological innovation and the importance of stability to encourage investments. The original toll bridge company claimed that its corporate charter impliedly conferred monopoly status that the state could not abridge. Taney declared that a corporate charter should be strictly construed to encompass only express guarantees, not implied privileges. Building on Taney’s analysis, Merrill and Smith contend that government could never be expected to refrain from any interference with the expectations of owners in order to accommodate a perceived need for useful economic and social change. In a revealing comment, the authors observe that implicit in Taney’s view “is the assumption that the government can generally be trusted to do the right thing.” This theme of confidence in the government is a guiding star for the authors, and one that colors their treatment of forbearance and explains their preference for minimal judicial protection of property.

However, there are significant problems in seeing Taney as the fountainhead of a policy of trusting in government. Important as it was, the *Charles River Bridge* decision does not give a complete picture of Taney’s Contract Clause jurisprudence or of the extent to which he stressed stability of contractual rights against governmental interference. In fact, Taney vigorously enforced the Contract Clause against state interference with both private agreements and public contracts. For example, in *Bronson v. Kinzie* he invalidated two Illinois laws that retroactively limited mortgage foreclosure sales and gave mortgagors broad rights to redeem foreclosed property. Taney stressed that the Contract Clause “was undoubtedly adopted as a part of the Constitution for a great and useful purpose. It was to maintain the integrity of contracts, and to secure their faithful

7. MERRILL & SMITH, supra note 1, at 226.
9. 42 U.S. (1 How.) 311 (1843).
execution throughout the Union . . . ”

Likewise, the Supreme Court under Taney repeatedly invoked the Contract Clause to strike down state legislation that attempted to abrogate state tax exemptions, to regulate state-charted banks, or to repudiate bonded debt. In these cases Taney and his colleagues were not content to rely on governmental forbearance. Nor did they demonstrate confidence in the ability of state governments to “do the right thing.”

Even when courts in the nineteenth century tended to protect economic rights more broadly than is the norm today, they nonetheless experienced difficulty in curbing governmental behavior. Again the history of the Contract Clause is instructive. Numerous federal and state court decisions invalidating state stay laws and mortgage moratoria as impairments of contract did not prevent state legislators from enacting such laws during periods of economic distress. The practical impact of court rulings was often muted. As Charles Warren perceptively noted, adverse decisions “did not, in fact, cause great hardship to debtors because, by reason of the interval of time which elapsed between enactment on these stay-laws and the Courts’ decisions as to their invalidity, the laws to a great extent achieved their main purpose of preventing sacrifice of debtor’s property.”

In short, judicial opinions did not always succeed in promoting governmental forbearance. Legislators responded to perceived political imperatives heedless of constitutional limits or social norms that supposedly dictated restraint.

Merrill and Smith mention the unique position of railroads that owned fixed assets that could not relocated to another jurisdiction

10. Id. at 318. See also McCracken v. Heyward, 43 U.S. (2 How.) 608 (1844).


13. Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1864). Although scholars have long debated whether Gelpcke was an application of the Contract Clause to encompass judicial interference with contracts or was the formulation of a uniform commercial law for diversity cases, under neither interpretation was the Supreme Court deferring to the state.

14. E.g., Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843); Malony v. Fortune, 14 Iowa 417 (1863); Robinson v. Howe, 13 Wis. 341 (1861); People ex rel. Thorne v. Hayes, 4 Cal. 127 (1854); Sheets v. Peabody, 7 Blackf. 613 (Ind. 1845); Mundy v. Monroe, 1 Mich. 68 (1848); Jones v. Crittenden, 4 N.C. 55 (1814).

15. CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 90 (1935).
and were thus especially vulnerable to state regulations and taxation. The experience of railroads with tax exemptions in New Jersey is illuminating. The state granted tax concessions to several railroads during the 1830s and 1840s. By the 1870s changed economic circumstances in the state convinced lawmakers in effect to renege on these concessions. Although the highest court in New Jersey upheld the tax concessions under the Contract Clause, the governor and legislature adopted coercive tactics that eventually persuaded the carriers to relinquish their exemptions. Political pressure prevailed over the supposed sanctity of contracts. This experience has led one scholar to ponder whether government can ever be trusted to keep its side of a bargain.

Or consider the Takings Clause, which in modern law is surely more potent than the generally neglected Contract Clause. Merrill and Smith correctly observe that the current fair market value standard falls well short of providing a complete indemnification for owners whose property is taken by eminent domain. Not only is the determination of market value in the context of a forced sale problematic, but the prevailing standard takes no account of lost profits, relocation expenses, loss of business good will, destruction of community ties, and costs of litigation. It is evident that the fair market value standard does not provide “a full and exact equivalent” for the property taken. Since the ascertainment of “just compensation”

16. MERRILL & SMITH, supra note 1, at 230.
19. MERRILL & SMITH, supra note 1, at 249–50.
20. The Supreme Court defined “just compensation” in terms of “a full and exact equivalent” in Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893) (Brewer, J.). There is a substantial body of scholarship insisting that the fair market value standard as presently understood does not put the owner in as good position as if his property had not been taken. See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 51–56, 182–86 (1985); Gideon Kanner, “Fairness and Equity,” or Judicial Bait-and-Switch? It’s Time to Reform the Law of “Just” Compensation, 4 ALBANY GOVT’ L. REV. 38, 41–58 (2011). In Community Redevelopment Agency v. Abrams, 543 P.2d 905 (Cal. 1975), for example, the Supreme Court of California reached the bizarre conclusion that business goodwill, although treated as property for some purposes, was not property in the context of just compensation for eminent domain.
has long been viewed as a judicial matter, it would seem appropriate for courts to reconsider the present compensation formula.

In a remarkable but revealing decision, the Supreme Court of California in 1960 maintained that it had a duty to hold down the amount of condemnation awards. Otherwise, it worried, the cost of public improvements would increase and “impose a severe burden on the public treasury.” The court was evidently more concerned with an imagined impact on government than with the constitutional right of an individual to receive a full indemnity. This reasoning entirely inverts the purpose of the “just compensation” requirement. To the extent that this parsimonious attitude prevails, the protective function of the “just compensation” standard is diluted in a manner not calculated to promote governmental forbearance. Indeed, skimpy awards encourage governmental overreach, and constitute in effect a subsidy to government and allied developers at the expense of individual owners. Merrill and Smith aptly point out that formulation of a standard “aimed at providing more complete compensation would enhance the security of property rights, and would be consistent with a general objective of promoting government forbearance.” If government was required to compensate for the full economic loss suffered by individuals whose property was taken, it might well be more guarded in the exercise of eminent domain. The need to raise tax revenue, always politically hazardous, could make government more circumspect in resorting to compulsory acquisitions of private property. “The pocket-book,” Justice David J. Brewer observed in 1891, “is a potent check on even the reformer.”

Yet there is room to doubt that even a strengthened formula for determining “just compensation,” although a help, would necessarily

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21. See 148 U.S. at 327 (holding that the determination of compensation when property is taken is “a judicial inquiry”); Van Horne’s Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, 312 (C.C. Pa. 1795) (Paterson, J.) (observing that the legislature “cannot constitutionally determine upon the amount of the compensation, or value of land”).


23. MERRILL & SMITH, supra note 1, at 250–51.

24. James Geoffrey Durham, Efficient Just Compensation as a Limit on Eminent Domain, 69 MINN. L. REV. 1277, 1313 (1985) (“Efficient just compensation should provide the significant legal check on the use of eminent domain that is now lacking. As long as the Court chooses not to permit meaningful review of public use claims, just compensation is the only effective constitutional check on governmental exercises of eminent domain.”).

constrain government very much. As Merrill and Smith note, the cost of paying compensation is placed on the taxpayers, not on the political figures utilizing eminent domain. “The incentives of government officials,” they maintain, “are especially likely to be skewed if the linkage between government action and the need for higher taxes is not very transparent.” Moreover, although the decision to acquire private property is frequently characterized as legislative in nature, such power is in fact commonly vested in unelected officials, such as redevelopment agencies and irrigation districts, which are largely immune from political controls. Loose judicial language about deference to the public will is problematic. Further, the expense of acquisition may well be obfuscated as officials have every incentive to downplay costs while making rosy promises about future public benefits. A further complication is that the success or failure of projects facilitated by eminent domain may not be apparent for years after the condemnation. In short, democratic accountability is frustrated. The public frequently has no realistic way of either assessing the cost of projects or of halting unwanted schemes. The present tendency to inadequately compensate property owners is particularly worrisome because the “public use” limitation on the exercise of eminent domain has been largely eviscerated at least at the federal level.

26. Merrill & Smith, supra note 1, at 227.
27. For example, in the controversial case of Kelo v. City of New London, 545 U.S. 469, 473–75 (2005) the exercise of eminent domain was initiated by the New London Development Corporation, a private non-profit entity. See Kanner, supra note 20, at 51 n.44.
29. Id. at 1022–23 (pointing out that most voters are not in a position to assess the economic merits of projects which rely on eminent domain); Durham, supra note 24, at 1295 (“The likelihood that the public educates itself with all the facts and figures behind eminent domain actions . . . is slight.”). See also Ilya Somin, Democracy and Political Ignorance: Why Smaller Government Is Smarter (2013) (arguing that widespread voter ignorance and irrationality calls into question meaningful political accountability in a democratic society).
30. James W. Ely, Jr., Thomas Cooley, “Public Use,” and New Directions in Takings Jurisprudence, 2004 Mich. St. L. Rev. 845, 851 (2004) (“For all practical purposes, the Supreme Court, followed by many state courts, has virtually eliminated the ‘public use’ limitation as a meaningful restraint on eminent domain.”); Thomas W. Merrill, Rent Seeking and the Compensation Principle, 80 NW. U. L. Rev. 1561, 1569 (1987) (“The Supreme Court has largely abandoned the requirement that the power of eminent domain be devoted to public rather than private ends.”).
In other areas of takings jurisprudence, Merrill and Smith are inclined to endorse a rather modest level of judicial supervision. Consider the “public use” requirement of the Fifth Amendment and its counterparts in state constitutions. It has long been held that private property could not be taken for private use even with the payment of compensation.\(^3\) Similarly, prominent scholars also stressed that eminent domain was limited to use by the public.\(^3\) Nonetheless, the authors correctly recognize that the Supreme Court has given the “public use” clause “a weak interpretation.”\(^3\) It is hard to quarrel with that conclusion, at least with respect to post–World War II cases. Not only has the Supreme Court equated “public use” with the more expansive notions of public purpose and public interest, it has been highly deferential to legislative and administrative determinations of the need to acquire private property. Indeed, the Court in \textit{Berman v. Parker} (1954) envisioned a very narrow role for judicial review in condemnation cases, declaring that “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”\(^3\)

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31. \textit{E.g.}, \textit{Calder v. Bull}, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (insisting that a legislature could not validly enact “a law that takes property from A. and gives it to B.”); \textit{Wilkinson v. Leland}, 27 U.S. (2 Pet.) 627, 658 (1829) (Story, J.) (“We have known of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.”); \textit{Olcott v. The Supervisors}, 83 U.S. (16 Wall.) 678, 694 (1872) (“The right of eminent domain nowhere justifies taking property for a private use.”); \textit{Bd. of Comm’rs of Tippecanoe Cnty. v. Lucas}, 93 U.S. 108, 114 (1876) (“Private property cannot be taken from individuals by the State, except for public purposes, and then only upon compensation . . . .”); \textit{Mo. Pac. Ry. Co. v. Nebraska}, 164 U.S. 403, 417 (1896) (holding that taking private property “for the private use of another” violates the due process clause of the Fourteenth Amendment); \textit{Thompson v. Consol. Gas Utils. Corp.}, 300 U.S. 55, 80 (1937) (Brandeis, J.) (declaring that “this Court has many times warned that one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid”).

32. \textit{Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union} 531 (1st ed. 1868) (“The public use implies a possession, and occupation, and enjoyment of the land by the public, or public agencies; and there could be no protection whatever to private property, if the rights of government to seize and appropriate it could exist for any other purpose.”); \textit{John Lewis, A Treatise on the Law of Eminent Domain in the United States} 506–97 (2d ed. 1909) (“Public use means the same as use by the public, and this it seems to us is the construction the words should receive in the constitutional provision in question.”). For Cooley’s views about the appropriate use of eminent domain, see \textit{Ely, supra} note 30, at 846–50 (noting Cooley’s concern that “eminent domain, unless confined, would become a tool for the powerful and politically well-connected to promote their interests, to the detriment of individuals with little political clout.”).

33. \textit{Merrill & Smith, supra} note 1, at 242.

34. 348 U.S. 26, 32 (1954).
This trend culminated in much criticized case of *Kelo v. City of New London* (2005), in which the Court sustained the exercise of eminent domain to acquire non-blighted residences for transfer to private developers for the purpose of promoting economic growth. Somewhat sympathetic to the Court’s deferential approach, Merrill and Smith stress the difficulties in ascertaining the appropriate scope of the eminent domain power in a variety of situations. In light of *Kelo*, they feel that the Supreme Court is unlikely to put many teeth in the “public use” limitation. Still, the authors reject “a universal right of eminent domain.” They point to state court decisions tightening the definition of “public use” under state constitutions, and to post-*Kelo* state legislation and constitutional amendments seeking to restrict economic development takings.

The discussion of “public use” by Merrill and Smith raises several questions. Do we not at the federal level already have “a universal right of eminent domain?” The authors admit that “practically any exercise in eminent domain can be described as satisfying a public-interest standard.” Dissenting in *Kelo*, Justice Sandra Day O’Connor lamented: “The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Super 6 with a Ritz-Carlton, any home with a shopping center, or any farm with a factory.” The record indicates that hardly any condemnations of property are ever invalidated in federal court. So, in effect, does not private property depend on the whim of governmental officials? Nor do the authors tackle the question of why courts treat “just compensation” as a judicial rather than a legislative matter, but then adopt supine deference to legislative decisions to take property.

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36. MERRILL & SMITH, supra note 1, at 247.
38. MERRILL & SMITH, supra note 1, at 247.
39. 545 U.S. at 503 (O’Connor, J., dissenting).
40. For decisions upholding economic development takings, see, e.g., Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008); W. Seafood Co. v. United States, 202 F. App’x 670 (5th Cir. 2006); Didden v. Village of Port Chester, 173 F. App’x 931 (2d Cir. 2006), cert. denied, 549 U.S. 1166 (2007). *But see* 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123 (C.D. Cal. 2001) (invalidating proposed condemnation on grounds that the city’s purpose was to benefit a particular commercial enterprise which threatened to leave the community).
“Why the Supreme Court,” Gideon Kanner has observed, “should be all but powerless to interpret the ‘public use’ clause, but all-powerful when it comes to interpreting the ‘just compensation’ clause—both appearing in the same sentence—has not been judicially explained.”41 After all, both “just compensation” and “public use” are constitutional standards designed to limit government power over individual owners. It is difficult to justify such disparate treatment of the two clauses. Another question relates to the theme of governmental forbearance. Merrill and Smith suggest that, in the absence of federal court review of condemnation cases, state courts may promote forbearance by more vigorously scrutinizing the “public use” standard with respect to eminent domain. But if that is so, would not a similar move by the Supreme Court do even more to rein in governmental misuse of condemnations? We are dealing with a national norm incorporated into the Bill of Rights. Should the Supreme Court simply wash its hands and relegate the matter to the state courts?

Clearly constitutional doctrines, as currently understood, are unlikely to play more than a secondary role in limiting governmental reach over property. Indeed, consistent with their preference for modest judicial oversight, the authors assert that constitutional provisions may not be the most important factor encouraging governmental forbearance. Among other sources of forbearance, they give attention to the political process. Merrill and Smith maintain that, as a practical matter, the government will hesitate before taking actions that would hurt a large number of property owners. This, they declare, explains the refusal of Congress to eliminate the tax benefits accorded homeowners despite repeated calls—at least by academics—to curtail such advantages.42 Now there is certainly some merit in the argument that the political culture is important for sustaining property rights; courts do not operate in a vacuum.

Still, the contention of the authors is reminiscent of Chief Justice Morrison R. Waite’s 1877 admonition: “For protection against abuses by legislatures the people must resort to the polls, not the courts.”43 Too often, however, this call for political redress is simply a myth. Waite, for example, never explained how railroads headquartered

41. Kanner, supra note 20, at 52.
42. MERRILL & SMITH, supra note 1, at 230.
43. Munn v. Illinois, 94 U.S. 113, 134 (1877).
in other states or out-of-state investors were supposed to seek protection from the political process against confiscatory rates imposed by state governments in the late nineteenth century. Nonetheless, with regard to the use of eminent domain, the federal courts have echoed Waite’s deferential approach. In 2008 the Second Circuit Court of Appeals declared that “both in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts.” Such a comment is little more than a flight into political fantasy. As a practical matter it is highly improbable that individual property owners can arouse sufficient public support to influence a general election when many issues compete for public attention. The free-wheeling exercise of eminent domain in the decades since World War II has resulted in the displacement of many thousands of persons from their homes. Yet the political process, rather than affording protection to displaced persons, encouraged their removal in the name of urban renewal.

Some scholars have expressed great confidence in federalism as a restraint on governmental abuse of property rights. Merrill and Smith contend that “a credible threat to exit from the jurisdiction” can furnish a political restraint on government. The notion that people can “vote with their feet” and thereby reduce the threat of eminent domain abuse has some superficial appeal. But it fails to adequately take account of factors that limit its effectiveness. Moving

44. In the late nineteenth century the Supreme Court moved away from the deferential Munn doctrine and established judicial review of state-imposed rates to assure an adequate return on invested capital. See James W. Ely, Jr., Railroads and American Law 96–99 (2001).
45. 516 F.3d at 57.
48. Merrill & Smith, supra note 1, at 230.
costs could be considerable and act as a disincentive to relocate. More importantly, whatever the merit of exit strategies in theory, they do not pertain to immobile assets such as land and utilities. As the authors recognize, foot voting simply cannot be employed to halt the exercise of eminent domain or the imposition of severe regulations on fixed assets. Railroads were particular victims of this tendency in the late nineteenth century as states piled onerous taxes and strict rate controls on the industry. Only federal judicial intervention provided a modicum of relief. In a pioneering 1888 opinion Justice Brewer enjoined enforcement of a state-imposed railroad rate schedule and stressed the limitations of the exit option as a means to safeguard railroads from confiscatory regulations. He rejected the state’s argument that if a carrier did not find the state’s rate remunerative it could leave the business. Likewise, in most situations landowners cannot realistically escape eminent domain or severe regulation by threatening to leave the jurisdiction. We are also left with the question, addressed in part below, as to why federalism justifies deference to state and local government only with respect to property rights. Why not to other constitutional rights? Should we rely on federalism to safeguard freedom of speech or the Fourth Amendment guarantee against unreasonable searches of private property?

Therefore, any reliance on the political process to safeguard property interests requires significant qualification. First, the political system is not likely to afford much solace to individual owners, such as the Kelo complainants, facing the loss of their land by eminent domain. The same holds true with respect to land use regulations. Neither political officials nor judges unduly fret when land use controls impose severe economic hurt on particular owners. An anemic


50. Merrill & Smith, supra note 1, at 230.

51. Chi. & N.W. Ry. Co. v. Dey, 35 F. 866, 880 (Cir. Ct. S.D. Iowa 1888) (Brewer, J.) (“Whatever of force there may be in such arguments, as applied to mere personal property capable of removal and use elsewhere, or in other business, it is wholly without force as against railroad corporations, so large a proportion of whose investment is in the soil and fixtures appertaining thereto, which cannot be removed.”).

52. The authors appear content with a weak regulatory takings doctrine, in line with their general confidence in government. Merrill & Smith, supra note 1, at 251–56.
regulatory takings doctrine does little to promote governmental forbearance and allows officials wide discretion to impose regulations.\textsuperscript{53} Second, to the extent that the political system does provide a check on the exercise on eminent domain, the outcome is highly likely to be skewed in favor of those with political influence. Political clout is not shared evenly across society as a whole. Eminent domain is commonly directed against racial minorities or the politically weak.\textsuperscript{54} The political process therefore may afford some protection to the politically well-connected, who may even benefit from the exercise of eminent domain,\textsuperscript{55} but it is hardly a panacea for abuse. Third, democratic governments, both here and in Europe, are highly responsive to seemingly endless demands for enhanced entitlements, subsidies, and bailouts. These can only be funded—to the extent that they are paid for at all and do not simply add to the deficit—by placing the burden on property owners.\textsuperscript{56} The redistributive nature of these measures poses a threat to the place of property in the polity. In other words, a broad if vague public sentiment supportive of private property may not translate into much help in concrete cases.

Moreover, I remain mystified as to why property owners are relegated to the political process while so many others’ claims of right receive greater judicial solicitude. Nothing in the text of Constitution or the views of the Framers suggests that there is a dichotomy between the protection afforded property rights and other individual liberties. Indeed, the Framers believed that personal rights and property were indissolubly linked.\textsuperscript{57} This attitude generally prevailed

\textsuperscript{53} STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 271 (2011) (“A handful of specific government actions limiting the use of property now required compensating its owners, but the vast majority of the regulatory state remained in place, unhindered by the takings clause or by any of its statutory supplements.”).

\textsuperscript{54} 545 U.S. 469, 521–22 (2005) (Thomas, J., dissenting) (stressing that the losses resulting from economic development takings “will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.”).


\textsuperscript{56} NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST 288 (2011) (“Private property rights are repeatedly violated by governments that seem to have an insatiable appetite for taxing our incomes and our wealth and wasting a large portion of the proceeds.”).

\textsuperscript{57} JAMES W. ELY JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 43 (3d ed. 2008). See also Walter Dellinger, The Indivisibility of Economic
throughout the nineteenth century. “It should never be forgotten,” Justice Stephen J. Field observed in 1890, “that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe.”58 The Progressive movement of the early twentieth century, however, launched a large-scale assault on the notion of individual rights, and especially on constitutionalized property.59 A high regard for private property was increasingly abandoned in favor of a statist ideology. The Progressives laid the intellectual groundwork for a jurisprudence that largely stripped property of constitutional protection.60 This agenda was brought to fruition by the New Deal Supreme Court, which separated property rights from individual freedom and instituted a double standard of judicial review. To rank rights into categories and assign property to a lesser category worthy of only minimal solicitude was an expression of judicial activism, reflecting New Deal political priorities.61 The result, of course, has been to enlarge legislative control over property and explains the reluctance of many courts to police eminent domain or to enforce the Contract Clause.

This is not to denigrate the significance of public sentiment in shaping a political climate favorable to property rights.62 I agree that courts cannot be expected to do it all. Judge Learned Hand warned a generation ago about undue reliance on judges to preserve our rights: “I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes, believe me, false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.”63

Rights and Personal Liberty, 2003–2004 CATO SUP. CT. REV. 9, 19 (“Economic rights, property rights, and personal rights have been joined, appropriately, since the time of the founding.”).


