COMPARATIVE PROPERTY RIGHTS
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INTRODUCTION

LYNDA L. BUTLER*

Property matters—whenever and wherever complex societies are involved. It may not exist in the same form or in the same situation or provide the same rights and powers, but wherever complex societies exist, their members have found a way to have property rights. Sometimes that way is formal and deliberate and sanctioned. Other times it is informal, arising from customs, cultural norms, or even outlaw behavior. Property matters because of the human desire to control resources for the protection of self and family and because, as complex societies develop, their emergent economic systems create wealth, enhancing a society’s well-being. Property rights are essential to that process, providing the framework for creating, trading, and managing this wealth and for maximizing the benefit of invested labor and capital for individual participants and their society.

A society’s political system, of course, must secure property rights to enable peaceful transfers to occur in the marketplace and to encourage investment. The degree to which property rights are secure will determine, in large part, how much wealth is created and how accepted the society’s political, economic, and property systems are. Cultural norms will affect the structure, the meaning, and the nature of property rights. As long as political and cultural values share enough common meaning, property rights can coalesce around those shared meanings and provide a fundamental set of rules to govern allocation and use of resources. Property systems, in other words, are a common characteristic of complex human societies worldwide.

In recent years property has come to the fore as a topic of international debate as developing countries join the world’s economy and as developed nations consider how to improve and fine-tune their economic and property systems. Aspects of this debate include the divide between public and private property, the extent of government’s power to regulate and expropriate private property, the normative foundations of property rights—especially their economic

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vision and political role—the role of culture and social institutions in the evolution of property systems, and the distribution of wealth among a society’s members. Though nations disagree about their approach to these matters, the international debate reveals a common set of attributes of property systems.

The 8th Annual Brigham-Kanner Property Rights Conference focused on Comparative Property Rights, continuing the international debate by highlighting the commonalities of property systems that have emerged from complex societies having different cultures and political histories. More specifically, the Conference explored the nature of property rights under different legal systems, the role that property plays in promoting social policy, and the impact of culture on the definition, interpretation, and protection of property rights. The Conference also considered how property systems promote, drive, and shape the economies of different nations, as well as the relationship between property rights and the environment. Other Conference topics included a panel on the impact of a leading jurist, retired Supreme Court Justice Sandra Day O’Connor, on the jurisprudence of constitutionally protected property, a panel on the role of practitioners in property systems, and a roundtable on the future of property rights. Panelists included American and Chinese academics, judges, and practitioners. The overriding goal of the Conference was to promote understanding of the property rights systems of different nations. Without a doubt, the Conference provided that understanding and much more, highlighting the common attributes of property systems across complex societies and cultures.

In furtherance of the Conference’s goals, the Property Rights Project at William & Mary Law School will publish papers written for this and successive conferences in the Brigham-Kanner Property Rights Conference Journal. The purpose of this Conference Journal is not only to provide a forum for scholarly debate on property rights issues but also to extend that debate to a wider audience. The contributions of American and Chinese scholars and practitioners included in this inaugural volume are quite impressive and demonstrate how important property rights are in modern societies.
THE FIFTH AMENDMENT REQUIRES THE GOVERNMENT TO PAY AN OWNER INTEREST EQUAL TO WHAT THE OWNER COULD HAVE EARNED HAD THE GOVERNMENT PAID THE OWNER THE FAIR-MARKET VALUE OF THEIR PROPERTY ON THE DATE THE GOVERNMENT TOOK THE OWNER’S PROPERTY

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Summary  

In this article, we review how the Fifth Amendment, and the Supreme Court’s jurisprudence applying the Fifth Amendment, require the government to pay a property owner the full fair-market value of property the government has taken, together with interest in an amount sufficient to fairly and fully compensate the owner for the government’s delay in rendering the owner payment for that property which the government took.
The government must pay interest equal to the return an owner would have earned on the fair-market value of the property taken had the government actually paid the owner this money on the date the government took the owner’s property. The appropriate interest rate—just like the value of the property taken—must be established by reference to the market at the time of the taking.

The Constitution does not give the legislative or executive branch authority to statutorily limit the amount of interest (or any other component of “just compensation”) which the Fifth Amendment requires the government to pay an owner when the government takes private property. And the interest an owner is due cannot be established by reference to government bonds which, by definition, are a measure of the government’s cost of borrowing money—not a measure of the owners’ loss of use of the funds over the relevant period.

Some courts, including the Federal Circuit, have sought to establish a uniform and efficient method to determine the appropriate rate of interest an owner is due. These courts have established a rebuttable presumption that the Moody’s Composite Index is a reasonable measure of the appropriate rate of interest to compensate an owner for the government’s delay in rendering payment. By taking judicial notice of the Moody’s Index, courts spare property owners the burden of having to prove the appropriate interest rate in each case.