59. James W. Ely, Jr., The Progressive Era Assault on Individualism and Property Rights, 29 SOC. PHIL. & POLY 255 (2012). Indeed, Progressives were hostile to judicial review and demonstrated little interest in any claims of individual right. For example, Edward S. Corwin declared in 1920 that “the cause of freedom of speech and press is largely in the custody of legislative majorities and of juries, which . . . is just where the framers of the Constitution intended it to be.” Edward S. Corwin, Freedom of Speech and Press Under the First Amendment: A Résumé, 30 YALE L.J. 48, 55 (1920).


61. ELY, supra note 57, at 139–41.

62. FISCHEL, supra note 47, at 324 (“The United States has had a capitalist economy based on private property primarily because Americans prefer it to the alternatives.”).

At the same time, there is little justification for courts to evade their responsibility to enforce the property clauses of the Constitution. Court decisions can help to mold public attitudes. The most significant impact of *Kelo* may well be heightened public awareness of the need to guard property rights, reflected in an outpouring of state constitutional amendments and statutory provisions designed to curb the use of eminent domain. I realize that the efficacy of such measure varies widely. Nonetheless, to my mind, the restoration of the rights of property owners to public and academic dialogue is a welcome development.

Lastly let us consider this question: why should we care about whether government shows forbearance toward private property? In an especially interesting paragraph, Merrill and Smith briefly explore the connection between democracy and property, positing that property rights are more secure under democratic government than under authoritarian governments. They observe: “There seems to be a loose associational relationship between widespread property ownership and political democracy, in that widespread property ownership supports democracy, and democracy helps support widespread ownership of property.”

It appears to me that this is a nod toward the Lockean emphasis on the rights of property owners as a bulwark of liberty. Is Locke correct? Are secure property rights a prerequisite for democratic government? Undoubtedly the absence of protected rights to property facilitates arbitrary government. As early as 1722 one English commentator aptly noted: “The only despotick Governments now in the World, are those where the whole Property is in the Prince.”

Indeed, there are few examples, either historical or contemporary, of free societies that do not respect the rights of property owners. In contrast, totalitarian governments in the twentieth century without exception either abolished property or severely curtailed private ownership to serve the dictates of the state.

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65. CATO’S LETTERS NO. 84 (John Trenchard, July 7, 1722).
66. See ANDREW BARNES, OWNING RUSSIA: THE STRUGGLE OVER FACTORIES, FARMS AND POWER 27–31 (2006) (discussing sweeping nationalization and collectivization of property in Russia in the 1930s, and concluding that “[t]he Stalinist system of ownership and control of property was thus remarkably extensive and coherent.”); GOTZ ALY, HITLER’S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE 16 (2005) (finding that “a source of the Nazi Party popularity was its liberal borrowing from the intellectual tradition of the socialist left”); ANDREW BARKAI, NAZI ECONOMICS: IDEOLOGY, THEORY, AND POLICY 3 (1990) (“It is quite
property may not guarantee political liberty, but its absence likely dooms free government.67 Echoing many commentators from the past, Justice Anthony Kennedy declared in 2010: “The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom."68 Whether Kennedy’s jurisprudence has always exemplified this sentiment is an issue beyond the scope of this essay, but his comment underscores the deep roots linking property and liberty.

In short, I agree with the authors’ conclusion that private property has proven resilient over time, demonstrating an ability to adapt to societal changes and technological innovation.69 I cannot, however, share their confidence that, absent more vigorous judicial oversight, the political system can realistically constrain government from interfering with the rights of individual property owners. Only judicial supervision can halt abusive tactics by governmental agencies, such as threatening individual homeowners with ruinous fines if they dare to challenge an edict.70 There is simply no excuse for judicial abdication concerning the constitutional protection of property rights.

clear that there was no free market economy in Germany throughout those years, even in comparison with other advanced industrial countries, none of which had operated under conditions of ‘pure competition’ since the beginning of the century. The scope and depth of state intervention in Nazi Germany had no peacetime precedent or parallel in any capitalist country, Fascist Italy included.”)

67. R ICHARD PIPES, PROPERTY AND FREEDOM 281 (1999) (“The right to property in and of itself does not guarantee civil rights and liberties. But historically speaking, it has been the single most effective device for ensuring both, because it creates an autonomous sphere in which, by mutual consent, neither the state nor society can encroach: by drawing a line between the public and the private, it makes the owner co-sovereign, as it were.”). See also D. Benjamin Barros, Property and Freedom, 4 N.Y.U. J.L. & LIBERTY 36, 69 (2009) (“It is difficult to see how other freedoms to speech, religion, or association could be secure in a society without the institution of private property.”).

68. Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’tl Prot., 560 U.S. 702, 733 (2010) (Kennedy, J., concurring). See also Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (Stewart, J.) (“In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.”).

69. B ANNER, supra note 53, at 3 (“[O]ur ideas about property have always been contested and have always been in flux.”).

INTRODUCTION

The topic for this panel of the conference is government forbearance: when government must—or should—refrain from changing previously existing individual entitlements.

There are many reasons why one might argue that government should forbear. It could be argued, for instance, that government should forbear because of the need to encourage individual investment, something that might erode if there is no certainty in property entitlements. Or it might be argued that government should forbear because continually changing rules can cause individual frustration and social instability. Or it could be argued that government should forbear because property is earned, or a necessary and natural entitlement, or is justified by some other theory of property rights.

In this Essay, I will focus on one particular forbearance argument: that government should forbear because of an individual’s justified reliance on previously existing legal entitlements. This argument is not rooted in consequentialist theory; it is not rooted in the argument that government should forbear because—if it does not—certain negative consequences will follow. Rather, it is the common and intuitively powerful argument that government should forbear in certain situations because the individual deserves to be protected against change in the rules of the game. To put it in common legal form, the individual has a contract or property right that can be asserted against government. Individuals, in these situations, are believed to have a right to rely on the legal status quo.

The idea that there are situations in which individuals can rely on the existing rules of the game—and resist their change—is not a novel one in law. There are many situations in which this phenomenon is recognized by law. For instance, if the government enters into
an express contract with a supplier, the terms of that contract generally cannot be unilaterally changed by government without consequence.\(^1\) From another direction, we are familiar with the idea that property rights are created by the established rules of the legal game. The proposition that property includes the “existing rules or understandings that stem from an independent source such as state law”\(^2\) is a very familiar one. And changes in these rights, through government action, can lead to a justified claim of unlawful deprivation.\(^3\)

Such ideas mask difficulties, however. The universe of express contracts with government might be limited because of the necessity of government consent; however, the universe of background laws on which an individual might rely is not. The idea of reliance on existing rules or legal understandings opens a Pandora’s box of possibilities. Statutes, regulations, ordinances—enacted by federal, state, and local governments—all articulate rules of existing law. Indeed, virtually any individual act or omission that we can imagine is dealt with somehow by the legal status quo: it is either expressly or impliedly permitted or prohibited. Does this mean that an individual can rely on any proposition that is expressed or implied by law, with the possibly justified cry of “foul” if that power or immunity is eliminated?

To put it another way, from the universe of possibilities, when can an individual estop government—because of his or her reliance—from changing the rules of the game?

To explore this question, we will consider six settings, represented by six famous cases in this area of law. In each case, claims of justified reliance on previously existing law were made—with demands for payment of damages as a consequence for change. These cases are rooted in two different legal theories that are rarely juxtaposed: reliance and forbearance rooted in contract, and reliance and forbearance rooted in property rights in land. My goal is to see what this

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3. See U.S. CONST. amend. V (“No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.”).
comparison illuminates, in the way of underlying ideas of reliance and forbearance, and to sketch some ideas as food for further thought.

I. Claimed Reliance Settings: “Contracts with Government”

A. Fletcher and the Express Government Contract

We will begin with an old chestnut, the case of *Fletcher v. Peck*.4 *Fletcher* dealt with a change of heart by the Georgia legislature in the conveyance of land. In 1795, the legislature conveyed particular land to private parties. Subsequently, it passed an act which annulled the law under which the conveyances had been made.5 The reason asserted for the rescission of the grants was that members of the legislature who had approved the sale had operated with corrupt and illicit motives.6

The question before the United States Supreme Court was whether “the State itself [could] . . . vacate a contract thus formed,” and be “absolved from those rules of property which are common to all the citizens of the United States.”7 Citing the federal Contract Clause, the Court held that it could not. “Conveyances have been made,” Justice Marshall wrote, “[and] those conveyances have vested legal estate . . . .”8 “When . . . a law is in its nature a contract, [and] when absolute rights have vested under that contract, a repeal of the law cannot devest those rights . . . .”9 Legislative power must have limits; and “where are they to be found if the property of an individual, fairly and honestly acquired, may be seized without compensation?”10

This rings true. Surely, if there is ever a situation in which an individual might be able to estop government change in his entitlements, it is when those entitlements are claimed under an express contract. If the government has expressly agreed to perform in a particular way, with this particular individual, and the individual

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4. 10 U.S. (6 Cranch) 87 (1810).
5. See id. at 127, 132.
7. Id. at 130, 134.
8. Id. at 135.
9. Id.
10. Id.
has relied upon that promise, government must be accountable if it later—unilaterally—changes the rules of the game.

Consider, for instance, the government procurement contract. If the government agrees to purchase a number of ships from a military contractor, and the contractor builds the ships, the government will be liable for damages (under ordinary contract principles) if it later simply refuses payment or delivery. In such a case, the government is acting like any private party in the procurement of goods. Accordingly, the law—and common sense—holds government to the responsibilities that any private party in a similar situation would incur. As was stated in a recent case, “ordinary government contracts are typically governed by the rules applicable to contracts between private parties.”11 Indeed, any other rule would “produce the untoward result of compromising the Government’s practical capacity to make [such] contracts.”12

What about the age-old idea that one legislature cannot bind the legislative authority of its successors? Could a later repudiation of an express contract by government be authorized by this rule? To put it abstractly, how are the obligations of contract incurred by government, and the need to protect the sovereign powers of government, reconciled?

In a series of cases, the United States Supreme Court has recognized the “reserved powers” doctrine, which addresses this question. Under this doctrine, certain substantive powers of sovereignty cannot be given up by government, through contact or otherwise. One example is the exercise of the police power;13 another is the power of eminent domain.14 However, sovereign powers protected by this doctrine are limited. Beyond those powers, government is not absolved of damage claims when an individual has express contract rights to government performance, and government has failed to perform as promised. In such cases, the individual is entitled to rely on the government’s promises, and sue for breach of contract if the

12. Id. at 884 (plurality opinion). See also id. at 913 (Breyer, J., concurring) (“This [rule] . . . is unsurprising, for in practical terms it ensures that government is able to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting.”).
government defaults. As explained by the Court, government has the capacity “to [bind] . . . future [legislatures] . . . by creating vested rights.”\textsuperscript{15}

So far, then, the rules are clear. Express contracts made with government, and property acquired under them, support individual reliance and require government forbearance. The question which remains is this: do these conclusions extend beyond this context?

\textbf{B. Charles River Bridge and Winstar: The Question of Implied Terms}

An express contract between an individual and government, which is complete as it stands and is accepted as operative “fact” by both parties, is—in a sense—the easy case for individual reliance and government forbearance. What about a contract which is express in some ways, but with open or possibly implied terms in others? Can an individual claim an enforceable reliance interest in this case?

The seminal case of this kind is \textit{Charles River Bridge v. Warren Bridge},\textsuperscript{16} decided by the United States Supreme Court in 1837. In 1785, the Massachusetts legislature enacted a law that empowered a private company to erect a bridge over the Charles River, and to collect tolls from those who traversed it. The bridge was built and for more than fifty years tolls were collected. In 1828, a later session of the legislature passed an act which authorized the building of a competing, publicly owned bridge very near to the other. This public bridge was built, and travelers paid nothing for passage.\textsuperscript{17}

The owners of the Charles River Bridge brought suit, claiming that the chartering and construction of the second bridge impaired their contractual rights with the State of Massachusetts. They claimed that the first legislative act “necessarily implied, that the [L]egislature would not authorize another bridge, and especially, a free one, by the side of [theirs] . . . , whereby the franchise granted to [them] . . . should be rendered of no value . . . .”\textsuperscript{18} They argued

\begin{itemize}
\item \textsuperscript{15} See \textit{Winstar}, 518 U.S. at 876 (plurality opinion).
\item \textsuperscript{16} 36 U.S. (11 Pet.) 420 (1837).
\item \textsuperscript{17} See \textit{id.} at 536–38.
\item \textsuperscript{18} \textit{Id.} at 539.
\end{itemize}
that their charter was—in fact—a contract with the State, and that the later act impaired the obligation of this contract.\textsuperscript{19}

The Court first remarked that the language of the contract must govern—the contract must “be interpreted by its own terms.”\textsuperscript{20} In addition, contractual obligations must be interpreted in light of the truism that “the object and end of all government is to promote the happiness and prosperity of the community.”\textsuperscript{21} This power should not “be presumed to [have been] surrender[ed]” if that surrender does not appear in explicit terms.\textsuperscript{22} “While the rights of private parties are sacredly guarded, we must not forget that the community also [has] . . . rights, and that the happiness and well-being of every citizen depends on their . . . preservation.”\textsuperscript{23} In this case, the Court observed, the protection sought was not stated in the contract. As a result, there was no justified reliance by Charles River Bridge on the pre-existing status quo, and no justified claim for government forbearance.\textsuperscript{24}

Justice Story dissented. “Is the charter to receive a strict or liberal construction? Are any implications to be made beyond the express terms?”\textsuperscript{25} “No one doubts,” he wrote, “that the charter is a contract and a grant . . . ,” and that “this franchise is . . . fixed, determinate property.”\textsuperscript{26} “I put it to the common sense of every man . . . [. If] the legislature had said to the proprietors: you shall build the bridge; you shall bear the burdens; . . . and yet . . . we reserve to ourselves the . . . power and authority to erect other bridges . . . [and] destroy your profits, . . . is there a man living, of ordinary discretion and prudence, who would have accepted such . . . terms?”\textsuperscript{27} “The prohibition arises by natural, if not necessary, implication.”\textsuperscript{28}

Justice Story’s argument was rejected, however, and the doctrine espoused by the majority in \textit{Charles River Bridge} has become known as the “unmistakability doctrine,” or the idea that no sovereign power

\begin{itemize}
\item \textsuperscript{19} See id.
\item \textsuperscript{20} See id. at 544.
\item \textsuperscript{21} See id. at 547.
\item \textsuperscript{22} See id.
\item \textsuperscript{23} Id. at 548.
\item \textsuperscript{24} See id. at 549–53.
\item \textsuperscript{25} Id. at 588 (Story, J., dissenting).
\item \textsuperscript{26} Id. at 588, 638 (Story, J., dissenting).
\item \textsuperscript{27} Id. at 615 (Story, J., dissenting).
\item \textsuperscript{28} Id. at 616–17 (Story, J., dissenting).
\end{itemize}
of government will be deemed surrendered unless done so in unmistakable terms.29 After Charles River Bridge, the unmistakability doctrine became a staple of Supreme Court jurisprudence, limiting the ability of individuals to rely on claims of implied terms in otherwise express government contracts. For individuals claiming a contractual right to the maintenance of existing law—something that is rarely provided by explicit agreement with government—the unmistakability doctrine presents a very serious, or near-fatal, impediment.

Recently, however, the United States Supreme Court refused to apply this doctrine, in a widely publicized case. United States v. Winstar Corporation30 dealt with government-facilitated takeovers of failing “thrifts” (savings and loan institutions) by healthy banks in the 1980s. The combination of high interest rates and inflation in the United States in the late 1970s and into the 1980s caused a rising tide of thrift failures.31 If an institution failed, the Federal savings and Loan Insurance Corporation (“FSLIC”) was required to indemnify depositors for losses incurred as the result of the failure of these federally insured institutions. In an attempt to forestall further losses, Congress tried a deregulatory scheme that weakened thrifts’ capital reserve requirements. Also adopted were generous accounting principles for thrifts, for purposes of determining their compliance with capital reserve requirements.32

Failures of thrifts continued, however, and the FSLIC was faced with deposit insurance liabilities that exceeded the amount of its insurance fund. By 1988, the FSLIC was insolvent by over $50 billion.33

“Realizing that FSLIC lacked the funds to liquidate all of the failing thrifts, the [federal] Bank Board chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions in a series of ‘supervisory mergers.’”34 Because such transactions were not intrinsically attractive to healthy institutions, “the principal inducement for these supervisory mergers

31. See id. at 845 (opinion of Souter, J.).
32. See id. at 845–46 (opinion of Souter, J.).
33. See id. at 846–47 (opinion of Souter, J.).
34. Id. at 847 (opinion of Souter, J.).
was an understanding that the acquisitions would be subject to . . .
particular accounting treatment that would help the acquiring
institutions meet their reserve capital requirements imposed by fed-
eral regulations.

Ultimately, this regulatory response was also unsuccessful in
stemming the crisis in the thrift industry. In a change of direction,
Congress enacted the Financial Institutions Reform, Recovery,
and Enforcement Act (“FIRREA”) in 1989. This law made substan-
tial changes in the regulation of thrifts, including the imposition of
new—and more stringent—capital reserve and accounting require-
ments. Once this law was passed, many institutions—including
institutions that had acquired failed thrifts—were immediately ren-
dered noncompliant, and subject to seizure by federal regulators.

Believing that the Bank Board and FSLIC has promised them the
continuation of the prior capital and accounting rules, three merged
institutions filed suit against the United States, seeking money dam-
ages on contractual and constitutional theories.

Before the United States Supreme Court, the first question was
whether the FSLIC had made express contracts with the plaintiff
banks, including a promise that the banks could continue the use
of the challenged practices if the law changed. Justice Souter,
writing for the plurality, treated this question as a matter of inter-
pretation of the individual merger agreements negotiated by the
banks and government regulators. The government denied that the
agreements contained such terms and argued that the statements
in the documents that referred to generous reserve and accounting
rules were simply statements of then-existing policy.

The plurality rejected this interpretation. For instance, discuss-
ing the merger documents for one bank, the plurality observed:

Although one can imagine cases in which the potential gain might
induce a party to assume a substantial risk that the gain might be
wiped out by a change in the law, it would have been irrational
in this case for [the cooperating bank] . . . to stake its very exis-
tence upon continuation of current policies without seeking to

35. Id. at 848 (opinion of Souter, J.). See also id. at 850–56 (opinion of Souter, J.).
36. See id. at 857–58 (opinion of Souter, J.).
37. See id. at 858 (opinion of Souter, J.).
38. See id. at 862 (plurality opinion).
embody those policies in some sort of contractual commitment. This conclusion is obvious from both the dollar amounts at stake and the regulators’ proven propensity to make changes in the relevant requirements. . . . Under these circumstances, we have no doubt that the parties intended to settle regulatory treatment of these transactions as a condition of their agreement.39

A finding that the parties’ agreement should be interpreted to assign the risk of regulatory change to the government, however, did not dispatch all questions that the case presented. In particular, even if such a finding would be binding on a private party under general contract principles, it was not at all clear—as a matter of law—that it could be binding on government. In short, there was the problem of the unmistakability doctrine and its application to this case.

The plurality, after a lengthy discussion of the doctrine and its policies, rejected its application. That doctrine, the plurality held, is rooted in the concern that a “contractual obligation [not] . . . block the exercise of a sovereign power of the Government.”40 That concern was—in turn—not involved in this case, because the plaintiffs sought only “insur[ance] . . . against . . . losses, arising from future regulatory change”; they did not seek “to bind . . . Congress from enacting [new] regulatory measures.”41

The plurality acknowledged that “while agreements to insure private parties against the costs of subsequent regulatory change do not directly impede the exercise of sovereign power, they may indirectly deter needed government regulation” by increasing the cost of its enforcement.42 However, the plurality finessed this issue on the ground that “Congress itself expressed a willingness to bear the costs at issue . . . when it authorized the FSLIC to ‘guarantee [acquiring thrifts] against loss’ that might occur as a result of a supervisory merger.”43 Applying the unmistakability doctrine in this case would also have harmful practical consequences, undermining the reputation of the government as a reliable contracting party.44

39. Id. at 863–64 (plurality opinion).
40. See id. at 879 (plurality opinion).
41. See id. at 887 (plurality opinion).
42. Id. at 883 (plurality opinion).
44. See id. at 883 (plurality opinion).
If one is honest, neither asserted reason for the non-application of the unmistakability doctrine in this case is particularly convincing. The distinction between payment of damages and regulatory power is artificial at best; presumably, in most if not all cases of this type, the plaintiffs will be suing for damages. If critical terms can be implied in such cases, because of the remedy sought, the principle that such terms must be explicitly stated in contracts of this type will have little practical application. As for the argument that application of the will impair the government’s ability to contract with individual parties in a reliable or meaningful way, we must remember that we are dealing with the “unmistakability”—not the “prohibitory”—doctrine. The issue is not whether a government can insure a contracting partner against change; it is whether such insurance must be done in unequivocal terms—a point on which the dissenting justices forcefully elaborated.45

So what accounts for the result in the Winstar case? The roots, I would argue, can be found in the fact that the “supervisory merger” deals that government pushed in this case were so clearly and unabashedly pursued for the government’s own financial benefit. Government agencies induced healthy banks to take over ailing thrifts in order to avoid FSLIC deposit insurance liability. In addition, Congress was aware—when debating FIRREA—that it would have the substantial effect of releasing the government from its contractual obligations.46 As Justice Souter stated, “[t]he statute not only had the purpose of eliminating the very accounting gimmicks that acquiring thrifts had been promised, but the specific object of abrogating enough of the acquisition contracts as to make that consequence of the legislation a focal point” in its passage.47

Reconciling Charles River Bridge and Winstar appears to be difficult, as an initial matter. In a broad-brush way, the cases are very similar. In both, there were express contracts between government and private business interests. In both, the contracts lacked express, unmistakable language that protected the private parties from later, adverse government action. In both cases, it can be said that the protection that the private parties sought was something that could reasonably be presumed, as a practical and commercial necessity,

45. See, e.g., id. at 929–30 (Rehnquist, C.J., dissenting).
46. See id. at 900 (opinion of Souter, J.).
47. Id. (opinion of Souter, J.) (footnote omitted).
for any private party entering such contracts. Yet, when the bottom line was reached, the Court was willing to supply this protection in *Winstar*, and in *Charles River Bridge* it was not.

What distinguishes these cases, in my view, is the taint of self-dealing. The take-away—as *Charles River Bridge* enduringly illustrates—is that courts are reluctant to imply substantial, protective terms in government contracts. This is true even when the contract without those terms can be seen as an improbably foolish bargain. However, this interpretive approach might succumb to another more generous account in cases of government’s blatant and acknowledged self-dealing. In *Winstar*, government induced reliance not only for an articulated public purpose—and the kind of general public benefit that government actions presuppose—but also to implement an explicit and calculated strategy to save itself billions of dollars that it would otherwise have owed. The later legislative change was also, explicitly, tailored to that end. Granted the line between general protection of the public fisc and the sharpness of government self-dealing might not always be clear. But in the latter case, the disputed protection against government action might well be implied. And forbearance on the part of government—from changing the rules of the game vis-à-vis those parties—might well be required.

C. “Deregulatory Takings”: The Case of the Implied Contract

For many years, state and federal governments heavily regulated certain industries. Interstate trucking, air transport, telecommunications, electric and gas utility companies, and others were subject to strict government rulemaking controls and government controls on new entry. The private businesses that flourished under these regimes were, essentially, government-protected and government-regulated monopolies.

These industries, in turn, invested on the basis of business and earnings that were generated by their status. They invested in specialized and durable assets that seemed necessary, or at least justified, under the regulated-monopoly regime. For example, utility companies operated under a model of self-sufficiency; they assumed the need to produce their own power, and invested in excess power capacity for periods of unusually high demand. Costs incurred under this regime were charged to their “captive” clientele.
In the 1990s, political winds shifted. As one author expressed it, “Americans . . . turned their backs on one of the New Deal’s most important legacies by deregulating nearly every market to which regulation ha[d] been applied.”48 Industries which had previously enjoyed regulated-monopoly status suddenly found themselves competing with new entrants and new models for service. In the utilities market, for instance, previously regulated monopolies suddenly found the models of “self-sufficiency” and “captive customers” obsolete. Electricity could now be freely purchased from low-cost sources, rendering the model of higher-cost, “self-sufficient” sources obsolete. In addition, customers suddenly had a choice among competing telecommunications, electric, and gas providers. Firms that had been regulated monopolies suddenly found themselves with what they called “stranded costs”—costs incurred in monopoly-status investment that were now difficult or impossible to recover in a market-based environment.49

The nature and extent of so-called stranded costs varied greatly from industry to industry.50 Some industries, such as airlines, experienced a boom in business as the result of deregulation and few assets in those segments were stranded.51 However, other industries—such as the electric utility industry—cited large losses, and claimed foul.52 The core of their claims was reliance: that they had relied on their regulatory monopoly status, and government had—unfairly—changed the rules of the game. They sought billions of dollars in compensatory damages.53

There might have been a political argument for some of these claims; indeed, one study points out that regulated utilities persuaded regulatory and state legislative bodies to provide more than $100 billion in relief (with the costs, in most cases, passed on to

49. See, e.g., Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin., 126 F.3d 1158, 1180 (9th Cir. 1997).
50. See Hovenkamp, supra note 48, at 803–04.
51. See id.
53. See Rose-Ackerman & Rossi, supra note 52, at 1458–59.
consumers as “transition costs”). Whatever the political outcomes at the time, what is more interesting for our purposes is the legal argument that was made by these industries. The assertion was that deregulation violated the government’s “regulatory contract” with these firms, and that compensation was required on that basis. They—and their advocates—argued that they had a tacit or implied understanding with government: that they would invest their resources in the running of the regulated/monopolistic enterprise, and the state would guarantee a particular rate of return. By engaging in deregulation, the state reneged on its side of the bargain. This deprived the firms of their “investment-backed expectations” — and was a taking of property without compensation.

In other words, the firms were entitled to rely on a continuance of the legal status quo.

In light of our prior investigations and derived principles, is this a case in which the costs of the regulatory change should fall on the individual firms, or on government? Is this a case in which individual reliance was justified, and government forbearance required?

This case is clearly the weakest so far examined. To impose a duty of forbearance (or the payment of costs) on government, in this case, one must infer not only particular contract terms, dealing with risks of regulatory change, but also the existence of the contract itself. As commentators have observed, there is little legal support for viewing the relation between private firms and the regulatory agencies that govern them as establishing enforceable, contractual relations. If there is some justified individual reliance in these cases, it is rooted in something far more insubstantial and uncertain than an explicit, executed contract.

In addition, even if the regulatory relation could be deemed a “contract” of sorts, there is nothing in that relation that would provide the desired contract term, i.e., the shifting of the costs of regulatory change from the firms to the public. Nothing in the history of regulatory dealing can be cited in these cases for such an “implied contract term.” Arguments rooted in claims for general

54. See id. at 1458–59 (discussing studies).
55. See, e.g., SIDAK & SPULBER, supra note 52, at 213–72.
economic protection, or in the idea that a prudent investor would insist upon such terms, have not (as discussed above) been successful in the courts. Nor does public policy somehow demand such a result. No sharp self-dealing by government is present in this case, as it was in Winstar; and there are cogent arguments that regulated firms were well aware of the risks of regulatory change that they ran if the political winds shifted. There is, in short, little legal reason to rescue these industries from the risks that they chose—as many choose—as entrepreneurs, little legal ground for claiming individual reliance or requiring government forbearance.

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In summary, the existence of a “contract” with government is one way to conceptualize when an individual is entitled to rely on an existing legal state of affairs, and government is—therefore—required to forbear. However, the idea of a “contract” with government as answering the question is superficial. The case might be a situation in which a government agent has signed an agreement with a private party, with express terms covering the issue of future legal change; but in most cases in which this theory is asserted, the facts will not be so simple.

In all of the other—more difficult—cases, our intuition and the cases above suggest the following principles:

1. For individual reliance to be justified, there must be more than the simple existence of law. There must be some kind of personal transaction between the individual and government to set the stage for a reliance claim.

This principle can be illustrated by a simple example. Let us say, for instance, that an individual wishes to open a bar in a college town. He heavily invests in the enterprise, in reliance on a state law that establishes a legal drinking age of 18. If the state thereafter increases the drinking age to 21, the individual—I believe we would all agree—has no legal claim to redress, even if his business is severely impacted by the change. The mere existence of a law that is addressed to the general public—without more—is not enough to create justified individual reliance, or to require government indemnification if the law is changed. Rather the individual most have
This principle is illustrated by the cases that we have examined. In *Fletcher*, there were express, negotiated understandings between individuals and government, governing the conduct of the parties. In *Fletcher* this understanding was the consummated sale of government land, and in *Charles River Bridge* it was the construction of a bridge in response to explicit, particular state authorization to do so. This principle was also met in *Winstar*: the federal government entered into negotiations, and executed agreements, with solvent banks to take over ailing thrifts. Its presence is far more tenuous, if it is present at all, in the regulated utilities cases. In those cases, government regulated certain industries, providing a legal environment for private operation; however, the degree to which there were particular, negotiated transactions or agreements between private firms and the regulating governments is much less clear. As a result, our intuition—and legal precedent—signal that this situation presents a weaker case.

This brings us to the second principle:

(2) A rule that law cannot change would present a serious problem in a dynamic society, in which changes in knowledge and the occurrence of exigencies continually challenge existing law. As a result, claims of reliance on previous law, and for indemnification for its change, must be cautiously granted.

For individual reliance to be justified, there must be some kind of explicit understanding between the individual and government that the risk of change is something that the public (government) has undertaken. Absent evidence of government exploitation or overreaching, “implicit” or “implied” understandings of this sort will not be recognized.

In our case of the disappointed bar-owning businessman, there was no explicit commitment by government to him that the law would not change, or that he would be indemnified if it did. Nor was there any exploitation or overreaching by government that would justify the rare conclusion that a bargain of this type should be implied. Government did not induce this investor to act in order to further government’s own, particular, self-interested strategy; its benefit, if any, was only of a kind that all law-abiding activities of all citizens might produce. The benefit that government sought to
achieve, from the initial drinking-age law or its successor, was simply the kind of generalized public benefit that has no particular relationship to a particular individual or previous transaction. As a consequence, both our intuition and the law would deny a claim to justified reliance and indemnification in this case.

This principle is, again, illustrated by our cases. In *Fletcher*, the government transferred title to particular parcels of land to particular individuals; completed land sales, without reservations or contingencies, are express agreements that all parties are entitled to believe will not be revoked. However, in *Charles River Bridge* and the “regulated utilities” cases, there were no such explicit understandings, or assumption of the risk of change, by government; and that absence was fatal to those individual reliance claims. Although the situation was similar in *Winstar*, the fact of government double-dealing tipped the balance in that case. The government’s calculated inducement of the healthy banks’ takeovers of the ailing thrifts, together with the government’s acknowledged desire to avoid its own crushing financial liability through this stratagem, justified findings of implied reliance and an obligation to indemnify in this case.

II. Claimed Reliance Settings: The Regulation of Land

The case of *Lucas v. South Carolina Coastal Council*,57 decided by the United States Supreme Court in 1992, presents classic claims of individual reliance and required government forbearance in the context of property rights in land. In the late 1970s, Lucas began residential-development activities on the Isle of Palms near Charleston, South Carolina.58 In 1986, he purchased two lots for development. At the time of their purchase, these lots were within an area generally covered by the Coastal Zone Management Act,59 which was enacted by South Carolina some years before. This Act required owners of coastal land that was part of a “critical area” under the Act to obtain a permit prior to development. At the time of their purchase, Lucas’s plots were not deemed to be “critical areas,” and—as a result—development was unrestricted.60

58. See id. at 1008.
60. See Lucas, 505 U.S. at 1008.
Two years after the lots’ purchase, South Carolina enacted a new law to more closely regulate shoreline activity. This law, the Beach-front Management Act, was intended to protect the beach/sand dune coastal system from unwise development that could jeopardize the stability of the beach/dune system, accelerate erosion, and endanger adjacent property. Under the regulations issued pursuant to the Act, development of Lucas’s two parcels was prohibited. Lucas challenged this situation in court, arguing that it effected a “taking” of his property without just compensation.

Lucas was not, obviously, deprived of the title to his land; rather, his claim was that he—as the title holder—had a prior right to build on his land, and that this right was, itself, the property that was taken. In the words of Justice Scalia, who wrote the majority opinion for the Court, “Lucas did not take issue with the validity of the [Beachfront Management] Act as a lawful exercise of South Carolina’s police power, but contended that the Act’s complete extinguishment of his property’s value entitled him to compensation regardless of whether the legislature had acted in furtherance of legitimate . . . objectives.” In other words, Lucas did not argue that the South Carolina authorities could not—as a matter of general law—do what they did; rather he argued that they could not do it to him, because of the destruction that the legal change caused to his legitimate, investment-backed expectations. In our terms, he argued that he was entitled to rely on the prior legal status quo; and that a change in the law, detrimental to him, required the payment of damages (or government forbearance).

The Supreme Court held that Lucas should prevail, provided that the new restrictions were “not part of his title to begin with” (something that was clear from the facts, and confirmed on remand).

On what basis did the Court make this decision?

The theoretical basis for the Court’s decision is—quite frankly—obscure. The majority began by observing that the question was whether the government went “too far” in its redefinition of the

62. See Lucas, 505 U.S. at 1008–09.
63. See U.S. CONST. amend. V (“No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use without just compensation.”).
64. Lucas, 505 U.S. at 1009.
65. See id. at 1008–10.
66. See id. at 1027.
landowner’s previously existing interests.67 This seems to be a comparison of what the claimant began with, and what the claimant has left. The Court stated that when a regulation “denies all economically beneficial or productive use of land,” it is, by definition, “too far” and compensation must be paid.68

This does not, of course, of itself explain why this result should obtain. The majority acknowledged this, stating that “[w]e have never set forth the justification for this rule.”69 Justice Scalia then proceeded to speculate what those reasons might be. “Perhaps it is simply . . . that a total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.”70 In any event, in such a case, “it is less realistic to indulge in our usual assumption that the legislature is simply ‘adjusting the benefits and burdens of economic life.’”71 In addition, the danger that such cases present—that government will be paralyzed if compensation is required for “every such change in the general law”—is minimal if confined to cases such as this. That concern “does not apply to the relatively rare situations where the government has deprived the landowner of all economically beneficial uses.”72

The rationale, therefore, seems to be an idea of compensatory justice. If we take from you, you deserve compensation. But this does not answer the real, underlying question. Why have we “taken” from you? What did you have, that has now been taken?

The majority’s approach assumes that there was some kind of “thing” or “entitlement” of which Lucas was deprived. Lucas still owned the land, so the title to the land could not be it. The only other possibility is that he had a legal right to the previously existing legal status quo.

The easy answer is, “of course he did”—that right being a kind of “property.” One could simply say—as the Court has seemed to imply, at various times—that there is a right to use land, of some uncertain and unexplained origin.73 However, there has to be more.

67. See id. at 1014–15.
68. See id. at 1015.
69. Id. at 1017.
70. Id.
72. Id. at 1018.
73. See, e.g., id. at 1016, 1027–31 (right to “essential use” of land); Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 496 (1987) (right to “economically viable use”).
Right to use how? In what way? For what? There has to be more than the answer that “there was an entitlement” held by Lucas to use his land in contravention of now existing law “because there was an entitlement.”

To the extent that the Court’s majority articulates an underlying theory, it seems to be one of reliance. For instance, the majority places great weight on whether the owner should have known of the restrictions as “part of his title to begin with.”74 “Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”75 Although an owner of personal property “ought to be aware of the possibility that new regulation might . . . render his property economically worthless,” the same is not true of the owner of land.76 Such an outcome would violate the “historical compact recorded in the Takings Clause,” and the owner’s “investment-backed expectations.”77

Reliance, as we have seen in the discussion above, is not a free-floating concept. There is reliance that is justified, and reliance that is not. To be justified, in this context, there must be more than the simple existence of law, around which the individual planned—there must be some kind of personal, individual/government transaction.

When juxtaposed next to our prior cases, above, the flimsiness of a reliance claim in Lucas’s case is striking. There was no personal, negotiated relationship between Lucas and the government of any kind; the law—which grounded his reliance claim—presented, at most, a particular legal environment for his private operation. His case even more starkly fails the second reliance condition that we derived above—that there must be some kind of explicit understanding between the individual and government that the risk of change is something that the public (government) has undertaken. Lucas’s claim involves no communication about government’s undertaking the risk of change of any sort, and there is no (alternative) evidence of government exploitation or overreaching. When compared to the cases that we have previously considered, it is most akin

74. See Lucas, 505 U.S. at 1027.
75. Id. at 1029.
76. See id. at 1027–28.
77. See id. at 1028, 1019 n.8.
to the disappointed bar owner who invested, and then was disappointed when a general change in the law impacted his investment.

There is one additional possibility that needs to be explored. Is Lucas entitled to different treatment from other citizen investors, because it was in land that he invested?

When one views the whole of the legal landscape, this certainly seems to be a prominent feature of what one sees. Changes in law affect investments of all kinds and can dramatically reduce their value. Stocks, farming enterprises, the production of industrial chemicals, the value of airplane companies, the value of machinery, and investments of every kind and description are affected—day in and day out—by changes in laws of general application. Conceivably all of these changes could be challenged by takings claims. However, land-based claims clearly dominate the takings landscape. And with few exceptions,78 we do not find the kind of solicitude for other claims that we find for land-based claims in the nation’s courts.

As a formal matter, however, the Supreme Court has never drawn a distinction between land-based claims and others.79 All that we hear are the majority’s musings in Lucas, to the effect that owners of personal property should be aware of the risk of financial wipe-out, while owners of land (for some reason) should not.80 Whatever the reasons one might advance for such bias, in that case they remain unexplored and unexplained. When one considers the blood, sweat, and tears of ownership and financial risk, the reasons for a radical difference in treatment—as far as the reliance theory goes—are far from obvious.

The bottom line is that reliance alone cannot really provide ground for Lucas’s claim or provide the theory for the Court’s decision. It is handy to say that “he relied on it, therefore he deserves it.” But on closer analysis, the theory crumbles. Unless we adopt the bold and sweeping assertion that there is a compact or agreement between government and all landowners that the latter shall never (without compensation) be deprived of all of the developmental use of their land, there is nothing to distinguish Lucas’s reliance from that of anyone else on what are laws of general application. And that bold

79. Hints about a distinction between land-based claims and other claims are rare. See, e.g., Lucas, 505 U.S. at 1027–28; E. Enters., 524 U.S. at 554–56 (Breyer, J., dissenting).
80. See Lucas, 505 U.S. at 1027–28, and note 76, supra.
assertion—even if made—is not a practical one. For instance, as the Court has implicitly found, it is completely financially impracticable for the government to pay “development prices” to all of the owners of the nation’s millions of acres of preserved—indeed, critically preserved—wetlands.81

If individual reliance is not—in fact—what drives _Lucas_ and other land-regulation cases, what does? Because of the Court’s continual reliance on misplaced reliance theories, this question is not easy to answer. Maybe it is the need to encourage investment in particular cases. Maybe it is the need to balance the loss of one individual against the losses of another. Maybe it is the need to achieve justice through the evaluation of competing individual and public interests. Explicit engagement of such questions will be difficult, no doubt. But it would yield more substance and insight than the unthinking use of an empty theory of reliance.

**CONCLUSION**

The problems posed by reliance and changes in law are not trivial; rather, they are ubiquitous. Any recognized configuration of rights, which property initially confers, is at most a snapshot of the way that conflicting individual and collective interests are resolved at that moment.82 The honoring of individual reliance claims—rooted in the prior legal status quo—attempts to freeze the process of legal change, at the cost of government indemnification.

As the result of the fundamental struggle that the individual claims and government defenses in this area represent, the circumstances under which individual claims of this type will be honored are limited. For individual claims to be honored, there must be more than reliance on the simple existence of law. There must be some kind of personal transaction between the government and the individual. In addition, for individual reliance to be justified, there must be some kind of explicit understanding between the individual and government that the risk of change is something that the public (government) has undertaken. Absent these restraints, “reliance” is unlimited, and creates more problems than it answers.

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81. See, e.g., _Palazzolo v. Rhode Island_, 533 U.S. 606 (2001) (_Lucas_ claim for preserved wetlands sidestepped, on the ground that the parcels in question had “upland” portions).
THE 2013 TAKINGS TRIPLETS:
FROM EXACTIONS TO FLOODING TO RAISIN
SEIZURES—IMPLICATIONS FOR LITIGATORS

JAMES S. BURLING*

INTRODUCTION

The 2013 takings triplets of Koontz, Horne, and Arkansas Game and Fish Commission from the United States Supreme Court augur well for the future of property rights.1 While there was nothing particularly revolutionary in any of the three decisions, a loss in any of these cases could have spelled some serious backsliding for the progress made in the past quarter-century by property rights advocates. Moreover, these decisions helped dissipate some of the pervasive property law pessimism that followed from the Court’s Kelo decision in 2006.2

Property rights cases have had a long history of incremental two-steps-forward followed by one-step-back progress. First English’s doctrinal clarification of the concept of temporary takings was undercut by the extreme equivocation of Tahoe-Sierra.3 The cautious optimism engendered by twenty years of growing respect for property rights at the state and federal level was cast into doubt with Tahoe-Sierra and then cut short by the Court’s retreat into the past with Kelo.4 In fact, entering into the 2013 Term, a dozen years had

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4. While Kelo arguably followed precedents set in Berman v. Parker, 348 U.S. 26 (1954) (employing a standard of great deference to hold a taking of private property for private redevelopers a “public use”) and Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (same), the property rights bar had some hope that a judicial reawakening was in the offing.
elapsed since the Court had handed down a mostly clear-cut property rights victory in *Palazzolo*, but even that decision was compromised internally by competing concurrences. 5

So, property rights advocates had some trepidation when the Court agreed to take three property rights cases for its 2013 Term. A loss in *Koontz* could have eviscerated the *Nollan* nexus requirement and the *Dolan* rough proportionality and burden-of-proof holdings for property-based unconstitutional conditions. A loss in *Arkansas Game & Fish Commission* could have spelled the end of all temporary takings, and left government agencies everywhere license to wreck havoc on real property so long as the wrecking did not last too long. And a loss in *Horne* could have augured further incomprehensible procedural barriers for litigants attempting to bring takings claims in various courts. As is now well-known, these setbacks did not occur. But what did these cases actually mean for the ability of property owners and government regulators to litigate cases dealing with property rights? That is the concern of this essay. But first a synopsis of the state of the law as we entered into the 2013 Term of the Supreme Court is in order.

**I. THE STATE OF REGULATORY TAKINGS AND EXACTIONS BEFORE 2013**

**A. Partial, Physical, and Total Takings**

In what is now considered the seminal partial regulatory takings case, the Court in *Penn Central Transportation Company v. City of*
New York held that three factors are particularly relevant to determining whether there has been a regulatory taking: the investment-backed expectations of the landowner, the economic impact of the regulation, and the character of the regulation.6 This test applies when there has been less than a “total” taking of the use and value of the property, in which case Lucas applies.

In contrast to the equivocal nature of the Penn Central test, the Court has adopted two “categorical” rules-cases in which a taking will always be found. In 1978, the Court decided in Loretto v. Teleprompter Manhattan CATV Corp.7 that a physical invasion, no matter how slight, was a taking. Here, the Court held that there was a taking when the invasion was only by some wires and a small cable box. Any infringement on the right to exclude was seen to be a taking.8

In Lucas v. South Carolina Coastal Council,9 the Court held that a regulation that prohibited all use and value of the property was a total taking. The Court found that use of the property for residential development did not constitute a nuisance and was not proscribed by “background principles” of property law. Over time, however, the efficacy of this test has proved elusive because there are few circumstances where a regulation actually destroys all use and value. Moreover, some courts have held that even if use is destroyed, there is no taking so long as there is residual value.10

B. Procedural Hurdles to Bringing Takings Cases

Property rights are not like other constitutionally protected rights. Whether they deserve less constitutional protection or whether they

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6. 438 U.S. 104, 126 (1978). The meaning (or meaninglessness) of these “factors” has been widely debated. To some they are a pastiche of subjective and objective factors, which are not particularly well-suited to determining whether the government has actually taken private property. See, e.g., Steven J. Eagle, The Four-Factor Penn Central Regulatory Takings Test, 118 PENN ST. L. REV. (forthcoming 2014). To others, the factors are a good start. See, e.g., Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (Cal. 1997) (adopting a ten-factor test).
8. A similar result was reached in Kaiser Aetna v. United States, 444 U.S. 164 (1979) (taking of dredged channel that the Corps of Engineers demanded to be opened to the public).
really are a “poor relation” to other rights,\footnote{11}{While the Court found restrictions on “economic” rights to be deserving of less scrutiny for purposes of due process in \textit{United States v. Carolene Products Co.}, 304 U.S. 144, 152 n.4 (1938), the Court also suggested in \textit{Dolan v. City of Tigard}, 512 U.S. 374, 392 (1994), that property rights were not a “poor relation” of other rights.} one thing is certain: the door to the federal courthouse is a lot harder to push through for property rights than other kinds of rights. In \textit{Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City},\footnote{12}{473 U.S. 172 (1985).} the Court held that a regulatory takings claim seeking damages could be brought in federal court if (1) administrative procedures below have been completed, and (2) the plaintiff has first utilized available state procedures. The first prong makes sense in that it could be premature to bring any kind of taking claim unless it is known what actually can and cannot be done with a parcel of property.\footnote{13}{But there are limits. As the Court explained in \textit{Palazzolo v. Rhode Island}, 533 U.S. 606, 622 (2001), “[r]ipeness doctrine does not require a landowner to submit applications for their own sake. Petitioner is required to explore development opportunities on his upland parcel only if there is uncertainty as to the land’s permitted use.”} But the second prong has proven to be far more problematic.\footnote{14}{See, e.g., Gideon Kanner, “[Un]Equal Justice Under the Law”: The Invidiously Disparate Treatment of American Property Owners in Takings Cases, 40 Loy. L.A. L. Rev. 1065 (2007); J. David Breemer, Overcoming Williamson County’s Troubling State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims, 18 J. Land Use & Envtl. L. 209 (2003).} This is especially so in light of the decision in \textit{San Remo Hotel, L.P. v. City and County of San Francisco},\footnote{15}{545 U.S. 323 (2005).} in which the Court held that if a litigant can first litigate a \textit{federal} regulatory takings claim in state court, he must do so—even if this means the doctrine of res judicata will prevent the owner from ever litigating a federal takings claim in federal court.\footnote{16}{J. David Breemer, \textit{You Can Check Out but You Can Never Leave: The Story of San Remo Hotel—The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen Claims for Federal Review}, 33 B.C. Envtl. Aff. L. Rev. 247 (2006). There may be exceptions to this prudential rule—such as when a local or state government first removes a claim from state to federal court and then argues that the claim must be dismissed because it is in the wrong court. See, e.g., Sansotta v. Town of Nags Head, 724 F.3d 533 (4th Cir. 2013) (refusing to dismiss takings claims after removal to federal court).}

One hurdle that seems to have been removed is the so-called “notice rule,” wherein a landowner who acquired property on notice of the existence of a regulatory scheme is otherwise precluded from...
challenging the application of the scheme. A number of claims foun-
dered upon this doctrine until the Court decided \textit{Palazzolo}, which held fairly explicitly that a purchaser of property subject to a reg-
ulation is not precluded from challenging the application of that regulation as a taking. “Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.”\textsuperscript{17} Despite this rather emphatic holding, its force is somewhat miti-
gated by the dueling concurrences and the predilection of some courts to distinguish the case into meaninglessness.\textsuperscript{18}

\begin{center}
\textbf{C. The Doctrine Unconstitutional Conditions and Property Rights}
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With the rise of the power of local governments to zone and regu-
late the use of private property in the wake of \textit{Village of Euclid v. Ambl}
\textit{er Realty Co.},\textsuperscript{19} governments have not been reluctant to use
that power to exact concessions from landowners who seek permits.
Pragmatic landowners will weigh the costs of delay and attorneys
and usually decide to accede to the demands, regardless of how un-
justified they might be. Nevertheless, some landowners will object
out of principle. Examples of such landowners include the Nollans,
Mrs. Dolan, and Coy Koontz, Sr. and his son, Coy Koontz, Jr.