### INTRODUCTION

The Fifth Amendment to the United States Constitution declares: “[N]or shall private property be taken for public use, without just compensation.” But the government does not always comply with the Constitution. In many cases, the government takes private property and yet seeks to avoid its obligation to pay the owner. In other cases, the government takes an owner’s property but only offers to pay a small percentage of what the owner would have been paid had the owner sold their property on the open market.

When the government refuses to honor its constitutional obligation to pay “just compensation” for property the government has taken, the owner’s only recourse is to file a lawsuit asking a judge
to order the government to pay the owner “just compensation” for what
the government took.

But litigation is costly and takes years to resolve. It typically takes the
better part of a decade to finally resolve a Fifth Amendment inverse
condemnation lawsuit. Throughout the pendency of an inverse
condemnation lawsuit—from the date it took the owner’s property until it
finally renders payment—the government has had the use of both the
property and the money it should have paid the owner on the date it
took the property.

When the government takes property, the Fifth Amendment requires
that it pay the fair-market value of the property on the date of the
taking. The Fifth Amendment also requires the government to pay
compensation for the delay between the date of the taking and the date
that compensation is paid.

This article addresses two questions. First, who decides what rate
of interest is sufficient to compensate the owner for the government’s
delay in rendering the constitutionally mandated payment for that
property which the government took? And, second, what principles
establish the metric by which to determine whether an award of
interest is sufficient to satisfy the constitutional mandate that the
government must pay an owner “just compensation”?

A. The Task of Deciding What Amount of Money Is Sufficient to
Provide “Just Compensation” Falls Exclusively to the Judiciary

It is exclusively the province of the judicial branch to determine the
“just compensation” which an owner is due under the Fifth

46 Stat. 1421 (current version at 40 U.S.C. §3114 (2002)). These statutes apply to direct takings
by the government.

In inverse condemnation cases—such as takings pursuant to the National Trails System
Act, 16 U.S.C. § 1241 et seq.—the government does not provide the owner any notice the
government has taken the owner’s property. And the owner frequently does not learn the government
has taken their land until years later when the trail developer shows up with bulldozers to
construct a public rail-trail corridor across the owner’s land. See Mark F. (Thor) Hearne, II et al., The Trails Act: Railroading Property Owners and Taxpayers for More Than a Quarter Century, 45 REAL PROP., TR. & EST. L.J., 115 (2010). In the Trails Act and other federal “inverse condemnation” cases, the owner’s only recourse is to pursue an inverse condemnation claim in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. §1491 (2011).

In a “direct taking,” the government initiates the lawsuit and acknowledges its liability to
compensate the owner. But, when (as is frequently the case) the government only offers to pay a
portion of the value of the property the government has taken, the owner bears the burden of
having to defend the owner’s right to be paid compensation equal to the value of that
property the government took.
Amendment. This principle applies with equal force to a determination of compensation the government owes for the value of the property taken and the compensation the government owes because the owner lost use of these funds during the government’s delay in honoring its constitutional obligation to pay the owner.

Congress has no constitutional authority to pass any law inconsistent with the Fifth Amendment’s “just compensation” mandate. Similarly, the executive branch has been granted no constitutional authority to determine the compensation a property owner is due under the Fifth Amendment.

It follows from these principles that any rate of interest established by a statute passed by the legislature or an edict of an executive branch can only provide a “floor” and not a “ceiling” on the amount of interest an owner is due as compensation for the government’s delay in paying the owner.

Thus, statutory interest rates, such as those in the Declaration of Taking Act and the Contract Disputes Act (“CDA”), are of no authority to a court. The Declaration of Taking Act (“DTA”) rate—which is currently 0.09%—is also a woefully inadequate rate of interest by which to establish the compensation an owner is owed for the many years the owner lost the property and also lost use of the money the government should have paid him the day the government took the property.

This first issue has been settled since the very earliest Fifth Amendment cases when the Supreme Court declared it was exclusively the role of the judiciary to decide how much compensation an owner must be paid for property the government had taken. A declaration by the legislative or the executive branch seeking to limit the amount of compensation (whether interest or property value) to be paid the owner is not binding on the court making this determination.