\textit{Nollan v. California Coastal Commission}\textsuperscript{20} involved a demand
that the Nollans dedicate to the public one-third of their beachfront
land in exchange for a permit to replace a one-story bungalow with
a two-story home. The Coastal Commission granted the permit with
the condition attached, but the Nollans never accepted the permit.
The Court held that a government may impose a condition upon the
granting of a development permit if that condition ameliorates a
direct negative impact caused by the development when that impact
could justify the outright denial of the permit.\textsuperscript{21}

\begin{itemize}
\item 17. \textit{Palazzolo}, 533 U.S. at 627.
\item 18. See supra note 5 (discussing \textit{Palazzolo} concurrences in context of \textit{Penn Central} analysis).
\item See also \textit{Guggenheim v. City of Goleta}, 638 F.3d 1111 (9th Cir. 2009) (distinguishing \textit{Palazzolo}
on basis of manner of acquisition of property—which was not at all relevant to the basis of the
Supreme Court’s decision).
\item 19. 272 U.S. 365, 388 (1926) (upholding area-wide zoning).
\item 20. 483 U.S. 825 (1987).
\item 21. \textit{Id.} at 836–37.
\end{itemize}
Although the Court [in Nollan] does a poor job of defining the parameters of the test, suggesting that it simply requires a correspondence between the government’s purposes and its means, its reasoning and holding clearly show that the raw nexus test requires (1) a legitimate state interest or purpose; (2) a connection between that interest and the land use exaction chosen to address it; and (3) a minimal connection between the impacts of the proposed development and the land use exaction.22

In Dolan v. City of Tigard,23 the City imposed two conditions in exchange for a permit to expand a plumbing store: dedicate riparian property to public access, and build a bicycle trail across the property. The Court held that the City had the burden of showing not only that there was a nexus between the conditions and impacts caused by the development, but also that the City must show the exactions to be “roughly proportional” to the impact.24

In response to the dissent’s criticizing the decision for “abandoning the traditional presumption of constitutionality,”25 the Court noted that it was not imposing this burden in the context of ordinary land use legislative zoning.26 This statement has led to assertions that the “rough proportionality” standards of Dolan do not apply when exactions are imposed through a legislative act, such as affordable housing ordinances that require developers to set aside a set percentage of new units for below-market sale to lower-income people, or pay an in-lieu fee to a local housing authority instead.27

The Court in Lingle v. Chevron reitered that Nollan and Dolan were special takings cases that followed from the doctrine of unconstitutional conditions.28 The Court also noted that where a regulation fails to substantially advance a legitimate governmental interest, it may violate the Due Process Clause, but not necessarily

24. Id. at 391.
25. Id. 512 U.S. at 405 (Stevens, J., dissenting).
26. Id. at 391 n.8 (majority opinion).
the Takings Clause. Thus, because the “substantially advance” test is not the rationale of *Nollan* or *Dolan*, the vitality of those cases was not disturbed.

**D. Koontz v. St. Johns River Water Management District: The Latest Take on Regulatory Exactions**

1. Nineteen Years of Litigation Preceded the Supreme Court Decision

   In 1972 Coy Koontz, Sr., purchased 14.9 acres of property near the intersection of two major roads near Orlando, Florida. In 1984 the state adopted a comprehensive wetlands management scheme. In 1994, Coy Koontz applied to develop 3.7 acres of his property. The water management district determined that the property was in a “Riparian Habitat Protection Zone” and the development of the 3.7 acres would require mitigation.

   Although Coy Koontz agreed to impose a conservation easement upon his remaining 11 acres, the St. Johns River Water Management District demanded more. Because 11 acres did not fulfill the District’s one- to ten-acre mitigation formula, it demanded that Koontz either reduce his development to one acre or that he accede to a condition to spend up to $150,000 to improve the wetlands functions on district-owned property five to seven miles away from the project site. Koontz refused and the District denied the permit.
Koontz filed suit toward the end of 1994. Ultimately, the trial court found that the conditions failed under *Nollan* and *Dolan* and ordered the District to give Koontz a permit and awarded $327,500 in damages under Florida Statutes § 373.617. In 1998 the court of appeals found the rejection of the application was final agency action and the case was ripe. The Florida Supreme Court reversed on two grounds. First, because Koontz never took the permit, the conditions had never, in fact, been imposed. And, second, it held that the holdings of *Nollan* and *Dolan* do not apply to the imposition of monetary exactions.

2. The Supreme Court Reverses the Florida Supreme Court’s Holding That Exactions May Be Challenged Only When a Permit Is Accepted

The United States Supreme Court granted Koontz’s petition for writ of certiorari and reversed. The Court held, per all nine Justices, that the tests of *Nollan* and *Dolan* apply not only in circumstances where a permit is granted with conditions, but also in those circumstances where a permit is denied because an owner refuses to accede to the permit conditions. “[R]egardless of whether the government ultimately succeeds in pressuring someone into forfeiting a constitutional right, the unconstitutional conditions doctrine forbids burdening the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.”


38. Koontz v. St. Johns River Water Mgmt. Dist., 720 So. 2d 560, 562 (Fla. App. 1998) (“There is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the governing body finally approves one before he can go to court. If the governing body finally turns down an application and the owner does not desire to make any further concessions in order to possibly obtain an approval, the issue is ripe.”).

39. 77 So. 3d 1220, 1230 (Fla. 2012) (“[T]he Nollan/Dolan rule with regard to ‘essential nexus’ and ‘rough proportionality’ is applicable only where the condition/exaction sought by the government involves a dedication of or over the owners’ interest in real property in exchange for permit approval; and only when the regulatory agency actually issues the permit sought. . . .”).

40. *Koontz*, 133 S. Ct. at 2595.
explain that the rationale behind the unconstitutional conditions doctrine is consistent with the application here:

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.41

Justice Kagan and three other Justices agreed with this basic principle: “The NollanDolan standard applies not only when the government approves a development permit conditioned on the owner’s conveyance of a property interest (i.e., imposes a condition subsequent), but also when the government denies a permit until the owner meets the condition (i.e., imposes a condition precedent).”42 The dissent, however, questioned whether under the facts of this case the permit had been denied because Koontz failed to accept the conditions or whether Koontz just halted ongoing negotiations.

3. The Supreme Court Finds That the Holdings of Nollan and Dolan Apply to Monetary Exactions

A five-Justice majority further held that monetary exactions should receive the same scrutiny given to exactions of land under Nollan and Dolan. The Court reasoned that Nollan and Dolan are special applications of the doctrine of unconstitutional conditions. Since government cannot simply demand a payment of money (outside the taxing power) it cannot demand the same money simply because it has the leverage of its permitting authority. But, recognizing that development can have negative external consequences, it is appropriate for government to demand ameliorating conditions—so long as they meet the appropriate tests. The Court held that this case is unlike other circumstances where government may demand

41. Id. at 2596.
42. Id. at 2603 (Kagan, J., dissenting).
money. Instead, here, “the monetary obligation burdened petitioner’s ownership of a specific parcel of land.”

In response to suggestions from the District and the dissent that this case should be viewed as an alleged regulatory taking under the rubric of *Penn Central*, the Court responded that

petitioner does not ask us to hold that the government can commit a regulatory taking by directing someone to spend money. As a result, we need not apply *Penn Central*’s “essentially ad hoc, factual inquir[y],” . . . at all, much less extend that “already difficult and uncertain rule” to the “vast category of cases” in which someone believes that a regulation is too costly.

The Court saw no need to explicate the distinction between taxes and exactions—finding it clear enough here and really a problem more in theory than reality: “[I]t suffices to say that despite having long recognized that ‘the power of taxation should not be confused with the power of eminent domain,’ . . . we have had little trouble distinguishing between the two.”

**E. Vexing Questions About Exactions That Survive Koontz**

1. **Do Nollan and Dolan Apply to Legislatively Imposed Exactions?**

   In *Dolan* the Court tried to allay fears of government advocates and the dissent that all manner of property regulation would be subject to the heightened scrutiny of “rough proportionality” by distinguishing zoning regulations, noting:

   First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

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43. *Id.* at 2599 (majority opinion).
44. *Id.* at 2600 (citation omitted).
45. *Id.* at 2602 (citation omitted).
To property rights advocates this passage has always been considered simply a means of distinguishing the particular facts in *Dolan* from general area-wide zoning schemes. But those with a more pro-government perspective have argued that this passage means first, that only individualized adjudicative decisions are subject to *Dolan* and, second, that *Dolan* applies only when the demanded exaction is land, as opposed to money. In *Koontz* the Court made explicit that both *Nollan* and *Dolan* apply to circumstances beyond the dedication of real property exactions. But it did not have occasion to opine on whether *Nollan*, *Dolan*, and now *Koontz* should apply to legislative exactions.

This is an issue on which state courts are in disagreement. Some state courts, like California, have held that a legislatively imposed exaction, an in-lieu fee for public art, should be exempt from *Dolan’s* rough proportionality standard. Others have subjected legislatively imposed fees to the heightened scrutiny of *Nollan* and *Dolan*, holding, for example, that “the character of the [condition] remains the type that is subject to the analysis in *Dolan* whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters.”

As a practical matter the legislative-adjudicative distinction is a distinction that lacks precision because it can become notoriously difficult at the local planning level to objectively tell one from the other:

> In reality, the discretionary powers of municipal authorities exist along a continuum and seldom fall into the neat categories of a fully predetermined legislative exaction or a completely discretionary administrative determination as to the appropriate exaction.

Suffice it to say that *Koontz* leaves this question open. However, considering that the exaction in *Koontz*—a ten-to-one mitigation

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47. For a discussion of this argument in the context of subsidized housing ordinances, see Burling & Owen, supra note 27.
48. See, e.g., Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), cert. denied, 117 S. Ct. 299 (1996) (reasoning that the arts fee was no different than other aesthetic regulations like paint color and landscaping).
measure—was pursuant to a broadly applicable regulatory fiat (that is, akin to a legislative act), there is little support in Koontz for the continuing vitality of the legislative exception. In fact, because the particular exactions in Nollan and Dolan were likewise pursuant to broadly applicable legislative acts, the derivation of this exception from the language in Dolan must be inherently suspect. If the rationale for the exception, as described in Ehrlich, stems from the inherently coercive nature of adjudicative permitting schemes,\(^{51}\) then a serious analysis is warranted on the degree to which legislative acts demanding tribute from the small minority of landowners who might wish to develop their property contain an element of coercion.

One aspect of this debate must be acceded to by all sides in the debate: there is a clear conflict on this issue in the lower courts as well as in the academy and sooner or later the Supreme Court will need to take this up. The Court once came close, in the denial of a petition for writ of certiorari in Parking Association of Georgia v. City of Atlanta, where Justices Thomas and O’Connor questioned in dissent why it should matter what the governmental source of the exaction may be.\(^ {52}\) Until the Court takes this issue up, property owners will continue to argue against the exception, and government lawyers will seek to apply it.

2. After Koontz, Is Nollan Satisfied If an Exaction Advances a Legitimate Public Purpose?

Actually, this a trick question because Nollan has never been satisfied if an exaction merely satisfies a legitimate public purpose. Readers may recall that for a time the Court had held that a regulation effects a regulatory taking if it “fails to advance a legitimate public purpose” or if it destroys “economically viable use.”\(^ {53}\) And, for a while, the holding in Nollan was sometimes justified under the rubric that an exaction that failed the Nollan nexus test was a regulatory taking because it failed to advance a legitimate government interest. But in Lingle v. Chevron U.S.A. Inc.,\(^ {54}\) the Court reversed itself and held that while a regulation that fails to substantially

\(^{51}\) Ehrlich, 911 P.2d at 438–39.
\(^{54}\) 544 U.S. 528 (2005).
advance a legitimate government interest might violate the Due Process Clause, it did not necessarily violate the Takings Clause.

But the Court also took pains in *Lingle* to note that this did not affect its holding in *Nollan*. In other words, the Court wrote, *Nollan* is still good law because it is an instantiation of the doctrine of unconstitutional conditions.\(^{55}\) In *Koontz* the Court reiterated that the holding in *Nollan* derives from the Takings Clause because the unconstitutional condition "burden[s] the right not to have property taken without just compensation."\(^{56}\) There you have it. *Nollan* is a regulatory takings case not because an exaction fails to substantially advance a legitimate public purpose (although it might not) but because a property owner cannot be forced to give up the right to receive just compensation for a taking as the price to pay for a government benefit or permit.

Moreover, the *Nollan* nexus test was *never* satisfied merely because an exaction simply happened to advance a legitimate governmental interest. Clearly, the beach easement in *Nollan* advanced the public purpose of creating more public beach. The problem was that the demand for more public beach was completely unhinged from any negative impact caused by the development of the Nollans’ home. So the bottom line is that it is completely insufficient to a *Nollan* analysis whether an exaction happens to result in some public good or effects a public purpose. *Koontz* didn’t change this—but it did solidify the force of *Nollan* that some saw having been limited after *Lingle*.

### 3. Must the Impact to Be Ameliorated Constitute a Public Nuisance?

No. *Nollan* held that an exaction or condition could be imposed *in lieu* of denying a permit if the exaction was related to the reason for denying the permit. But it also noted that the rule applied only where a permit denial would not by itself constitute a taking:

> The Commission argues that among these permissible purposes are protecting the public’s ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach

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55. *Id.* at 548.
created by a developed shorefront, and preventing congestion on
the public beaches. We assume, without deciding, that this is so—
in which case the Commission unquestionably would be able to
deny the Nollans their permit outright if their new house (alone,
or by reason of the cumulative impact produced in conjunction
with other construction) would substantially impede these pur-
poses, unless the denial would interfere so drastically with the
Nollans’ use of their property as to constitute a taking.57

In other words, if a permit denial were to constitute a taking under
Penn Central, then an exaction in lieu of that denial would not be
justified under the Nollan rule because if the permit could not be
lawfully denied, then the government has no business demanding
an exaction for granting the permit.

Importantly, the external harms allegedly caused by the develop-
ment in Nollan (the “psychological barrier” and beach congestion)
were not clearly nuisances. The government can regulate all sorts
of land uses that fall short of being nuisances—sometimes to pre-
vent a harm and sometimes to create a public good. Indeed, in Lucas
the Court noted that when it comes to permitting actions, there is
little principled distinction between land use requirements that
provide a public benefit and those that prevent a public harm.58 But
the Court also noted in Lucas that if a regulation was truly nuisance-
preventing, with nuisance being defined by the “background prin-
ciples” of a state’s law of property, then the denial of the noxious use
could not constitute a taking of the property, no matter how much
use and value may be lost.59

Thus, a regulation prohibiting a genuine “background principle”
nuisance is not a taking. A government agency may, however, sub-
stitute the prohibition of a nuisance for a conditioned permit. Thus,
for example, a government could prevent the construction of a dam
that might flood a neighbor’s property (to use an example given in Lucas)
and not be liable for a taking. But it also could, in theory,

58. Or as the Court put it, only a “stupid staff” would not be able to conjure up a harm-
preventing rationale for a regulation. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1025
59. Id. at 1029 (“Any limitation so severe cannot be newly legislated or decreed (without
compensation), but must inhere in the title itself, in the restrictions that background prin-
ciples of the State’s law of property and nuisance already place upon land ownership.”).
approve the dam so long as the nuisance flooding was ameliorated—perhaps by paying damages to the affected neighbors agreeable to being paid. Thus, while the harm to be prevented by a development permit denial could be, but need not be, a nuisance-like activity, the requirements of Nollan apply to any condition imposed as a substitution for an otherwise lawful permit denial.

4. Are Nollan, Dolan, and Now Koontz Really Just Variations of the Same Test?

No. In properly understanding and applying the tests, it is important to understand that Nollan and Dolan apply different tests to the imposition of exactions. Nollan requires that there be a connection, or nexus, between the impact of the development that could justify a permit denial and the exaction. In Dolan the nexus was established: expanding a plumbing store and creating more impervious surface could increase traffic and could increase the potential of downstream flooding. Assuming (and the Court did not decide) that those impacts could justify a denial of Mrs. Dolan’s permit, then a measure to ameliorate traffic (the bicycle path) and a measure to ameliorate the flooding potential (dedication of land next to the creek) could easily satisfy the nexus test in Nollan. But this could quickly become absurd, as Dolan began to demonstrate. As John Muir once observed: “When we try to pick out anything by itself, we find it hitched to everything else in the Universe.” Or as the trial court noted in Koontz: “When a butterfly flutters its wings in one part of the world, it can eventually cause a hurricane in another.” But Nollan must be more than an intellectual parlor game. Otherwise, a government agency could soon demand all manner of public benefit dedications so long as there was some remote connection to an adverse impact from the project. That is why the Court in Dolan imposed the additional test that the exaction-imposing entity must prove that the condition is roughly proportional to the denial-justifying impact of the project. Koontz did not change this.


61. JOHN MUIR, MY FIRST SUMMER IN THE SIERRA 110 (Sierra Club Books 1988) (1911).

5. When Should an Exaction Be Challenged?

One of the procedural conundrums raised by the Koontz state supreme court decision involves timing. When should an exaction be challenged? Coy Koontz, Sr., filed his challenge after his permit was denied. During the course of the litigation, the District has taken great pains to point out that Koontz was never legally obligated to fulfill the conditions. While the Florida Supreme Court found this dispositive, the United States Supreme Court held that Koontz could challenge the condition when he could show (and the trial court held) that the permit was denied because he refused to accede to one of the conditions.

If the decision had gone the other way, this could have been the death knell for many challenges. That is because in some states, once a permit is accepted with conditions and a permittee takes the benefit of the permit, the permittee is estopped from challenging the conditions. For example, in Pfeiffer v. City of La Mesa, a California Court of Appeals held that a permit condition could not be challenged once the permittee accepted the permit and began to accept its benefits.

Other states have declined to follow this rule. In Florida, the state supreme court’s decision in Koontz created substantial uncertainty as to whether a permittee could ever challenge a permit condition if a condition could not be challenged when a permit is denied but also could not be challenged if the permit is granted under a rule similar to California’s. In fact, Coy Koontz unsuccessfully sought a rehearing of the state supreme court’s decision for clarification on this very point. With Koontz holding that a condition may be challenged when a permit is denied because an applicant has refused to accept the condition, a challenge may proceed. However, in those jurisdictions holding that the ability to challenge a condition may be waived upon the acceptance of a permit, Koontz

64. As a result of the Pfeiffer decision, the state legislature adopted a statute creating a limited exception to Pfeiffer. See CAL. GOV’T CODE §§ 66000–66009 (West 2013). Incidentally, in Nollan, the Nollans came close to accepting the permit with attached conditions but refused the permit at the last minute, once they realized they could obtain pro-bono representation in a challenge to the condition. That enabled them to avoid the Pfeiffer rule.
doesn't change things. It is imperative that litigants seeking to challenge a permit condition learn first what effect the acceptance of a permit with conditions has on the ability to challenge the conditions in a particular jurisdiction.

6. Will Koontz Result in Local Governments Refusing to Negotiate Permit Conditions for Fear of a Lawsuit?

No. While this fear was expressed in Justice Kagan’s dissent, this seems overblown. Recall that the trial and appellate courts found that the permit had been denied because Koontz refused to accede to the permit condition and the case was therefore ripe. In other words, there was nothing left to negotiate; Koontz was given a take it or leave it offer and he left it on the table. The negotiations were over. More importantly, a local government can easily couch its negotiations expressly in terms of “ideas to be explored,” “non-binding suggestions,” and the like. Only an incredibly “stupid staff” would set out a list of permit conditions and say “take it or leave it.” And in denying a permit, the local government could say, “we’re denying the permit because of the adverse impact caused by the project, and not because the applicant refuses to accede to certain suggested ameliorating conditions.”

More importantly, because we must presume that local agencies act in good faith and are usually not averse to all development, and because local agencies have an incentive to work with local landowners in order to see that good projects are built, they also have every incentive to try to get some ameliorating exactions as part of the package. And landowners will not blithely let a permit be denied if they can instead accept harm-ameliorating conditions combined with a permit approval. In other words, both sides will continue to negotiate just as they have since 1987 when Nollan was decided.

68. See supra note 38 and accompanying text.
The give (by landowners) and take (by government officials) will continue. In short, for better or worse, rumors of the demise of government as usual following *Nollan*, then *Dolan*, and now *Koontz* have been greatly exaggerated.


No. With respect to fees, the Court put it best:

> It is beyond dispute that “[t]axes and user fees . . . are not ‘takings.’” We said as much in *County of Mobile v. Kimball* . . . , and our cases have been clear on that point ever since. This case therefore does not affect the ability of governments to impose property taxes, user fees, and similar laws and regulations that may impose financial burdens on property owners.\(^\text{70}\)

Under the law of most states, fees must be related to the costs of administering the program for which fees are charged and that fact is not affected one way or the other by *Koontz*. *Koontz* is about exactions imposed to ameliorate harms that can justify a permit denial; it is not about normal permitting fees. If a landowner objects to a fee, there are existing avenues to call the fees into question; *Koontz* is just not one of the avenues.

As the Court put it in *Koontz*, this will not change:

> Finally, we disagree with the dissent’s forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. Numerous courts—including courts in many of our Nation’s most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it.\(^\text{71}\)

**F. Physical Invasions After Arkansas Game & Fish Commission v. United States**

In *Arkansas Game & Fish Commission v. United States*,\(^\text{72}\) the Corps of Engineers, to please farmers upstream from a dam, changed the

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70. *Koontz*, 133 S. Ct. at 2601 (citations omitted).
71. *Id.* at 2602 (citations omitted).
72. 133 S. Ct. 511 (2013).
timing of its water releases for six years. This caused regular flooding of state property well into the growing season, causing the saturation and eventual destruction of 18-million board feet of timber that belonged to the State of Arkansas. The Court of Federal Claims awarded $5.7 million in damages, but the Federal Circuit reversed.73

The United States denied its liability saying that it had stopped the flooding after seven years and did not intend for the damage to occur in the first place. The United States argued that it could not be liable for a temporary flooding based on language in a 1924 Supreme Court case, *Sanguinetti v. United States*.74 *Sanguinetti* held that “in order to create an enforceable liability against the government, it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land. . . .”75 From this, the United States argued that to be compensable, such takings must be permanent.

A unanimous Supreme Court, in a decision written by Justice Ginsburg, disagreed and held that in a temporary physical invasion taking like this, there was no requirement that the flooding be permanent for liability to arise.76

The Court also gave short shrift to the reappearance of an argument that has appeared in virtually every takings case decided in the past quarter-century—that a finding of government liability will cause an end to government as we know it. The Court was not impressed:

> Time and again in Takings Clause cases, the Court has heard the prophecy that recognizing a just compensation claim would unduly impede the government’s ability to act in the public interest. . . . We have rejected this argument when deployed to urge blanket exemptions from the Fifth Amendment’s instruction. While we recognize the importance of the public interests the Government advances in this case, we do not see them as categorically different from the interests at stake in myriad other Takings Clause cases. The sky did not fall after *Causby*, and today’s modest decision augurs no deluge of takings liability.77

73. *Id.* at 516–18.
74. 264 U.S. 146 (1924).
75. 133 S. Ct. at 520 (quoting *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924)).
76. 133 S. Ct. at 520–21.
77. *Id.* at 521 (citations omitted).
Coming in a unanimous decision written by a “liberal” Justice, this portends well for advocates of property rights in that they may no longer have to work as hard to allay fears that justice for one landowner will be perceived as creating hardship for all.

The Court, however, also injected some uncertainty into what was a settled principle in physical invasion type cases—that government is per se liable for a taking when it physically intrudes on private property. In determining whether there is liability, the Court opined that factors relevant to the takings analysis might include “foreseeability,” “intent” and, in a departure from every prior physical invasion case, the Court speculated in dicta that the *Penn Central* factors could be “relevant to the takings inquiry”:

> We rule today, simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection. When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking.

> Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. . . . So, too, are the character of the land at issue and the owner’s “reasonable investment-backed expectations” regarding the land’s use.78

> It is too soon to tell what the lower courts will make of this conflation of the *Penn Central* regulatory takings factors with the per se rules of physical invasions—concepts the Court previously told us were separate and divisible.79 So far, at least in this case, the court of appeals has not taken the conflation beyond traditional flooding liability cases, ruling on remand that “intent” to flood was unnecessary for liability, only that the flooding be foreseeable, a concept.

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78. *Id.* at 522 (citations omitted).

79. Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 323 (2002) (“This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a ‘regulatory taking’ . . . .”).
quite common in government flood liability cases. Indeed, this holding is quite consistent with the law of other states that have cautioned against impressing the law of takings with tort doctrines such as intent.

G. Are the Dancing Raisins Ripe?

In Horne v. Department of Agriculture, a raisin-grower objected to the statutory marketing order requirement that he give a substantial percentage of his crop to the government in order to sell the remainder. After failing to comply, Horne was assessed with fines of over $650,000 by an administrative law judge. After administrative proceedings, dealing in part on the precise application of the statute to their activities, Horne sued in federal district court, arguing that the statute did not apply to him and that if it did it would effect a taking in violation of the Fifth Amendment. The Ninth Circuit held, relying on takings ripeness doctrines, that the takings claim should have been filed in the Court of Federal Claims where relief was available under the Tucker Act.

While much of the Supreme Court’s unanimous decision turned on arcane statutory questions involving the distinction between raisin “handlers” and raisin “producers,” the Court ultimately held that despite Williamson County, the marketing order’s statutory scheme allowed the district court to hear the takings claim and thus the case had been properly filed in district court. The Court remanded the case for a determination of whether there was a taking. While the facts of this case are numbingly unique, we can take away the lesson that Williamson County is not an absolute barrier.

80. “In order for a taking to occur, it is not necessary that the government intend to invade the property owner’s rights, as long as the invasion that occurred was ‘the foreseeable or predictable result’ of the government’s actions.” Ark. Game & Fish Comm’n v. United States, 736 F.3d 1364, 1372 (Fed. Cir. 2013).
82. 133 S. Ct. 2053 (2013).
83. Id. at 2056.
84. Id.
85. Id. at 2059.
86. Id. at 2060.
Conclusion

*Koontz* did not effect a revolution in the law; it simply regularized the procedure and scope of the rules in *Nollan* and *Dolan*. But if Koontz had lost his case, then in time *Nollan* and *Dolan* would have been eviscerated as meaningful checks against unjustified demands in the permitting process; likewise, for *Arkansas Game and Fish* and *Horne*. None of these cases marked much of a change in the status quo. However, if the Court had adopted the federal government’s crabbed interpretation of temporary physical invasions in *Arkansas Game and Fish*, then landowners would have ended up in a significantly worse place than they had been before these cases were decided. And even more landowners would have found themselves trapped in the ripeness quagmire of *Williamson County* if the Ninth Circuit’s raisin ruling remained.

All governments now must do what some have been doing for a long time: follow the rules when a permit is denied and not treat monetary exactions as a means of evasion, compensate people for damages caused by foreseeable government flooding, and let the courts hear allegations of regulatory takings.

*Koontz* is particularly instructive. It is not too much to ask to require government agencies to prove the necessity and scope of conditions that are imposed as part of the development process. Landowners are not ATM machines or magic lamps to be rubbed by local planners. Many communities have many wishes for new and better public infrastructure. But these wishes must be fulfilled by the taxpayers, not just those who happen to be standing in line at the permit office.

There are still questions yet to be resolved when it comes to the application of the doctrine of unconstitutional conditions, but, in order to fulfill the guarantees in the Constitution against unfair treatment of landowners by opportunistic government agencies, those questions should largely be answered in a way that requires these agencies to justify what they take in exchange for permits—and to justify those demands in a manner that comports with *Nollan*, *Dolan*, and now *Koontz*. In other words, the constitutional way of doing things.

And we have not seen the last litigation over government liability for government-caused flood damages. While the government should
not be liable for every flood, there are many instances where flooding is the foreseeable consequence of government actions that move water from one (usually more populated) place to another (usually less populated) place.

Finally, the *Williamson County* ripeness doctrine remains a vexing barrier to justice in the federal courts for many litigants. *Horne* didn’t put an end to *Williamson County*, but it did not expand its scope. The demise of that unfortunate doctrine must await another day.
NATIONALIZATION AND NECESSITY: TAKINGS AND A
DOCTRINE OF ECONOMIC EMERGENCY

NESTOR M. DAVIDSON*

Serious economic crises have recurred with regularity throughout our history. So too have government takeovers of failing private companies in response, and the downturn of the last decade was no exception. At the height of the crisis, the federal government nationalized several of the country’s largest private enterprises. Recently, shareholders in these firms have sued the federal government, arguing that the takeovers constituted a taking of their property without just compensation in violation of the Fifth Amendment.

This Essay argues that for the owners of companies whose failure would raise acute economic spillovers, nationalization without the obligation to pay just compensation should be recognized as a natural extension of the doctrine of emergency in takings. Public officials must be able to respond quickly to serious economic threats, no less than when facing the kinds of imminent physical or public health crises—such as wildfires and contagion—that have been a staple of traditional takings jurisprudence. Far from an affront to the rule of law, this reflection of necessity through an extension of emergency doctrine would reaffirm the flexibility inherent in property law in times of crisis.

INTRODUCTION

On the morning of Thursday, September 4, 2008, with the global economy teetering on the edge of collapse, Treasury Secretary Henry Paulson came to the Oval Office to brief President Bush on the challenges facing Fannie Mae and Freddie Mac, two troubled private companies at the heart of the U.S. mortgage finance system. “For the good of the country,” Paulson would later write in his memoir of the crisis, “I had proposed that we seize control of the companies,” and that the Administration do so swiftly, without warning. As Paulson said to the President that morning, the “first sound they’ll hear is

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their heads hitting the floor.” The next day, Paulson summoned top executives from Fannie Mae and Freddie Mac to the White House and dropped the ax, nationalizing companies that held over $5 trillion worth of mortgage-related assets.

Although there was a widely held, if erroneous, belief at the time that Fannie Mae and Freddie Mac were governmental entities, the companies in fact were publicly traded, with hundreds of millions of privately held shares outstanding on the eve of their takeover. Given this, the privatization of these companies may have seemed a remarkable intervention in the market and a sui generis infringement on the property rights of shareholders and other economic stakeholders in these companies. But these were by no means the only instances of the government taking control of significant private enterprises during the recent economic crisis (or, for that matter, in past economic crises). The technical mechanisms varied in each instance, but the practical results were the same for General Motors (“GM”), the American International Group (“AIG”), and other companies nationalized during the chaotic early days of the Great Recession.

Shareholders and others who claim an economic stake in these firms have recently filed several suits raising, among other claims, Takings Clause challenges to the takeovers. These claims squarely raise the question whether public officials have the authority and necessary latitude to respond to overriding threats to the national economy without compensating those whose economic interests have been harmed as a consequence. These cases thus have the potential

2. I use the term nationalization intentionally to describe instances of the government—and it is usually the federal government—taking control of private enterprises, recognizing that the term has traditionally carried negative connotations. Doing so, however, recognizes the reality of this particular economic intervention in our constitutional discourse.
4. See infra Part II. Shareholders who held Fannie Mae and Freddie Mac stock at the time of their nationalization are seeking just compensation on the order of $41 billion. See Complaint at 63, Wash. Fed. v. United States, No. 1:13-cv-00385-MMS (Fed. Cl. June 10, 2013) [hereinafter Complaint, Washington Federal]. Similarly, one of AIG’s largest shareholders—and former CEO—is asserting takings claims through both direct and shareholder derivative claims on behalf of the company, seeking just compensation across these claims of at least $55 billion. See Starr Int’l Co. v. United States, 106 Fed. Cl. 50, recons. denied, 107 Fed. Cl. 374 (Fed. Cl. 2012).
5. It can be argued that the nationalization of Fannie Mae and Freddie Mac fell into a different category because they were originally congressionally chartered (hence the descriptor...
to shape the policy landscape for future economic crises, as well as important aspects of our understanding of takings law.

This Essay’s core claim is that the nationalization of private enterprises whose failure would pose particularly significant systemic risks can be justified in times of economic crisis without a mandate to provide the owners of those firms just compensation.6 Overriding necessity has always placed an important limitation on the absolutism of common-law property rights, and there is likewise a well-established doctrine of emergency in the constitutional law of property. This strain in the jurisprudence has traditionally been invoked in contexts such as disasters and public health crises, giving public officials the ability to create firebreaks in the face of wildfires or stop the spread of contagion without compensating those whose property interests are harmed as a result.7

Although the constitutional doctrine of emergency in takings law has not historically included economic exigencies, its logic of imminent necessity clearly applies to firms whose failure pose systemic risks in our increasingly interconnected economy. The underlying rationale has always been that officials must be free to act quickly and decisively to forestall great harm and that property injured as a consequence is a reasonable burden for owners to bear. The same can be said for nationalization as it has been practiced in times of economic crisis. “Too big to fail” does not always mean too important to require compensation for those harmed when the failure of such firms is prevented, but under the right circumstances, that is precisely the constitutional latitude that public officials require.

“government-sponsored enterprise,” or GSE). However, these particular GSEs had clearly been privatized (even if they remained heavily regulated).

6. Nationalization potentially implicates other constitutional provisions, most notably the Due Process and Equal Protection clauses, as well as statutory and regulatory issues, many of which have been raised in the recently filed cases.

7. See infra text accompanying notes 58–67. There are two related doctrines that have some relevance to the constitutional landscape of takings and nationalization. The first is the version of the emergency doctrine in constitutional property that has arisen in the military context. See infra note 61. The second is a contested doctrine of incompatible economic imperatives exemplified by the cedar rust tree destruction blessed by the Supreme Court in Miller v. Schoene, 276 U.S. 272 (1928). See infra text accompanying notes 82–83. For reasons elaborated below, this Essay does not rely primarily on either of these traditions to craft a doctrine of economic emergency in takings, although each sheds some light on the boundaries of necessity in constitutional property.
An extension of the emergency doctrine to such economic actors hardly means that all property rights are casually defeasible in times of crisis, as some critics of nationalization suggest.\(^8\) Nor would it undermine the rule of law to acknowledge that the nature of the harms at issue in emergencies can evolve. But it does mean that the legal boundaries of property in crisis are—and should be—more flexible than such critiques suggest.

Let me address two conceptual objections at the outset about the nature of the doctrinal claims at issue, as an initial instinct may be that there is no actual takings issue in nationalization. Consistent with our general historical approach, every instance of nationalization in the most recent economic crisis was accompanied by the investment of significant public resources in companies that were understood at the time to be failing. And, in each instance, the relevant firm at least nominally authorized the takeover.\(^9\)

This might suggest categorically that no takings liability could attach, but these conditions do not necessarily obviate that potential for takings liability. This is because shareholders would not necessarily have fared as poorly as they did had these companies gone through bankruptcy proceedings (or had the firms somehow found buyers), and also because the public investments seem not to have actually compensated shareholders. Moreover, shareholders are vigorously contesting the voluntary nature of the takeovers, and board consent is not necessarily a bar to shareholder claims.\(^10\)

There is more to be said about these and related doctrinal issues, but given that takings challenges to nationalization are quite active and likely to be a factor in any future crisis, I am advancing a less technical, more foundational argument in this Essay.\(^11\) Property is a constitutive project that, despite the claims of some theorists for universal norms, develops over time through the accretion of legal and

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8. See infra text accompanying notes 85–89.
9. See infra note 30.
10. See infra text accompanying note 57.
11. The technical merits of the takings claims that have been raised recently are important, and I will review them briefly in Part II. But this Essay will not attempt to weigh definitively the many substantive and procedural nuances these claims raise, many of which require substantial additional factual development to resolve. Moreover, even if the specific suits now pending from the wave of nationalization during the Great Recession do not succeed, the issues they raise are live, and likely to recur in future economic crises, so understanding the dimensions of takings liability in nationalization is important regardless.
cultural responses to particular challenges. Nationalization raises not only important questions about the intersection of corporate law and constitutional property, but also provides a telling window through which to observe the boundary between individual rights and community obligation instantiated in that evolving property law.

I. NATIONALIZATION IN TIMES OF ECONOMIC CRISIS

Financial crises are a seemingly inevitable feature of our economic system and have recurred with distressing regularity throughout American history. Amidst the tremendous variety of public policy responses throughout those cycles, one regulatory tool that public officials have repeatedly deployed has been the takeover of private companies, particularly where the potential collapse of those companies has posed larger economic threats.

In the Great Depression, for example, the Federal Reconstruction Finance Corporation took ownership interests in thousands of banks to prevent their failure. One of the more direct precursors of nationalization during the recent Great Recession was the takeover of Continental Illinois National Bank and Trust. In 1984, the bank was one of the ten largest in the country, and the federal government, fearing that a failure would cause a financial panic, took an eighty percent ownership stake, which was held until the bank was sold a decade later to Bank of America.

Nationalization was a particularly prominent—if narrowly focused—tool during the recent Great Recession. As to Fannie Mae

12. See Steve Lohr, U.S. Not Always Averse to Nationalization, Despite Its Free-Market Image, N.Y. TIMES (Oct. 13, 2008), http://www.nytimes.com/2008/10/13/business/worldbusiness/13iht-nationalize.4.16915416.html (noting that the Resolution Finance Corporation made investments in banks in the 1930s equivalent to between $400 and $500 billion in current dollars). One of the more direct precursors of nationalization during the recent Great Recession was the takeover of Continental Illinois National Bank and Trust. In 1984, the bank was one of the ten largest in the country, and the federal government, fearing that a failure would cause a financial panic, took an eighty percent ownership stake, which was held until the bank was sold a decade later to Bank of America. Id.

13. See Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1299–300 (2011) (noting that the federal government became the controlling shareholder in companies such as GMAC and owned as much as 34% of outstanding Citigroup common stock); see also Deborah Solomon et al., U.S. to Buy Stakes in Nation’s Largest Banks—Recipients Include Citi, Bank of America, Goldman; Government Pressures All to Accept Money as Part of Broadened Rescue Effort, WALL ST. J., Oct. 14, 2008, at A1 (discussing federal bank investments); Damian Paletta, Lingling Wei & Ruth Simon, IndyMac Reopens, Halts Foreclosures on Its Loans, WALL ST. J., July 15, 2008, at C1 (describing the takeover of IndyMac). All told, the companies that the federal government nationalized had a collective economic footprint in the trillions of dollars—yes, with a t—and hundreds of millions of publicly traded shares. That said, nationalization was a relatively small part of a set of much
and Freddie Mac, the Housing and Economic Recovery Act of 2008 ("HERA"),\textsuperscript{14} authorized the Federal Housing Finance Agency ("FHFA") to place the companies in conservatorship.\textsuperscript{15} Facing mounting evidence of potential threat to the national economy from the instability of the housing enterprises, FHFA acted on this authority in September 2008, placing both companies in conservatorship.\textsuperscript{16}

AIG followed a slightly different pattern, although the end result was similarly federal control. At the moment the economic crisis was reaching its most precarious point, AIG stood at the center of a significant system of risk associated with housing finance.\textsuperscript{17} AIG had sold a high volume of credit default swaps, a form of insurance used by investors in collateralized debt obligations ("CDOs") such as mortgage-backed securities.\textsuperscript{18} However, the housing crisis caused counterparties to start to make claims and collateral calls against this insurance, causing a liquidity crisis for the company. In September 2008, the Federal Reserve Bank of New York agreed to provide AIG with a two-year revolving line of credit of up to $85 billion, and obtained control of the company in exchange.

GM was a third variation on nationalization arising from Great Recession, albeit one that has not generated shareholder takings litigation primarily because it resulted in bankruptcy. Although still

\begin{footnotesize}


\textsuperscript{16} The technical means through which the companies were nationalized involved votes by Fannie Mae and Freddie Mac’s Boards of Directors to consent to the conservatorships, one of the grounds provided under § 4617, although there were arguably other grounds under the statute available for an involuntary imposition. The conservatorship came as part of a broad-based assumption of the GSEs’ risks and the taking of equity by the federal government in Fannie Mae and Freddie Mac. Specifically, Treasury received $1 billion in senior preferred stock and warrants to obtain 79.9 percent ownership of Fannie Mae and Freddie Mac’s common stock. In exchange, Treasury provided the companies with a line of credit (originally up to $100 billion, later increased) and began purchasing Fannie and Freddie-issued securities to forestall a collapse in the pricing of such securities. See Cynthia M. Hajost, From Oversight to Conservatorship: What Does the Housing and Economic Recovery Act of 2008 Hold For GSEs Fannie Mae and Freddie Mac?, 18 J. AFFORDABLE HOUS. & CMTY. DEV. L. 3, 7 (2008).


\textsuperscript{18} Credit default swaps are contracts that provide, in exchange for ongoing payments by counterparty, “that the party writing the CDS is obligated to pay the counterparty the par value of the debt instrument in the event the instrument defaults.” Starr Int’l Co. v. United States, 106 Fed. Cl. 50, 55, recon. denied, 107 Fed. Cl. 374 (Fed. Cl. 2012).
\end{footnotesize}
the world’s largest automaker at the time, by the peak of the crisis in 2008 GM faced serious liquidity challenges from a combination of the general economic slowdown and a rise in fuel costs.\textsuperscript{19} From late 2008 through the spring of 2009, the federal government provided GM with a series of loans in what would eventually become a $50 billion rescue plan.\textsuperscript{20} Through a structured bankruptcy, the federal government eventually came to hold a nearly 60 percent stake in the company.\textsuperscript{21}

Common to each of these instances of nationalization—and many other examples in the past—is that the company involved posed systemic economic risk, which is to say that if they were to fail, the consequences would likely have induced larger market failures. The demise of any firm costs jobs, risks undermining confidence in some sector of the economy, or otherwise redounds beyond the boundaries of the company at issue. But in the modern economy, certain firms raise the risk of particularly acute spillover effects. Scholars have debated the bounds of what constitutes an institution that is, in the words of the Treasury Department, “systemically important,”\textsuperscript{22} but the primary focus in the context of nationalization has been on threats of rapidly escalating market failures of great significance.\textsuperscript{23}

For financial firms, this can relate to liquidity for related firms and collateral cascades with counterparties.\textsuperscript{24} For non-financial firms,...
the size of an enterprise can embed its influence not only on investors and creditors, but also on employees, franchisees, suppliers, and other economic actors in the orbit of that firm. These significant macro-scale spillover effects may impact financial markets, as with AIG, or housing markets, as with Fannie Mae and Freddie Mac, or even broad consumer and labor markets, as with GM. In each arena, the failure of a subset of truly significant and interconnected economic entities can have macroeconomic consequences that are every bit as tangibly harmful as the physical and public health threats encompassed in traditional emergency doctrine.

The critical defining characteristic of systemic risk in this context is not simply external harm rippling out from collapse—that is necessary, but hardly sufficient—but rather that a particular firm’s failure is likely to cascade and threaten large sectors of the economy, if not the economy in toto. Financial markets and the firms that operate in them are increasingly entwined, a phenomenon that the financial reporter Andrew Sorkin describes as the “new ultra-interconnectedness.” Just as ordinary nuisance involves harm to the use and enjoyment of one owner’s property arising from activities on another owner’s property—spillovers that cross physical property lines—so too can economic contagion leap from firm to firm, and market to market almost instantaneously. By whatever definition is used to identify such firms, it seems clear that each of the major companies nationalized in the most recent crisis qualifies.