And, when you think about it, this just makes sense. It would thoroughly undermine the Fifth Amendment if the legislature, as the body exercising the government’s power of eminent domain to take a citizen’s private property, could also set the compensation the owner would be paid. If this were so, Congress’ could pass a statute
declaring, “We condemn a designated owner’s property, and we authorize payment of one thousand dollars for acquisition of this property.” Should Congress’s declaration bind the court determining the just compensation which the Fifth Amendment requires, it would become no more than a matter of legislative grace. This is not what the Constitution provides. Nor is it consistent with the fundamental principle that the Fifth Amendment is “self-executing” and not dependent upon Congress’s legislative compensation.

B. The Compensation Owed an Owner for the Government’s Delay Is to Be Determined by Reference to an Appropriate Market-Rate That Measures the Likely Income an Owner Could Have Earned on These Funds Between the Date of Taking and the Date of Payment

The Supreme Court has declared that “just compensation” due an owner for a Fifth Amendment taking should be determined by reference to the objective market-based measure of the owner’s loss. “[W]e have recognized the need for a relatively objective working rule.” The Court therefore has employed the concept of fair-market value to determine the condemnee’s loss. Under this standard, the owner is entitled to receive “what a willing buyer would pay in cash to a willing seller at the time of the taking.”

Determining what an owner is due for the government’s delay in compensation is not substantially different from the manner in which courts determine the fair-market value of the property taken.

3. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979). The Court then quoted Justice Frankfurter’s opinion in Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) in which the Court earlier held:

The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker. Most things, however, have a general demand which gives them a value transferable from one owner to another. As opposed to such personal and variant standards as value to the particular owner whose property has been taken, this transferable value has an external validity which makes it a fair measure of public obligation to compensate the loss incurred by an owner as a result of the taking of his property for public use.

4. Id.
As noted above, the value of the property is determined by what a hypothetical willing buyer would pay in cash to a willing seller for the property at the time the property is taken. This amount is determined by looking to the market at the time of the taking to provide, as Justice Frankfurter explained, “external validity.” The owner’s loss of use of this principal amount should be similarly determined by reference to a market-based measure to determine the owner’s loss of the “time value” of the money the owner was due on the date of taking.

A number of courts have looked to the “prudent investor” rule as a guide to determine the return an owner would have realized had a reasonably prudent investor invested these funds on the date of the taking.

The Federal Circuit (and its predecessor Court of Claims) sought to avoid the burden of expense and litigating the proper rate of interest in each individual takings case. To avoid relitigating interest in each case, the Federal Circuit adopted a rebuttable presumption that the Moody’s Composite Index provides a reasonable measure of the interest an owner would have earned on the funds were they prudently invested during the relevant period.

Finally, the courts are in essentially unanimous agreement that when the delay between the date of taking and the date of payment is greater than one year, interest must be compounded to justly compensate the owner for losing the use of these funds.

I. THE FIFTH AMENDMENT IS A SELF-EXECUTING CONSTITUTIONAL GUARANTEE THAT PROPERTY OWNERS BE JUSTLY COMPENSATED FOR PROPERTY TAKEN BY THE GOVERNMENT

As soon as private property has been taken . . . the landowner has already suffered a constitutional violation, and “the self-executing character of the constitutional provision with respect to compensation,” is triggered. This Court has consistently recognized that the just compensation requirement in the Fifth Amendment is not precatory: once there is a “taking,” compensation must be awarded.5

In 1790, John Adams declared, “Property must be secured, or liberty cannot exist.” This principle underlies the Fifth Amendment’s Takings Clause, which provides that “private property [cannot] be taken for public use without just compensation.”

Though this provision of the Fifth Amendment is often said to protect “property rights,” that is something of a misnomer. The Supreme Court noted:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

The Fifth Amendment’s guarantee that a property owner will be justly compensated does not exist by legislative grace. Rather, an owner’s right to “just compensation” after a taking (and the corollary obligation of the government to fully and justly compensate the owner for what it has taken) is a self-executing constitutional principle.

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7. U.S. CONST. amend. V.

[Inverse condemnation] suits [are] based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the amendment. The suits were thus founded upon the Constitution of the United States.9

The government takes property when it directly appropriates title and possession of an owner’s property or when the government redefines the owner’s right to use and possess their property.10 The Supreme Court has “traditionally recognized the special need for certainty and predictability where land titles are concerned.”

9. Jacobs v. United States, 290 U.S. 13, 16 (1933). In First English, the Court held:
   We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of “the self-executing character of the constitutional provision with respect to compensation” . . . . As noted in Justice Brennan’s dissent in San Diego Gas & Electric Co., it has been established at least since Jacobs that claims for just compensation are grounded in the Constitution itself . . . . Jacobs v. United States, moreover, does not stand alone, for the Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

First English, 482 U.S. at 315–16 (numerous citations omitted).