Given this risk, it is hardly surprising that another common element of each instance of nationalization in the recent crisis was that

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25. The reaction to the failure of Lehman Brothers exemplifies the risks involved. When Lehman filed for bankruptcy on September 15, 2008, the Dow Jones Industrial Average dropped more than 500 points, wiping out roughly $700 billion in value from a broad range of investment portfolios. The Lehman Brothers’ bankruptcy involved “8,000 subsidiaries and affiliates, $600 billion in assets and liabilities and more than 100,000 creditors.” Peihani, supra note 22, at 130.

federal control came with significant public subsidies. These included, most prominently, direct subsidies, lines of credit and other financing, assumptions of liability, debt guarantees and similar loan backstops. This might seem to take nationalization immediately out of the realm of takings and into the realm of “givings.” But there is a difference between a grant of public funds to an entity, even a subsidy that carries significant strings, and one that accompanies the transfer of functional or actual ownership or control, even if the ultimate net financial result for the entity involved is positive (or even significantly positive). Moreover, a government takeover can result in a significant or even complete elimination of the economic value of pre-existing ownership rights in the entity, despite the subsidy. Indeed, it is arguable that in many instances public funds provided to failing companies during the Great Recession did not compensate those with ownership interests prior to the takeover but rather were used to keep the entities operating and prioritize the claims of other stakeholders.

The Fannie Mae, Freddie Mac, and AIG nationalizations, moreover, each resulted from an agreement with, or at least acquiescence by, the company’s Board of Directors. Shareholders challenging these takeovers have made the obvious counterarguments about duress, asserting in essence that any acquiescence was illusory, and it is not implausible that the courts will credit these arguments.

Finally, with some notable exceptions—Fannie Mae and Freddie Mac in particular—nationalization in times of economic crisis tends to be short-lived and targeted at immediate market-failure cascades, rather than some long-term governmental self-interest. The

27. In the case of GM, for example, the total public investment reached roughly $50 billion. See Horton, supra note 20, at 275. AIG’s line of credit eventually reached over $182 billion. Pam Selvarajah, The AIG Bailout and AIG’s Prospects for Repaying Government Loans, 29 REV. BANKING & FIN. L. 363, 365 (2010).


31. Another historical example of nationalization of a significant failing company that can be put in the long-term column of the ledger is Amtrak, which was created under the Rail
prevailing ethos behind this short-term orientation was expressed by then–Treasury Secretary Paulson early in the crisis, when he said that "government owning a stake in any private U.S. company is objectionable to most Americans—me included." Accordingly, the federal government entirely divested its ownership stake in AIG by December 2010 (making a profit of slightly under $23 billion). GM was similarly reprivatized by December 2012. The fact that governmental control was temporary does not necessarily change the takings calculus at the time of each takeover but does shape how one might evaluate the purpose and legitimacy of the intervention.

All of this underscores a pattern of nationalization in which state intervention is focused on the potential macroeconomic consequences of the failure to act in times of crisis, with a primary purpose to reinforce faltering markets and limit the large-scale consequences of the potential collapse of firms that are particularly important from a systemic-risk perspective. The question remains, however, whether this type of intervention requires compensation for those whose

Passenger Service Act of 1970. See Laurence E. Tobey, Costs, Benefits, and the Future of Amtrak, 15 Transp. L.J. 245, 253 (1987). The statute led to the public ownership of much of the nation’s private intercity passenger rail service. Id. at 255. By contrast, although the Consolidated Railway Corporation, or Conrail, was created in the early 1970s to nationalize certain freight lines of six bankrupt carriers, it was privatized in 1987 and its assets are now owned by CSX Transportation and Norfolk Southern Railway. See Agis Salpukas, Conrail Chugs Off into the Sunset; CSX and Norfolk Southern Take Over, N.Y. TIMES (June 1, 1999), http://www.nytimes.com/1999/06/01/business/conrail-chugs-off-into-the-sunset-csx-and-norfolk-southern-take-over.html.


35. There is a basic doctrinal divide in the law of takings when it comes to temporary takings. For traditional exercises of the power of eminent domain, temporary takings generally require compensation and the primary question is valuation. For regulatory takings, however, the question of the duration of a governmental action is itself an aspect of the predicate question of whether a taking has occurred. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 331 (2002). As will be discussed below, the appropriate way to think about nationalization in the recent crisis is as potential regulatory takings, so the temporal dimension can be important in evaluating the expectations of those who ownership interest in entities has been harmed by nationalization.
property rights are harmed in the name of larger public benefits—the quintessential question at the heart of every takings claim. Understanding that the answer, in general, should be “no” requires an exploration of the particular takings claims at issue in nationalization.

II. POTENTIAL TAKINGS LIABILITY IN NATIONALIZATION

As I noted at the outset, this wave of nationalization has recently begun generating significant litigation raising takings challenges on behalf of shareholders and the companies themselves, through derivative suits. The theory of economic emergency that this Essay advances does not ultimately turn on whether the current claims necessarily succeed, given that the issue of economic nationalization will continue to recur, just as economic crises continue inevitably to recur. But it is useful, nonetheless, to outline the basic nature of the claims at issue and acknowledge that, despite their early stages, it is quite plausible that one or more could succeed.

A. Fannie Mae and Freddie Mac

In June 2013, a group of individual and institutional Fannie Mae and Freddie Mac shareholders filed a class-action suit, alleging that the federal government’s conservatorship of Fannie Mae and Freddie Mac constituted an illegal exaction and/or taking of their property without just compensation.\(^\text{36}\) The complaint, which seeks roughly $41 billion in compensation, raises two primary claims. The first is that the conservatorships were illegally imposed under the terms of HERA.\(^\text{37}\) The second, broader set of charges argue that the conservatorship was designed to channel funds from Fannie Mae and Freddie Mac to other companies (providing the government with a vehicle to purchase troubled mortgage debt), and ultimately back to the Treasury.\(^\text{38}\)

36. Complaint, Washington Federal, supra note 4, at 50.
37. 12 U.S.C. § 4617. Specifically, they allege that the conservatorship was imposed not in response to concerns about Fannie Mae and Freddie Mac’s financial condition, but rather because of concerns about the broader health of the financial system. They further allege that the consent of Fannie Mae and Freddie Mac’s Boards under § 4617 was coerced. These claims go to the threshold question of the authority of the government to act and the validity of the action, not whether the conservatorship constituted a taking of the plaintiffs’ property without just compensation.
38. Complaint, Washington Federal, supra note 4, at 56.
Specifically, the shareholders assert that they were harmed by FHFA's order to the companies to cease paying dividends (other than to the Treasury), the subsequent delisting of the companies' common and preferred shares from the New York Stock Exchange in June 2010, and by agreements to sweep net profits from the government-sponsored enterprises (“GSEs”) for the Treasury when they returned to economic stability.\textsuperscript{39} The complaint states that the government’s imposition and subsequent administration of conservatorships (where the government purchased roughly 80% of the companies’ stock) rendered the common and preferred shares of the companies virtually worthless.

The plaintiffs further assert that Treasury did not seek or obtain the companies’ consent to sign stock agreements, and, in drafting the stock agreements, the Treasury did not take into consideration factors required by the companies’ charters. Though HERA contemplated conservatorships to return Fannie Mae and Freddie Mac to their previous financial health, the shareholders argue that the takeovers went beyond helping the companies and were instead designed to promote overall growth of the economy by providing increased liquidity to the mortgage market.\textsuperscript{40} According to the plaintiffs, none of the conditions required by statute to impose conservatorships existed because Fannie Mae and Freddie Mac were adequately capitalized at the time of the conservatorships.\textsuperscript{41}

B. American International Group

On November 21, 2011, Starr International Company, Inc., one of AIG’s largest shareholders (headed by Maurice “Hank” Greenberg, the former chairman of AIG in the years before the economic crisis), filed suit challenging the federal takeover. Starr argued that the government illegitimately forced AIG to issue over 562 million shares for

\textsuperscript{39} Id.
\textsuperscript{40} Id. at 55.
which the government paid only $500,000,\(^42\) and that the government then forced the company to purchase over $62 billion worth of CDO assets from AIG counterparties, which, Starr alleged, led to the direct taking of cash collateral from AIG.\(^43\) Starr’s direct takings claims are based on the argument that the dilution of shares by the government undermined both the economic value and the voting power of Starr’s holdings.\(^44\) Amid anger from Congress and voters who expressed disbelief that AIG would sue the same entity that rescued it from financial collapse, AIG decided not to join the Starr lawsuit.

C. Assessing the Viability of These Claims

Were there no plausible takings claims in arising from the practice of nationalization, then it might be unnecessary to evaluate rationales for justifying the practice, although the issue of economic nationalization is likely to recur in future crises. Certainly, if the government directly seized control of the companies at issue, as it has done at times in the past,\(^45\) or similarly directly expropriated the shares of the owners of those companies, it seems hard to argue that there would be no threshold issue of takings liability. In those cases, the government could certainly be challenged on the scope of its authority to act,\(^46\) on whether such action met the public use test, or even on the measure of just compensation.\(^47\) But there would be little doubt

\(^{42}\) In June, 2009, AIG undertook a reverse stock split that reduced its outstanding shares from 3 billion to 150 million, which allowed the conversion of the government’s preferred to common stock in January 2011. Starr Int’l Co. v. United States, 106 Fed. Cl. 50, 58 (Fed. Cl. 2012).

\(^{43}\) Id. at 59. In June 2013, the Court of Federal Claims ruled that Starr’s shareholder derivative claims were barred by application of the business judgment rule because AIG’s Board had considered and rejected them. Starr Int’l Co. v. United States, 111 Fed. Cl. 459, 471 (Fed. Cl. 2013).

\(^{44}\) Id. at 482.

\(^{45}\) See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 615–28 (1952) (Frankfurter, J., concurring) (recounting history of industrial seizures).

\(^{46}\) It is well settled, although not without controversy, that the federal government has the power of eminent domain. See generally William Baude, Rethinking the Federal Eminent Domain Power, 122 YALE L.J. 1738 (2013). Nationalization—whether through direct eminent domain, or more often through other means, as was universally the case during the Great Recession—does not rely on some reserve of federal power implied in other sources but instead on specific grants of authority by Congress. As noted, the Fannie Mae, Freddie Mac, and AIG litigation all assert statutory arguments challenging the basic validity of the federal government’s authority to act.

\(^{47}\) Even with direct expropriation, compensation to shareholders and other stakeholders
that a *taking* would have occurred and the questions raised in this Essay squarely presented.

Nationalization as it unfolded in the Great Recession, however, presents more of a doctrinal puzzle. The preferred tool to take over companies during the Great Recession, as noted, was through board consent. Shareholders are thus arguing that governmental control had the effect of diluting the value and voting rights of extant shares, which is essentially a regulatory takings claim. As such, the claims might be resolved under the familiar ad-hoc framework the Supreme Court laid out in *Penn Central Transportation Co. v. New York City* or through the total-deprivation-of-economic-value analysis the Supreme Court set out in *Lucas v. South Carolina Coastal Council*.

As to *Lucas*, it is conceivable that a shareholder could prevail on the argument that the relevant intervention had the direct effect of destroying the value of their shares. The Court in *Lucas* suggested that personal property—particularly in regulated industries—falls outside the categorical rule that applies to land, but lower courts have been mixed on this question. Were a court to apply *Lucas*—and not find a background principle of state property law applicable to forego compensation—then the primary question would be a factual one of whether there was a total deprivation.

Under *Penn Central*, by contrast, the inquiry would likely focus primarily on the reasonable expectations of owners in light of the

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48. Claims that are being made on behalf of the nationalized firms themselves that their property was siphoned off for public purposes while the government was in control might be seen as closer to a direct taking.

49. 438 U.S. 104, 123 (1978) (“In engaging in these essentially ad hoc, factual inquiries [for regulatory takings], the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.” (internal citations omitted)).


51. *Id.* at 1027–28 (noting that “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale”).

52. See Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227 (2004) (discussing lower court decisions that have rejected the *Lucas* distinction between real and personal property for purposes of applying a per se test).
relevant type of firm and the nature of economic ownership in large, publicly traded companies.\textsuperscript{53} Certainly, most shareholders should expect that regulation can change the economic landscape in which companies operate, even for companies that are not as heavily regulated as Fannie Mae and Freddie Mac have been (or banks and similar financial institutions generally are).\textsuperscript{54} But it is a closer question with respect to an actual government takeover, even under the extraordinary circumstances of an economic crisis that are present when companies face not only failure, but failure that threatens wider economic harm. It is reasonable for shareholders to expect that the government will not directly appropriate their ownership stake for its own purposes, and that would seem to apply to the collateral consequences of public investments to rescue firms whose failure threatens significant, imminent macroeconomic harm.\textsuperscript{55}

In the background for shareholder claims is the possibility of bankruptcy, even for companies that had not actually failed at the time of nationalization.\textsuperscript{56} If shareholders would have been wiped out in the absence of public intervention, it is hard to see how they should be able to recover in a takings claim. But it is not entirely clear that such demise was inevitable or that shareholders would necessarily have been lost all economic value even in a collapse. Even if a company is likely to end up in bankruptcy, it is not necessarily the case that all shareholder value would be subordinate to claims of creditors. Where there is insufficient residual value, shareholders are unlikely to retain any value in bankruptcy. In some ways, this is a question of the certainty of the impending demise. A short-term crisis is not the same thing as an actual collapse and an early intervention may

\textsuperscript{53}{Questions under the Penn Central analysis regarding economic impact, as with the issue of total deprivation or not, require factual development that remains contested in those suits that have actually been filed.}


\textsuperscript{55}{A non-trivial argument can be made that for many shareholders, any loss from the nationalization of one firm may be compensated implicitly in offsetting gains to the larger economy. That is because shareholders, as a general matter, should not bear firm-specific risk given how easy diversification is to achieve and the fact that no premium should be paid for bearing overly concentrated investments.}

\textsuperscript{56}{Cf. Morrison, supra note 24.}
have left shareholders in a worse position than it might have seemed at the time.

Moreover, as noted, there is a serious question of whether the acquiescence of boards of directors to a takeover renders any takings challenges by shareholders moot. Shareholders are contesting the voluntary nature of those approvals, but even if that argument fails, it does not necessarily follow that such board action precludes claims by those harmed by an agreement between the board (on behalf of the corporate entity) and the government. A claim based on collateral damage to shareholders would not be outside the mainstream of takings claims in other contexts.57

In sum, there is a plausible argument that at least some of the claims currently being asserted in challenging nationalization in the Great Recession are viable as a threshold matter under the Takings Clause, and the suits are proceeding apace. Even if not all of the claims being raised succeed, the issue of takings liability will inevitably shadow future economic crises. How, then, to understand the fundamental nature of what the government does in this situation—as an aberration or as an extension of the fabric of takings doctrine? It is to that question we now turn.

III. A DOCTRINE OF ECONOMIC EMERGENCY

Shifting our focus, then, nationalization—even without compensating shareholders—for firms whose failure would significantly threaten our interconnected economy can be justified for the same reasons that certain acute emergencies have historically fallen outside the scope of the Takings Clause. I recognize that such an exercise in analogical reasoning requires significant caveats, which I will explore below. But the parallels between traditional overriding necessity and the kind of emergency presented by the potential failure of firms that pose particularly significant systemic risks in the midst of economic crisis are surprisingly apt.

A. From Physical Threats to Systemic Economic Risk

In the law of takings, there is a well-recognized tradition of constitutional latitude granted to officials to respond to imminent threats

to the public through the appropriation or even destruction of private property without compensation. As the Supreme Court noted in *Lucas v. South Carolina Coastal Council*, officials have long had the authority to harm or even destroy “real and personal property, in cases of actual necessity, to prevent the spreading of a fire’ or to forestall other grave threats to the lives and property of others.”

This constitutional doctrine of emergency parallels a tort doctrine of public necessity that provides a limited, but clear, exemption from liability to avert imminent harm.

There are two primary areas where constitutional immunity for emergency has traditionally arisen. The first has involved military necessity, primarily in times of war. Cases have arisen, for example, involving the destruction of privately owned assets—bridges and refineries, for example—tracing all the way back to claims made

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58. There is a related, although not entirely parallel, doctrine of private necessity that provides a privilege against trespass. One primary difference between public necessity and private necessity is that in the latter context, although a private actor is not liable for the act of trespass, the actor is generally liable for any harm that results from the privileged entry. *See Restatement (Second) of Torts* § 197 (1965). For private necessity, courts tend to require that an action be taken to preserve life or property. Moreover, any individual who invokes the defense must be reasonable in their actions and cannot exploit the privilege beyond what is required under the circumstances. Generally, then, courts will look for evidence indicating a strong relationship between the action taken and the harm averted, and the stronger the relationship, the more likely the doctrine of private necessity will be found to apply to the situation.

59. 505 U.S. 1003, 1029 n.16 (1992) (quoting Bowditch v. City of Boston, 101 U.S. 16, 18 (1880)).

60. *See Restatement (Second) of Torts* § 196 (“One is privileged to enter land in the possession of another if it is, or if the actor reasonably believes it to be, necessary for the purpose of averting an imminent public disaster.”); id. § 262 (“One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is or is reasonably believed to be necessary for the purpose of avoiding a public disaster.”). Public officials have historically faced both tort suits and constitutional actions, hence the intertwined nature of the takings emergency jurisprudence and the tort doctrine of public necessity.

61. During World War I, for example, the federal government temporarily nationalized critical infrastructure, such as railroads and telegraphs (and including even the Smith & Wesson Company). Again in World War II, the federal government nationalized transportation and energy companies important to the war effort. Perhaps the apogee of the rationale—and functionally likely the reason it is no longer deployed with any regularity—involved the events that gave rise to *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In this case, not often discussed by property theorists, although exceedingly familiar to scholars of the separation of powers as the *Steel Seizure* case, the Supreme Court rejected President Truman’s attempt to nationalize the steel industry during the Korean War pursuant to nothing more than an Executive Order.

62. *See*, e.g., United States v. Caltex (Phil.), Inc., 344 U.S. 149 (1952) (holding that destruction of oil facilities in the Philippines during battle in World War II did not constitute
during the American Revolution. In this context, emergency doctrine has been drawn somewhat narrowly, perhaps recognizing the potentially all-encompassing nature of military need. There are also national security considerations at play that make the tradition of military necessity a somewhat uncomfortable basis to find grounding for a doctrine of economic emergency in takings.

However, a second, more immediately relevant, context in which state action in times of crisis is excused from takings liability involves steps taken to prevent disasters in the face of imminent physical threats such as spreading wildfires, flooding, and contagious disease. To pick one of any number of historical examples by way of illustration, in \textit{American Print Works v. Lawrence}, the Mayor of New York City and two Alderman were found not liable in trespass, and no takings were held to have occurred, following their decision to use gun powder to blow up the buildings at 44 and 46 Exchange Place—and in the process destroy “800 cases prints; 70,000 pieces prints; 50 cases drillings; 1000 pieces drillings, and a large quantity of prints, drillings, and other dry goods, wares, and merchandizes of great value, to wit, of the value of two hundred thousand dollars.” The officials made the decision to destroy the storehouse in the face of what was then “one of the most extensive fires ever known in this country, and property, both real and personal, to the value of many millions of dollars was destroyed, much the larger portion being

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  \item a compensable taking under the Fifth Amendment; Juragua Iron Co. v. United States, 212 U.S. 297 (1909) (finding no recovery for owners of a factory destroyed by soldiers fighting in Cuba to prevent the spread of disease); United States v. Pac. R.R, 120 U.S. 227, 239 (1887) (recognizing “the exemption of government from liability for private property injured or destroyed during war, by the operations of armies in the field, or by measures necessary for their safety and efficiency” in a case involving federal government destruction of private property during the Civil War).
  \item 63. See Respublica v. Sparhawk, 1 U.S. (1 Dall.) 357, 1 L.Ed. 174 (Pa. 1788) (holding that there was no recovery for destruction of property where the British were on the verge of taking Philadelphia).
  \item 65. 21 N.J.L. 248 (1847).
\end{itemize}
consumed by the flames.” Similar cases have been a staple of takings (and tort) jurisprudence since the time of the Founding—and before.67

The logic of uncompensated taking in the emergency context seems to rest on a number of foundations. First, in many instances the property at issue would have been destroyed regardless of the actions of public officials, so if, for example, a house is destroyed to stop a wildfire that would have destroyed that house regardless, the owner can hardly complain.68 But not all instances of emergency action fall into this category. An alternative explanation might be that invoking necessity in situations of crisis represents a particularly acute collective action problem that justifies swift action even without compensation.69 There is much to this, but a final rationale, and the one that seems most clearly to explain the doctrine, is that vulnerability to this kind of exigency is inherent in the obligations of ownership and membership in a community.70

66. Id. at 261 (Randolph, J., concurring).
67. See, e.g., Field v. City of Des Moines, 39 Iowa 575 (1874). Bowditch v. City of Boston, 101 U.S. 16 (1880), is probably the best known of these early emergency cases, by virtue of Justice Scalia’s invocation of the case in Lucas. See supra text accompanying note 59. The facts of Bowditch echo so many of the urban firebreak cases in the crowded cities of the nineteenth century. In the face of “great fire [that] occurred in the city of Boston on the night of the 9th and 10th of November, 1872,” fire engineers decided to demolish a building that was in the path of the fire; the building was blown up (destroying “fixtures, merchandise, and tools belonging to [the plaintiff] . . . of the value of $60,000” as well as the value of the plaintiff’s leasehold estate), which “stopped the progress of the fire.” Id.
68. As applied to economic emergencies, the analogy could be that if a company is nationalized but would have gone under in the absence of public intervention, that is no different from a house being destroyed that would have been burnt regardless. However, as noted, it can be quite contestable whether a company would have failed and even if so, whether shareholders would necessarily have lost the share value or control rights they did.
69. Richard Epstein has argued that common-law necessity doctrine can be justified as a limited intrusion on otherwise absolute property rights where transaction costs prevent gains from trade. Richard Epstein, Property and Necessity, 13 HARV. J.L. & PUB. POL’Y 2,7 (1990) (“Under certain localized circumstances, however, conferring . . . absolute rights to exclude does not advance competition in ordinary markets, but rather it creates bilateral monopoly, holdout problems, and transaction-cost obstacles of one sort or another. At common law it is just these various situations in which there is a systematic, intuitive willingness to back off the comprehensive ideal of property in favor of a system that is a little bit frayed at the edges.”). If one translates that logic from common-law judges to other legal actors, and from private to public actors, the basic rationale remains. This rationale can then translate fairly directly to the emergency exception for just compensation.
This emergency exception has not generally been applied to the kinds of “grave threats,” to quote the Court in *Lucas*, that arise out of economic crises, but the logic of doing so is compelling. As the above discussion of systemic risk illustrates, there are certain firms whose potential demise threatens not only localized economic harm, but a kind of ripple effect that can injure broad swaths of the economy, and in some cases the economy as a whole. The increasingly interconnected nature of economic activity places certain firms at a nexus point where the consequences of failure can induce economic panic and damage every bit as fast-moving as a wildfire. Public officials have many policy tools available when such an economic wildfire starts, including, of course, doing nothing and letting markets react, which is what happens when most firms fail. But creating financial firebreaks through nationalization is a response that echoes a long tradition of legitimate necessity in constitutional property, whatever one might think of the merits or wisdom of any given choice to apply the policy.

The merits of drawing on a well-established doctrinal tradition, in the best (constitutional) common-law tradition, is that this kind of analogical exercise can suggest several important limiting principles to cabin an exercise of authority legitimately open to concern about abuse. The analogy thus suggests, as an important constraint, that any doctrine of economic emergency would require a genuine threat (defined here in terms of the harms arising from the systemic risk posed by the potential failure of a firm) as well as imminence—that

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71. To be clear, the gravamen of the argument here is that the traditional jurisprudence of emergency in the law of takings supplies a foundation for a similar doctrine in the context of economic crises, but the argument is not that emergency creates executive authority where there is none. The Supreme Court has been skeptical of invocations of economic emergency since at least *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935) (“Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power.”). Nonetheless, emergency is clearly a legitimate basis for understanding the contours of constitutional authority that already exists. See, e.g., *Block v. Hirsh*, 256 U.S. 135 (1921) (noting that “a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation” in upholding emergency rent control during World War I); *see also Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (“While emergency does not create power, emergency may furnish the occasion for the exercise of power. . . . The constitutional question presented in the light of an emergency is whether the power possessed embraces the particular exercise of it in response to particular conditions.”).
officials must act quickly to forestall that grave harm. Moreover, inherent in all emergency rationales is the constraint that officials must be acting reasonably in the face of such threats.\textsuperscript{72}

Although military necessity jurisprudence is less directly relevant than the disaster and public health cases, one distinction the Supreme Court has drawn in the former context can supply another important limiting principle for economic emergencies. In cases of military necessity, the Court has long distinguished between immediate threats and military actions that seem designed to satisfy a public need that could otherwise be met through the market, such as where property is “taken for the service of our armies, such as vessels, steam-boats, and the like, for the transport of troops and munitions of war, or buildings to be used as store-house and places of deposit of war material, or to house soldiers or take care of the sick, or claims for supplies seized and appropriated.”\textsuperscript{73}

In other words, if a public actor is appropriating or destroying property to respond to an immediate crisis, that necessity is more likely to be recognized as an exigency that can obviate compensation, but if the motivation (or consequence) is to supply the government with a benefit that the government could have procured, then claims of necessity will be met with greater skepticism.\textsuperscript{74} This echoes the general argument that Joseph Sax made that takings liability is appropriate where the government seeks to benefit itself, but there should be no liability where the government is merely adjusting economic relations.\textsuperscript{75} Given legitimate concerns about the risk of aggrandizement

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\item \textsuperscript{72} As the Texas Supreme Court emphasized in a case rejecting the application of the emergency doctrine in a case under the Texas Constitution,
  
  one who dynamites a house to stop the spread of a conflagration that threatens a town, or shoots a mad dog in the street, or burns clothing infected with small-pox germs, or, in time of war, destroys property which should not be allowed to fall into the hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances.


\item \textsuperscript{73} United States v. Pacific R.R., 120 U.S. 227, 239 (1887).

\item \textsuperscript{74} The analysis may not be the same for actions taken by authorities after the initial takeovers, when the entities involved had been returned to positions of financial stability. However, the initial compensability of the takeovers is a distinct question from the validity of subsequent actions once the firms were nationalized.

\item \textsuperscript{75} See Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 63 (1964) (“[W]hen economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of
in economic nationalization, this strain of the necessity rationale can be a vital constraint.  

There are reasonable arguments to be made, of course, against the analogy between physical and financial threats. Perhaps the most salient is the question of imminence. After all, the GM bankruptcy process played out over the course of months and even AIG and the GSEs arguably might have bought some time had other policy interventions been tried. However, the immediacy of the relevant threat should be measured in terms of public and market reaction to failure to act, rather than the time it takes for a policy to reach fruition. Properly viewed this way, economic emergencies are not significantly different for businesses whose failure poses systemic risks than when a wildfire is raging, even if it may take time for officials to align the necessary institutions to allow action. Markets today can react almost instantaneously to signals from public officials and even the possibility that certain firms might fail in the absence of public action can cause significant public harm.

76. In the Fannie Mae, Freddie Mac, and AIG suits, one set of arguments that the claimants are making is that the takeovers in each case were not designed to forestall financial panic or even stabilize critical aspects of the economy but rather to directly benefit the federal government itself. For example, in the GSE suits, the allegations relating to the sweep of profits to the federal government are essentially arguments that the conservatorships were thinly disguised ways of pumping money into the federal treasury. See Complaint, Washington Federal, supra note 4, at 65. Considering the amount of public subsidy—and the genuine uncertainty about the outcome of the interventions in each case—this argument is hard to credit on its face. Nationalization that represents a surgical intervention, and particularly one that is temporary, is better understood as a move (wise or not) to stabilize markets, rather than expropriation to benefit the government itself. There are legitimate reasons why some members of a polarized public may question this logic. See Levitin, supra note 23. But I think the better understanding of the governmental actions at issue—at least in the initial nationalization—is that they were not aggrandizing.

77. As noted, emergency doctrine generally requires imminent danger and an actual emergency that establishes the necessity. See, e.g., TrinCo Inv. Co. v. United States, 722 F.3d 1375, 1378 (Fed. Cir. 2013) (doctrine not appropriate to be invoked when the Forest Service was undertaking prophylactic, rather than emergency, wildfire prevention).

78. The Great Recession demonstrated, however, that public institutions can sometimes move extremely quickly in the face of true looming public disaster. In the midst of the recent crisis, particularly in its early days, federal officials often had to act more like private dealmakers, forcing them, as Steven Davidoff and David Zaring have argued, to “decide quickly, negotiate hard, consider transaction and other costs to the best they can, and then call it a day.” Davidoff & Zaring, supra note 3, at 467.

79. Arguments about the comparative significance of the relevant types of threat—that fire or disease are of a different order of magnitude than economic harm—or even some
Moreover, the context of economic emergency no doubt presents significantly greater complexity than a fast-moving fire or a rapidly spreading disease. An official may be able to watch a fire approaching and reasonably conclude with relatively little information that the destruction of property is an appropriate precautionary measure to lessen the risk of a larger conflagration. An economic crisis sufficiently grave to threaten larger macroeconomic harm, on the other hand, may be hard to define. We have suffered many significant downturns, such as the stock market crash in 1987 and the end of the tech bubble, all without significant takeovers. Even if the threshold condition of a sufficient emergency can be discerned, delineating between appropriate “firebreaks” and other firms that should be left to the market, regardless of the consequences, is exceedingly difficult.80

For all of these reasons, some takings theorists have been troubled by the concept of emergency or necessity as a justification for vitiating a compensation mandate.81 The argument for applying emergency to economic crisis is admittedly novel, and the Court has been reluctant to expand immunity from takings liability beyond categories traditionally recognized in common law. But many lower courts understand formalist taxonomical objection, make little sense. In the kind of shock that the failure of the most interconnected and economically significant firms might bring, there are very real and extremely wide-spread harms that result, and such harms can last far longer than the aftermath of a wildfire.

80. Because nationalization so often involves action at the federal, rather than state (or local) level, it does present a paradigm of takings that inverts the traditional locus of eminent domain at the state level. Simply by dint of the docket, most foundational questions of takings law involve challenges to state and local regulation or eminent domain, and any doctrine developed in the context of federal law must be sensitive to the consequences for states and localities. That said, traditional emergency doctrine in takings jurisprudence much more often involved such state and local entities, so the extension of the doctrine to the economic sphere would not be entirely orthogonal to past experience. Nonetheless, if an economic emergency doctrine is grounded in the nature of extraordinary systemic risk, that fact might suggest caution in states and local governments invoking the rationale, given the risks of inconsistency across states and the limits of a national perspective for such sub-federal governments.

81. See, e.g., John J. Costonis, Presumptive and Per Se Takings: A Decisional Model for the Takings Issue, 58 N.Y.U. L. REV. 465, 487 n.94 (1983) (describing the “necessity” and “emergency” cases as “among the Court’s most troublesome takings precedents because they lack a basis in principle”). Peter Byrne has noted that emergency and related doctrines have “stood on the fringes of regulatory takings doctrine because giving them full effect would come close to abolishing any normative foundation for regulatory takings generally.” J. Peter Byrne, The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time, 73 LA. L. REV. 69, 93 (2012). But this anxiety ignores the pedigree of the privilege and the not-insignificant boundaries that courts have historically placed around the doctrine. Whether that is more or less normatively destabilizing than the many other ambiguities in takings doctrine is hard to say.
that definitions of harm and public exigencies can evolve over time, and these complexities are ultimately judicially manageable.

In short, while the traditional law of emergency in takings would import significant constraints on the invocation of the rationale to support nationalization of systemically important firms in economic emergencies, the extension of the doctrine in this way makes eminent sense. It is important doctrinally to give reasonable latitude to the judgment of officials in the thick of crisis, even if, in the calm after the storm, other avenues might seem to have been preferable. All of this, then, gives us the rough outlines of a doctrine of economic emergency in takings that bears directly on the practice of nationalization.

B. Economic Externalities and Irreconcilable Choices?

To this point, the argument has sought to ground a takings doctrine for nationalization that reflects, and extends, traditional emergency rationales. There is a closely related jurisprudential vein in constitutional property, however, that might supply an even broader doctrinal grounding for nationalization. Public officials are sometimes faced with the choice of irreconcilable economic conflicts reflecting the harm that one owner’s property threatens to cause another owner. In a situation posing this kind of irreconcilable choice, officials may legitimately choose one set of economic interests over another.

This logic is familiar from the cedar rust tree disease case, *Miller v. Schoene*, where the Court articulated the dilemma as follows:

> [T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.

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82. 276 U.S. 272 (1928).
83. *Id.* at 279.
This recognition of the harm principal can apply as well to modern economic harms caused by private entities in companies whose failure poses systemic risks. *Miller* was a due process, not a takings case, and the Court appeared to distance itself from the case in *Lucas*. But the proposition has not been explicitly disavowed and, even transformed, can be seen in the *Lucas* understanding of background principles of state law as a limitation on *per se* takings liability.

As with other necessity-based rationales, the *Miller* doctrine is not unlimited and must be grounded in the reasonable exercise of authority, however deferentially construed. The reason for relying on the emergency doctrine as a basis for justifying nationalization in times of economic crisis is that a *Miller*-esque economic nuisance argument is harder to cabin and harder, perhaps ironically, to operationalize. Relying on the tradition of imminent necessity, rather than a broader conception of harm and incompatibility, is thus a sounder foundation for what might be understood as a novel extension of economic authority.

IV. NATIONALIZATION, NECESSITY, AND THE RULE OF LAW

Even if one were to accept the argument that the emergency doctrine should logically be extended to contemporary economic dangers, one might still object more fundamentally to the idea of invoking crisis and systemic risk to affect the landscape of takings law, regardless of the nature of the emergency. Nationalization is a term that for many people invokes visions of unconstrained dictatorial authority—think banana republic—and all the more so if there are grounds for taking control of companies without compensating those harmed by that action.

Indeed, some commentators have argued that it is precisely in times of crisis that protection for property rights—taken somewhat narrowly to mean constraint on public authority to adjust economic benefits and burdens—should be at its highest level. Todd Zywicki,

84. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1022–23 (1992) (“The ‘harmful or noxious uses’ principle was the Court’s early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State’s police power.”).

for example, argues that the purpose of property rights (and the rule of law more generally) is to provide “as much stability as possible” to facilitate the “economic coordination” that economic activity requires, and in emergencies more than ever.86 Zywicki gives the following example:

Consider the milk in your refrigerator or cafeteria. Think of the chain of coordination required to get it there: Farmers must decide to use their land to graze dairy cows; determine how many cows to graze; and employ people and use machinery to milk the cows, pasteurize the milk, and deliver it into the stream of commerce. All the coordination in that relatively simple chain of production must then align with millions of consumers deciding whether to buy milk or Coke and ensuring that they can buy both milk and Cheerio’s. The extent to which these systems are coordinated is remarkable.87

Zywicki, drawing on Friedrich Hayek, argues that complex economic activity not only requires this kind of coordination but involves constant informational feedbacks to adjust.88 State intervention to respond to market failures short-circuits this feedback mechanism and the resulting uncertainty, so the argument goes, undermines incentives for private investment.89

However, these kinds of arguments about the necessity of stability and the rule of law in constitutional property ignore another side to the ledger of expectations about property. Zywicki’s milk may require Herculean market coordination to get from the cow to the consumer’s cup, but such complex markets are apt not only to be much less efficient in the absence of a baseline of regulatory protection in the ordinary course,90 but reveal their greatest weaknesses in times of

87. Id. at 197 (footnote omitted).
88. Id.
89. Id. at 199. Zywicki makes some leaps in causation that are hard to support. For example, Zywicki argues that the reason credit markets have been slow to return after the crisis is because “political response to the financial crisis (or perhaps more accurately rationalized as a response to the financial crisis) created a huge amount of instability that makes it hard to price a loan.” Id. at 198. The real reason banks were slow to extend credit in the aftermath of the housing crisis, however, is most likely not policy-induced “instability” but much more likely the very inability of the Hayekian information chain to allow lenders to accurately assess (and price) risk in the face of market failure.
90. See Joseph W. Singer, Things That We Would Like to Take for Granted: Minimum
economic crisis. For markets to work, property rights must be appropriately calibrated and all the more so during times of emergency.

Hanoch Dagan has mounted a broader challenge to expropriation without compensation as an affront to the rule of law that has relevance here as well.91 Dagan asserts that any constitutional doctrine that offers less than fair market value for takings offends two aspects of the rule of law. First, drawing on Joseph Raz, Dagan argues that judicial validation of non-compensatory takings fails to provide the guidance necessary for people to form clear expectations about how authorities will exercise their coercive power, which in turn is critical to the value of autonomy.92 Second, the case-by-case method through which compensation practices are determined threatens the rule of law value, Dagan continues, that seeks to constrain the arbitrary exercise of power.93

These are important concerns—and Dagan acknowledges that takings without full compensation can be justified on the grounds of the reciprocal obligations that owners have as members of a community, which I think best explains traditional emergency doctrine in takings94—but his concern with guidance and arbitrary exercise of power risks a kind of circularity. In practice, the kinds of standards that tend to dominate takings law actually provide a significant amount of notice to owners and the broad sweep of litigation on takings tends to generate rule-like categories that are quite intelligible.95 As Joseph Singer has noted, “while the ad hoc test looks vague on paper, it is highly predictable in practice. The courts entertain a strong presumption that regulations of property are legitimate if passed by legislatures to promote public ends.”96 Indeed, Singer rightly notes, “the Penn Central test is more predictable than a seemingly rigid rule that would prevent changes in ‘established property rights’ given

92. See id. at 6 (citing Joseph Raz, The Rule of Law and Its Virtues, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 213, 218 (1979)).
93. Id. at 6–7.
94. See supra text accompanying notes 68–70.
96. Id. at 1405.
the need to interpret what those rights are before they can be defined as immune from change without compensation.”

Moreover, whether the judicial validation of expropriatory practices that do not provide compensation represent the arbitrary exercise of power depends heavily on one’s view of the discretion being deployed. If a policy of intervention to solve a potentially devastating market collapse—as one example of a reason why compensation might not be granted—seems like an excuse for officials to advance some more nefarious goal, then such steps will seem arbitrary regardless of the legality of the process through which such power has been exercised. This is partly a cultural question, and it was evident in much of the popular reaction to nationalization during the Great Recession. Ultimately, though, it requires some external metric of arbitrariness to say that an exercise of the power to interfere with property rights, including compensationless expropriation, necessarily violates this aspect of the rule of law.

It is reasonable to raise questions about the arbitrariness of the exercise of power the longer the government remains in control of an entity. Economic nationalization that involves forestalling market failure and restoring the health of a systematically important firm may take on a different cast—and raise increasing risks—if that control continues longer than necessary to respond to an emergency. Fannie Mae and Freddie Mac remain under conservatorship, while AIG and GM and others have be re-privatized, and it is not surprising that the conservatorships have generated ongoing questions about the purpose and role of federal control. This does not change the calculus in moments of crisis, but is worth reflecting on for the ultimate legitimacy of any instance of nationalization.

In short, while it is fair to argue that extraordinary departures from what property law demands in the name of emergency may undermine the rule of law, nationalization—so present throughout our history, as much as we tend to forget the fact—is not such a departure. The critical point about the rule of law here is that, as uncomfortable as this reality might be, a doctrine that acknowledges the kind of limited intervention represented in our tradition of nationalization would

97. Id.
not be outside the bounds of law but deeply consonant with the oldest pathways of the takings clause.

CONCLUSION

One might question the wisdom or the foresight of any of the instances of nationalization that occurred in responding to the Great Recession and there is no doubt that, in the heat of the moment, officials likely made mistakes. In the early months of the crisis, a great deal of debate swirled around which companies should be saved or left to their fate—why Bear Stearns and not Lehman?—and it was difficult for officials to anticipate how events would play out given that all indications pointed toward a rapidly spreading global economic meltdown.

There is a difference, however, between policy concerns about nationalization and constitutional arguments for barring the practice without compensation, which would likely forestall the practice altogether. How one views the wisdom of nationalization in any given instance is inherently complicated, and my own perspective is that this is a valuable policy tool if used carefully, recognizing the risk of abuse, as with all public authority. But that debate is one that is better carried out in a political, rather than judicial, arena.

It does no violence to norms of ownership—or the rule of law—to acknowledge that overriding necessity in times of crisis can be as relevant to economic emergency as it has always been to more prosaic threats. The doctrine of economic emergency that this Essay has proposed accords with the deepest traditions of our system of property, and rightly should be so recognized.
Judicial takings weren’t much talked about until a few years ago, when the Stop the Beach case made them suddenly salient. The case arose from a Florida statute, enacted in 1961, that authorizes public restoration of eroded beaches by adding sand to widen them seaward. Under the statute, the state has title to any new dry land resulting from restored beaches, meaning that waterfront owners whose land had previously extended to the mean high-tide line end up with public beaches between their land and the water. This, the owners claimed, resulted in a taking of their property, more particularly their rights under Florida common law to receive accretions to their frontage on the water, and to have their property remain in contact with the water. The state supreme court disagreed, concluding that the owners never had the rights they claimed. The owners then sought (and were granted) review by the Supreme Court, the question now being whether the state supreme court’s decision worked a judicial taking because it was contrary to Florida common law. They lost, all of the participating justices concurring in the view that the Florida court’s decision did not contravene any established property rights.

So there was no judgment of a judicial taking in Stop the Beach, nor, indeed, any judgment that “there is such a thing as a judicial taking,” because only four members of the Court think that. The plurality opinion, written by Justice Scalia as a part of his opinion for the Court, concludes that the Fifth Amendment’s Takings Clause

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2. *Id.* at 718. Justice Scalia wrote the opinion for the Court, in which all of the justices concurred, and the plurality opinion, joined by Chief Justice Roberts and Justices Thomas and Alito. There were two separate opinions concurring in the judgment but not in the plurality’s views on judicial takings—one by Justice Kennedy, joined by Justice Sotomayor, the other by Justice Breyer, joined by Justice Ginsburg. Justice Stevens did not participate in the case.
plainly applies to all the branches of government, not just the executive and legislative. “If a legislature or a court declares that what was once a private right of ownership no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”

These views have already provoked a fairly considerable literature. I don’t claim to have read all the articles, but I have sampled many and learned a lot. The literature about Stop the Beach is way more illuminating than the opinions in the case itself, the plurality opinion especially, but like the plurality opinion the literature is provocative. And just as Stop the Beach has moved scholars to muse, so their musing has led me to do the same. What follows are some riffs on the case and the scholarship alike, part primer and part critique.

I.

The law of takings distinguishes between (1) explicit takings of private property under the government’s inherent power of eminent domain, and (2) implicit takings of private property caused by legislation, administrative regulation, or other governmental actions. In type 1 cases, the government sues in a condemnation action; in type 2 cases, the property owner sues in an inverse condemnation action. There is no issue about a taking in type 1 cases, the very point of the lawsuit being to force the sale of the property in question (which the government may do, provided the transfer is for a public use and that just compensation is paid). There is always an issue about a taking in type 2 cases, where the property owner claims that the government’s actions amount to a taking, even though the government insists otherwise.

Judicial takings, if there ever is such a thing, would be takings of type 2, governed by a cluster of Supreme Court rules conventionally referred to as the law of “regulatory takings.” The label is inaccurate, because type 2 cases commonly arise in instances where the consequences of the governmental action in question have no relation whatsoever to any proximate regulatory provision, whether legislative or administrative. It is better to think in terms of explicit

3. Id. at 715.
and implicit takings, and I take the license to do so at times in the discussion that follows.

II.

A.

As mentioned above, only a plurality of the Court believes that there can even be such a thing as a judicial taking. Skeptics suggest that logically judicial takings can’t really exist. A common version of the argument based on logic runs as simply as this: Courts lack the power of eminent domain. Since they are thus incapable of explicitly taking property, they are also incapable of implicitly taking property.

I find this line of argument unpersuasive. Eminent domain is an inherent power of government. Nothing in the Constitution confers it; the Takings Clause operates to limit it. The clause’s constraints apply to the government generally. No language indicates or even suggests that courts are excluded from the generalization. Professor Thompson, after reviewing historical materials regarding the drafting of the Takings Clause, concludes that it occurred to no one to consider its applicability to the judiciary. “The original understanding of a taking,” he says, “was simply too narrow to raise the issue: the fifth amendment’s takings provision was addressed not to the type of indirect, regulatory taking that most judicial property changes resemble, but to traditional exercises of eminent domain.”

Such a history hardly puts judicial takings logically out of constitutional bounds. It tells us nothing about what the original understanding might have been had judicial takings been on the table. But they weren’t; the focus was on explicit exercises of the eminent domain power (the idea, and thus the law, of implicit takings developed many years later). And I suppose no court had ever entertained the notion that it could explicitly condemn property, or that it should. That would have been an audacious challenge to convention shaped by “traditional exercises of eminent domain,” as Thompson puts it. So we can say for sure that there was and is no practice of explicit

4. Barton H. Thompson, Jr., Judicial Takings, 76 VA. L. REV. 1449, 1458 (1990). Thompson’s article, though published two decades before the opinions in Stop the Beach, is as valuable now as it was before.
condemnation by courts, but that hardly denies the power of courts to do what traditional practice has left to the other branches.

B.