The Court similarly held that “[w]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” Id. at 321; see also Hendler v. United States, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (citing Jacobs, 290 U.S. 13) (“Since the suit was based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity.”).

10. See, e.g., Preseault v. Interstate Commerce Comm’n, 494 U.S. 1, 8 (1990) (declaring that the National Trails System Act gives rise to a compensable per se taking by destroying the owner’s “reversionary” right to regain unencumbered use, title, and possession of their land); see also Louisiana v. Garfield, 211 U.S. 70, 76 (1908); Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196, 207–08 (1886); Doolittle’s Lessee v. Bryan, 55 U.S. 563, 567 (1852). Following Preseault, the Federal Circuit has declared the National Trails System Act to be a per se taking in this manner. See, e.g., Preseault v. United States, 100 F.3d 1525, 1531 (Fed. Cir. 1996); Ladd v. United States, 630 F.3d 1015 (Fed. Cir. 2010); Hash v. United States, 403 F.3d 1308 (Fed. Cir. 2005); Ellamae Phillips Co. v. United States, 564 F.3d 1367 (Fed. Cir. 2009).
and said it is unwilling “to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.”

Whenever the government takes private property, it is doing so by an exercise of its sovereign power of eminent domain. Only the government possesses the ability to force an unwilling property owner to surrender title to their property. Many owners would rather keep their property and would not sell at any price. A celebrated example is Susette Kelo, the eponymous landowner whose home was taken by the government for the benefit of a private corporation, giving rise to *Kelo v. City of New London, Connecticut*.

When the government acts by eminent domain, an owner’s only recourse is “just compensation” as guaranteed by the Fifth Amendment. Because the government’s obligation to justly compensate the owner is the only limitation upon its power of eminent domain, that obligation must be meaningfully enforced. The principles vindicated by the constitutional guarantee of “just compensation” are of fundamental importance not just to the owners whose land has been taken, but to every citizen.

II. THE FIFTH AMENDMENT GUARANTEES A PROPERTY OWNER COMPENSATION THAT “MUST BE A FULL AND PERFECT EQUIVALENT” OF THE VALUE OF THE TAKEN PROPERTY

The concept of just compensation is comprehensive, and includes all elements, “and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.” The owner is not limited to the value of the property at the time of the taking; “he is entitled to such addition as will

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11. Leo Sheep Co. v. United States, 440 U.S. 668, 687–88 (1979); see also Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1012 (1984) (“If Congress can ‘pre-empt’ state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. . . . [A] sovereign, by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent”); *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) (“[A] State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court.”).

12. The government has the ability to exercise its eminent domain authority on behalf of the private interests. The extent to which the government should delegate its extraordinary eminent domain power to private interests remains a highly controversial issue.

produce the full equivalent of that value paid contemporaneously with the taking.” Interest at a proper rate “is a good measure by which to ascertain the amount so to be added.”

The Supreme Court explained that:

[T]he language used in the Fifth Amendment . . . is happily chosen. . . . The noun “compensation,” standing by itself, carries the idea of an equivalent. . . . If the adjective “just” had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective “just.” There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken.

A landowner has been justly compensated only when the government pays the owner an amount sufficient to put him in “as good position pecuniarily as he would have occupied if his property had not been taken.”

In Monongahela, the federal government instituted proceedings to acquire an “upper lock and dam” previously owned by the Monongahela Navigation Company. The parties disputed the value of the dam, and the federal government argued that it should not be required to compensate Monongahela for the value of the tolls that it collected when it owned the dam. The Supreme Court disagreed, holding that private property should not be appropriated “unless a full and exact equivalent for it be returned to the owner.” Only after the owner has been compensated for the “true value” of his property can “it be said that just compensation for the property has been made.” This was true even if the United States had been


16. United States v. Miller, 317 U.S. 369, 373 (1943); see also Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984) (holding that courts should “ensure that [the property owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.”).


18. Id. at 326.

19. Id. at 337.
empowered under the Commerce Clause to perform the taking, because “the power to regulate commerce is subject to all the limitations imposed by [the Constitution] . . . and among them is that of the fifth amendment.”

The government must also compensate a property owner for any delay in the payment of “just compensation.”

In *Seaboard Air Line Railway Co. v. United States*, 261 U.S. 299 (1923), the federal government took possession of 2.6 acres of land in South Carolina owned by the Seaboard Railway Line. Seaboard filed suit against the government, and succeeded, including an award of interest on its compensation claim. The court of appeals overturned the interest award, holding that it was improper because the statute authorizing the taking made no provision for interest. The Fourth Circuit denied interest because, in its view, interest cannot be recovered against the federal government absent an express waiver of sovereign immunity.