But let us suppose, for the sake of argument, that there clearly is no power in the courts to engage in explicit condemnation. It would be an obvious non sequitur to conclude from this that judicial decisions cannot work implicit takings. The logical fault is illustrated by Professors Dana and Merrill in their indispensable text on the law of takings.\(^5\) They observe, correctly, that condemnation and regulation are substitute means by which governments can control the use and ownership of property. If condemnation is used, the government has to pay; if regulation is used, it does not, unless some body of law says otherwise. The Court’s law of implicit takings says otherwise, for the obvious reason: if government could choose freely between condemnation and regulation, it would be inclined to favor regulation in order to evade the obligation to pay compensation.\(^6\) To control against undesirable substitution effects, the Court’s rules of decision aim to force compensation when regulation “has an impact [on property rights] functionally equivalent to an exercise of eminent domain.”\(^7\) But “courts, unlike legislatures and many executive agencies, do not have the power to take property by eminent domain. Consequently, the basic logic for the [implicit] takings doctrine . . . does not apply to courts: It is difficult to say that a court, by changing the law, is seeking to evade any obligation that it has . . . .”\(^8\)

The fault in the argument is apparent. Dana and Merrill simply assume that the power of eminent domain necessarily entails the power to take by explicit condemnation, which I have suggested is a contestable proposition. Yet, in my view, it doesn’t matter. Whether or not courts have the power of eminent domain, governments surely do, and courts, as the plurality in \textit{Stop the Beach} correctly observes, are indisputably a branch of the government. Governments also

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6. \textit{Id.} at 4–5. We can draw an analogy to federal estate and gift taxes. An estate tax must sensibly be accompanied by a gift tax in order to prevent estate tax avoidance by making inter vivos gifts.
have the purse power, and thus the means, unavailable to the judicial branch, to pay compensation for judicial takings. And just as governments should not be able to evade the obligations of the Takings Clause by substituting regulatory activity for explicit condemnation, they should not be able to evade the obligations by substituting judicial activity for regulatory activity.

III.

Even if there are no logical reasons to fuss about judicial takings, there are prudential ones. Before we get into these, it is important to have in mind what judicial takings are about—better, what they would probably be about should the Stop the Beach plurality someday win another vote.

Judicial takings are solely concerned with court decisions that re-allocate existing property rights by changing established property doctrine. Note two points: While statutes and administrative regulations can change doctrine too, thus triggering the Takings Clause, legislative and executive actions can also work takings in ways that judicial actions cannot. Relatedly, statutes and regulations might change doctrine and reallocate rights, yet still not amount to takings under the Supreme Court’s rules. Whether this is true of judicial decisions as well is a nice question, as we shall see.

At least from the standpoint of the Takings Clause, courts and the other governmental branches are free to change established property rules so long as there is no alteration in existing property rights. The Court made this plain long ago: “A person has no property, no vested interest, in any rule of the common law.”

9. Actually, courts may have the means to pay, in a way. See infra note 39.
10. See Thompson, supra note 4, at 1450; DANA & MERRILL, supra note 5, at 228–29.
11. The obvious example is explicit condemnation. Another is government enterprises that interfere with private property (as when a public sewer system causes flooding).
reversions.\textsuperscript{13} Never mind that those rights are worthless or nearly so, because in fact, though not in law, they are contingent to a fault, little more than expectancies.

Retroactive abolition of the fee tail might be accomplished by legislation or by independent judicial decision, but there could be a judicial taking in either case, as \textit{Stop the Beach} makes clear. The point is obvious in the case of judicial abolition. As to legislative abolition, a judicial taking looms if a party sues in state court claiming that the abolition works a taking, and the court upholds the legislation in light of state common law. The party could then seek review in the Supreme Court or sue in federal district court, claiming a judicial taking in that the state court changed the state’s established property law doctrine. The federal court would have to determine whether the state common law really is what the state court said it was. Federal oversight could also result from claims filed by property owners who were not parties to the initial litigation that led to judicial takings challenges but sue independently, asserting in federal court that the judicial decision upholding the retroactive abolition of the fee tail takes their property rights.

IV.

The path to federal oversight of alleged state takings is complicated by various procedural rules developed by the Court. The details of this part of the story are well treated elsewhere, so I leave them aside.\textsuperscript{14} Whatever the path, the end point finds one federal court or another involved in the interpretation of state property law. So, critics argue, even if judicial takings are not logically out of bounds, they are objectionable for prudential reasons: Judicial takings would flood the federal courts with litigation involving issues beyond their immediate expertise, intrude unduly on the state’s acknowledged

\textsuperscript{13} See, e.g., Green v. Edwards, 77 A. 188 (R.I. 1877) (holding that retroactive abolition of the fee tail is an unconstitutional deprivation of property without due process of law). So the Court in \textit{Munn} observed: “Rights of property which have been created by the common law cannot be taken away without due process.” \textit{Munn}, 94 U.S. at 134. Today, I presume, these decisions would talk about takings rather than due process. On judicial takings versus due process, see Eduardo M. Peñalver & Lior Jacob Strahilevitz, \textit{Judicial Takings or Due Process?}, 97 CORNELL L. REV. 305 (2012).

authority to define property rights, and impose financial obligations that compromise the prerogative of the states’ political branches (the judiciary is not such a branch) to manage the expenditure of public funds.

The weightiness of these concerns is a function of, among other things, the frequency with which judicial takings would be found to have occurred, but I don’t see how anyone can provide even a rough estimate of that. One would need to know, first of all, how often property owners find occasion to assert in law suits that judicial decisions “declare that what was once an established right of property no longer exists”\(^\text{15}\) —more to the point, how often property owners would find occasion to make such an assertion were a doctrine of judicial takings to become the law of the land. After all, the doctrine might constrain courts from declaring what they otherwise would have declared. If the universe of relevant instances proved to be small, then so would the consequences of the doctrine, at least insofar as the obligation to pay compensation is concerned.

Second, whatever the size of the universe, the number of instances in which judicial takings would actually be found is sure to be smaller, and maybe substantially so, or even overwhelmingly so. But to make a rough guess about this we need to know exactly what the plurality opinion means in saying that judicial takings would arise whenever courts declare that established property rights no longer exist. The statement might seem clear, but it isn’t, as evidenced by the divergent interpretations of it found in the literature. Below I consider some ambiguities and what various commentators make of them.

A.

We might suppose that since the courts are just another branch of government, they should be treated just like the other branches when it comes to takings. The plurality opinion in Stop the Beach can be read to stand for this proposition. In its little exegesis on “some general principles of our takings jurisprudence,” the plurality notes that “our doctrine of regulatory takings aims to identify regulatory actions that are functionally equivalent to the classic taking [by condemnation under the power of eminent domain].”\(^\text{16}\) For examples,

\(^{15}\text{Stop the Beach, 560 U.S. at 715.}\)

\(^{16}\text{Id. at 713, quoting Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).}\)
the plurality cites several of the Court’s rules: when government action works a permanent physical occupation of private land, there is a taking; when government action wipes out all economically beneficial use of private property, there is a taking; when government action re-characterizes as public property what before was private property, there is a taking.\textsuperscript{17}

Anyone familiar with takings law knows there is more to it than this. The plurality’s examples refer to several of the Court’s \textit{per se} or categorical takings rules—rules of the form “if X happens, that is always a taking.” The rules are not quite so hard-edged as the plurality opinion suggests. It notes that temporary physical occupations are not takings \textit{per se} but leaves unmentioned that this is also true of wipeouts of value (the latter of which, moreover, are never takings if they are the consequence of controlling common law nuisances, and not \textit{per se} takings if they wipe out the value of only part of a parcel).\textsuperscript{18}

Putting the common law nuisance exception aside, all of the instances above—and many others involving government actions that impact the value or use of private property—might still work takings under the multi-factor, \textit{ad hoc} test laid out in the \textit{Penn Central} case.\textsuperscript{19} The probability of a property owner winning a takings claim under that test, however, is very low. So is the probability of a property owner being able to rely on any of the \textit{per se} rules, because government agents have learned to abstain from activities that cause permanent physical occupations and permanent wipeouts of entire parcels.

\textit{B.}

It seems to follow from the foregoing that if (1) courts are subject to the same constraints as the other branches, then (2) successful judicial takings challenges would be rather few and far between. But point (2) follows only if point (1) holds, and on this the plurality is

\textsuperscript{17} Id.

\textsuperscript{18} For most purposes, the Court considers takings challenges by looking at the impact of a government action on the whole piece of property involved, as opposed to just a part of it. This is to say that the Court rejects a practice of “conceptual severance.”

\textsuperscript{19} \textit{Penn Central Transportation Co. v. City of New York}, 438 U. S. 104, 124–25. Most simply stated, the multi-factor test considers the diminution in value of property caused by the government action, the extent to which the action interferes with the owner’s distinct investment-backed expectations, and the character of the government action. For a fuller statement and examination of the factors, see DANA & MERRILL, supra note 5, at 131–64.
unclear and the commentators divided. Professor Somin, for example, agrees with point (2) because he reads the plurality opinion to say that point (1) does hold. His interpretation relies on Justice Scalia’s statement that condemnation by eminent domain “is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent.”

The emphasis in that statement is Somin’s. He could as well have emphasized the last words of the statement—“depending on its nature and extent”—because those words also suggest that the plurality would apply to the judicial branch the rather forgiving body of rules that the Court applies to the legislative and executive, lock, stock, and barrel. This includes, Somin infers, the multi-factor test of Penn Central, which “[c]ourts generally apply . . . in ways that favor the government.”

Contrast the view of Professor Echeverria. “It is difficult to know,” he says, “whether Justice Scalia’s theory of judicial takings is intended to fit into, or instead subvert, established takings doctrine,” but he worries that subversion is the aim. His interpretation—just as reasonable as Somin’s—suggests that Justice Scalia means to establish a per se rule that “every change in established law is a taking,” and to apply the rule not just to the courts but “to all the branches” of the government. “In any event, the scope of the proposed new judicial takings claim is breathtaking.”

20. Stop the Beach, 560 U.S. at 715; Ilya Somin, Stop the Beach Renourishment and the Problem of Judicial Takings, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 105 (2011). There are other statements in the plurality opinion that support Somin’s interpretation. See Stop the Beach, 560 U.S. at 713 (Takings Clause “is concerned simply with the act, and not with the governmental actor”); (“There is no textual justification for saying that [the existence or scope of government power to take property without just compensation] varies according to the branch of government”); (“Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment”).

21. Somin, supra note 20, at 104.


23. Id. at 477.

24. Id. at 481. Professor Echeverria has told me in a recent conversation that he considers his interpretation in this respect supported by the Court’s subsequent opinion in Arkansas Game & Fish Comm’n v. United States, 133 S. Ct. 511 (2012). He reads the case to say that whereas only permanent physical invasions or occupations are per se takings, direct government seizures or forced transfers of ownership are always takings, regardless of the temporal duration of the seizure or transfer.

25. Echeverria, supra note 22, at 479.
So we have two academic experts on takings fairly interpreting the same opinion and reaching dramatically different conclusions about what it promises, or threatens, to stand for. Both interpreters invoke *Penn Central*. Somin, as we saw, figures the case would play the same role in judicial takings doctrine that it does in takings by the other branches. Echeverria worries that the opposite could happen, noting that the plurality opinion mentions *Penn Central* nowhere but in a footnote—a slight “consistent with Justice Scalia’s abhorrence for the kind of ad hoc balancing that *Penn Central* exemplifies.”

Who has the better of this particular debate I cannot say. Divining the meaning of the plurality opinion is pure guesswork, and I know nothing of Somin and Echeverria’s records in that regard. I have to suppose that their contrasting interpretations might be influenced (and appropriately so) by their views about the law of takings generally. Professor Somin is an advocate of “stronger rules for regulatory takings rules,” with “stronger rules” meaning rules that protect property owners, and constrain the government, more than do the present ones. Professor Echeverria probably doesn’t share that sentiment; his professional career, teaching, and research interests reflect an ongoing commitment to resource conservation and environmental quality. I find it interesting, though, that someone like Somin, who wants the plurality opinion to portend much, argues that it portends little, whereas someone like Echeverria, who wants it to portend little, argues that it portends much. Or maybe this is exactly as one would expect.

V.

It should be apparent by now that even very careful readings of *Stop the Beach* provide little basis for guessing about the likely impact of the plurality opinion, were it to become the law. So much depends on what the plurality has in mind, and on what (if anything)

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it would have to surrender to garner a fifth vote. The law could end up being something like what Somin foresees, or what Echeverria foresees, or somewhere in between, and in any event could be expected to morph over time.

If Somin’s interpretation of *Stop the Beach* proves to be on the money, there would be little occasion for drama. We would have a unified and familiar doctrine of implicit takings law, equally applicable to all branches of the government, the judiciary included. To be sure, that doctrine makes it very difficult to avoid takings liability when the consequences of government actions are permanent physical occupations or permanent wipeouts of the value of entire parcels that can’t be justified on nuisance control grounds. Note, however, that it is easy to avoid the circumstances that would give rise to those consequences. The instances triggering the Court’s *per se* takings rules arise mostly from accidents or stupidity. Hence most takings cases would continue to be reviewed, just as most cases are now, under the *Penn Central* multi-factor test, which cuts the government a lot of slack.

Suppose, on the other hand, that Echeverria’s worst-case reading holds. There would be a *per se* rule applicable to all governmental branches, across the board: There is a taking when any government action alters the status quo such “that what was once an established right of property no longer exists,” period.28 The problem, though, is that such a rule might well mean less than all it could. There are all sorts of ways the rule could be narrowed but still stand; and there are ways to limit the rule’s consequences in any event, even if it

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28. *Stop the Beach*, 560 U.S. at 715. Of course, there could be a *per se* rule limited just to the courts; that approach would fall on the spectrum somewhere between the extremes represented by views like Somin’s and views like Echeverria’s. No doubt there are other variations that might occupy the middle ground, but I want to consider only the one that would confine the *per se* rule to the courts. It is an especially interesting variation, and my thinking about it has been provoked by conversations with Tom Merrill about a thought experiment in his property book, MERRILL & SMITH, *supra* note 27, at 1373. This is my riff on the experiment, with apologies to Tom if I have missed the point or otherwise mucked things up: Suppose a state statute would pass muster under the conventional implicit takings rules regarding physical invasions, wipeouts, and the *Penn Central* multi-factor test. The statute is challenged as a taking in state court, which upholds it on the ground that the rights alleged to have been taken do not exist under state law, whereas actually they do. Would this amount to a judicial taking, even though the court’s misinterpretation of state law didn’t matter to the correct result? Might the state court decision simply be ignored, on grounds of harmless error? Cf. Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 619 (2012).
stands in full. What follows are some illustrations of each observation. Many of them have already been discussed at considerable length elsewhere, so at times I settle for brief mention accompanied by references that provide an abbreviated guide to some of the relevant literature.

A.

As to narrowing the rule, consider what it might mean to speak of a “right of property” and what it might mean to say that the right “no longer exists.” Lawyers, for better or worse, commonly speak of property as “a bundle of rights”—conventionally the right to exclude, the right to use, and the right to transfer. The question for present purposes is whether the “right of property” is to be taken as referring to any twig within any one of these rights, or to the entirety of any one of these rights, or to the whole bundle of rights and their twigs. From the latter rendition—call it “conceptual integration”—it could follow that government action destroying only one or several of the twigs or even the rights would not necessarily be a taking under the per se rule because the bundle itself has not been destroyed but only depleted; it still exists. My own view, with which there might be wild disagreement, is that the Court has been ambivalent regarding the relevant “property right,” sometimes tolerating the destruction of one particular twig or right (not the whole bundle) and other times not, especially if the particular right is the right to exclude.

An obvious narrowing technique—one already mentioned in Part III—is for a court to make any changes in existing law prospective. As we have seen, there is no entitlement to particular rules of property, and this suggests that prospective changes in the rules would not be regarded as takings. But a closer look at the matter leads me to conclude that this technique might not always work. After all, prospective changes in property rules can constrain and reduce the value of existing property rights. The advent of zoning illustrates the point. Nonconforming uses were allowed to continue (subject to various limitations), on the thought that retroactive application of the new zoning rules to existing uses would result in government liability for takings. Application of the zoning rules to undeveloped land, on the other hand, was regarded as purely prospective in its effects.
This is obviously incorrect. Before zoning, owners of undeveloped land had existing property rights (the right to develop, constrained only by nuisance law) the value of which was adversely affected by the new zoning rules, and sometimes very substantially. In *Euclid*,\(^{29}\) the Court avoided the difficulty by reasoning that the zoning rules were essentially regulating nuisances, but that was bogus then and would certainly be considered bogus now, after *Lucas* and its stress on *common law* nuisances.\(^{30}\) In short, prospective zoning was actually retroactive (the same problem arises today in the context of zoning amendments), and the same is true of much prospective lawmaking. To figure out whether and how this point matters turns on the property rights issues discussed at the beginning of this section, and it is impossible to say how the Court would resolve those issues.

Another narrowing technique is suggested by Professor Barros.\(^{31}\) He argues that any law of judicial takings (actually, the law of implicit takings generally) should apply only to private–public transfers, and not to private–private transfers.\(^{32}\) After all, the latter do not destroy private property rights but merely transfer them, whereas the consequence of public–private transfers is that private property rights no longer exist, because they have been rendered public property rights.

The literature mentions several other related methods by which to narrow the *per se* rule. Consider Justice Scalia’s opinion for the Court in *Lucas*, in particular his reference to “background principles of the State’s law of property” that limit the nature of any property owner’s title from the outset.\(^{33}\) The question in *Lucas* was whether development activity subject to a regulation enacted by South Carolina could be viewed as a common law nuisance under state law; if it could, there would be no liability for a taking. The Court referred the question to the South Carolina Supreme Court, which held that the activity in question was not a nuisance under state common law, and so

\(^{29}\) *Euclid* v. Ambler, 272 U.S. 365 (1926).


\(^{31}\) Barros, supra note 14, at 919–32.

\(^{32}\) He notes that his idea “bears a resemblance to Joseph Sax’s distinction between government acting as enterpriser and government acting as mediator between conflicting private claims.” *Id.* at 919 n.48, citing Joseph L. Sax, *Takings and the Police Power*, 74 *Yale L.J.* 36, 62 (1964).

\(^{33}\) *Lucas*, 505 U.S. at 1029.
there was a taking. Suppose it had held otherwise, not because there was a precedent holding that the activity in question was a nuisance, but because there were precedents from which it could fairly be gathered that the activity was covered by the state’s principles regarding nuisance law. Would that be a “change” in doctrine triggering a judicial taking?34

Nobody knows, but the answer might turn on how deferentially federal courts would review state court interpretations of state law. Justice Scalia addresses the matter in a footnote, explaining that the plurality’s vision of judicial takings “contains within itself a considerable degree of deference to state courts. A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.”35 Professor Fennell notes that a deferential posture would be particularly appropriate given the Court’s practice of pronounced deference to state governments on the question of what sorts of projects meet the public use requirement of the Takings Clause.36

B.

The discussion above concerns matters determining the event of a judicial taking. Even given the event, its consequences, financial consequences in particular, could perhaps be mitigated in several ways. Recall that critics of judicial takings object that they would give rise to financial obligations payable from public funds. This is

34. As Professor Fennell puts the matter, “When we assess whether property law has ‘changed,’ we must make some assumption about whether property law is made up of narrow doctrinal rules, broad overarching principles, or something in between.” Lee Anne Fennell, Picturing Takings, 88 NOTRE DAME L. REV. 57, 101 n.141 (2012).

35. Stop the Beach, 560 U.S. at 726 n.9.

36. Fennell, supra note 34, at 100. Regarding deference, see also Barros, supra note 14, at 932–36, noting among other things that the holding in Stop the Beach reflects considerable deference to the state supreme court’s reading of the law. And indeed it does. The Court relies on a state supreme court precedent that the state court’s opinion did not itself so much as mention, which precedent seemed to lead to “counter-intuitive” and “arguably odd” results. Stop the Beach, 560 U.S. at 732. In the Court’s view, the question is what the state law is, not whether the state law is dumb. See generally Richard A. Epstein, Littoral Rights Under the Takings Doctrine: The Clash Between the IUS Naturale and Stop the Beach Renourishment, 6 DUKE J. CONST. L. & PUB. POL’Y 37 (2011).
thought to be inappropriate because it interferes with the exclusive prerogative of the political branches, the executive and the legislative, to manage the state fisc. I don’t see this argument as a weighty one, mainly because state courts make all sorts of decisions that call for public expenditures. The plurality opinion dismisses the argument on the ground that the default remedy for takings would be to reverse an offending judicial decision, not to order that compensation be paid. The difficulty here is that a taking might have occurred in the meanwhile, prior to reversal, and under the Court’s decision in *First English* compensation would be due for that meanwhile period. But the plurality opinion makes no mention of *First English*.

Tom Merrill has suggested to me a related point, the essence of which is that suits for declaratory judgment could be used to determine whether some challenged government action would work a compensable taking. A judgment in the affirmative would simply give the government an option to alter or abandon the action in question, or instead go forward and be liable for compensation. It bears mention that *First English* could still come into play, but even then the approach would limit the financial burdens of judicial takings.

A final limiting device mentioned in the literature is statutes of limitations. Professor Barros argues that the limitations period for bringing a federal court judicial takings claim “should run from the time that the state supreme court reaches a binding decision on the disputed property issue,” and that the limitations period should be the same for property owners who were, and those who were not, parties to the state court litigation. He notes, however, that the plurality opinion has language suggesting that suits by owners not parties to state litigation would be permitted decades after a state court decision changing the law. This is another instance of the ambiguity that runs through *Stop the Beach*.

37. A similar sentiment is expressed in Bloom & Serkin, supra note 28, at 589.
38. *Stop the Beach*, 560 U.S. at 723.
39. *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987). For discussion of whether *First English* should apply to judicial takings, see Fennell, supra note 34, at 111–12. Professor Fennell also discusses instances in which courts could find funds for takings by, in essence, requiring parties in disputes to pay each other. Id. at 99, 104, 111–14.
40. Barros, supra note 14, at 951.
41. Id. at 952–53.
VI.

As we have seen, nothing in Stop the Beach tells us what the future holds, even if judicial takings become the law of the land. The consequences could be moderate or extreme or somewhere in the middle, but the ambiguities in the plurality opinion itself provide no basis for divining which. Looking elsewhere, however, may provide at least a clue.

The law of implicit takings developed by the Supreme Court, in my view, is usefully considered as if it were designed to maintain and reinforce two important but often conflicting ideological and political commitments rooted in the Nation’s traditions—one to strong rights of property, the other to the imperatives of an active and effective state. The Court honors the first commitment with its per se rules, which are narrow in their application but nevertheless important for their rhetoric. For the sake of property rights, the right to exclude is protected against even the most trivial permanent encroachments. The Court honors the second commitment with exceptions and ad hoc rules that weaken the per se rules and provide the government with enormous leeway to act free of any obligation to pay compensation. For the sake of the state, it tolerates extraordinary impositions on property values.

To paraphrase Justice Holmes, government could hardly go on if it had to pay for every change in the law, but, he added, there have to be limits to that proposition.42 What limits we have at present are those observed in the Court’s rules on implicit takings. The pattern we see has been pretty stable for a long time; if it holds, then we can expect any law of judicial takings that develops to be relatively inconsequential. But that’s a big “if.”

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42. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).