The Supreme Court disagreed. Instead, it held, citing *Monongahela*, that a landowner is “entitled [to] the full and perfect equivalent of the property taken.” Just compensation must put the property owner “in as good position pecuniarily as he would have been if his property had not been taken.” As such, just compensation is “comprehensive and includes all elements and no specific command to include interest

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20. *Id.* at 336.
21. *See Jacobs*, 290 U.S. at 16–17 (“The concept of just compensation is comprehensive, and includes all elements, and no specific command to include interest is necessary when interest or its equivalent is a part of such compensation.”); *see also Miller*, 317 U.S. at 381 (holding that the government’s failure to render immediate compensation requires the government to pay “interest on a larger sum from date of taking to final award”); *Seaboard Air Line*, 261 U.S. at 306 (holding that interest is “necessary in order that the owner shall not suffer loss and shall have ‘just compensation’ to which he is entitled”); *Schneider v. County of San Diego*, 285 F.3d 784, 791 (9th Cir. 2002) (“[J]ust compensation’ in the constitutional sense, has been held, absent a settlement between the parties, to be fair market value at the time of the taking plus ‘interest’ from that date to the date of the payment.”).
24. *Id.; see also Kirby Forest*, 467 U.S. at 10 (holding that courts should “ensure that [the property owner] is placed in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation”); *Miller*, 317 U.S. at 373; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 52 (1928); *United States v. New River Collieries Co.*, 262 U.S. 341, 344 (1923).
is necessary when interest or its equivalent is a part of such compensation." An owner is "not limited to the value of the property at the time of the taking," but instead is "entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking." A fair rate of interest for the period between taking and payment, said the Court, "is a good measure by which to ascertain the amount so to be added." Thus, a fair rate of interest must be paid to render "just compensation" to the owner, and because this obligation is inherent in the Fifth Amendment, Congress need not expressly waive sovereign immunity for payment to be made.

In Jacobs, the federal government built a dam that flooded the Jacobs’s property. The Fifth Circuit held the government owed compensation, but overruled the trial court’s decision awarding interest. The Fifth Circuit reasoned that since a Fifth Amendment taking case was founded upon an implied contract with the United States, interest could not be awarded because Congress had not waived sovereign immunity.

The Supreme Court rejected the Fifth Circuit’s reasoning and reversed its holding. Instead, it declared that the Fifth Amendment entitles property owners to “just compensation, not inadequate compensation.” This right is not founded on a theory of implied contract, but instead, upon the Constitution and, in particular, the Fifth Amendment. The Court found the Fifth Amendment’s guarantee of


26. *Seaboard Air Line*, 261 U.S. at 304; *Boston Sand & Gravel*, 278 U.S. at 52; *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123 (1924); *United States v. Klamath & Modoc Tribes*, 304 U.S. 119, 123 (1938) (“The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.”); *Blackfeet & Gros Ventre Tribes of Indians v. United States*, 119 F. Supp. 161, 164 (Ct. Cl. 1954).

When the taking precedes the payment of compensation, the right to interest as an element of just compensation under the Fifth Amendment is inseparable from the claim for the principal value of the land—they arise at the same time—from the same source—each being a component part of just compensation.

27. *Id.* The Supreme Court allowed the trial court’s award of interest at the rate set by the state of South Carolina to stand. *Id.* The rate of interest was not specifically challenged in *Jacobs*.

28. See *Jacobs*, 290 U.S. at 15.

29. *Id.* at 16 (citing *United States v. N. Am. Transp. & Trading Co.*, 253 U.S. 330 (1920)).

30. *Id.*

31. *Id.*
“just compensation” “comprehensive,” encompassing “all elements” of compensation, including interest. As in Seaboard, the Supreme Court overturned the court of appeals and restored the award of interest to the property owners in Jacobs.

Monongahela, Seaboard, and Jacobs conclusively establish that an appropriate and adequate amount of interest is not added to “just compensation,” but is instead an essential component of “just compensation” in itself. Lower courts have been following the guidance laid down in these cases ever since.

Courts have increasingly held that awarding compound interest is appropriate in inverse condemnation claims. The first reason for this is that courts recognize the long delay required to determine liability in inverse condemnation cases. Direct condemnation proceedings—where the government openly declares its intention to take land—are distinguishable from inverse condemnation proceedings, where a plaintiff must file a lawsuit to “recover the value of property which has been taken in fact” by the government. The Supreme Court has recognized “important legal and practical differences between an inverse condemnation suit and a condemnation proceeding.” A direct condemnation proceeding is “commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain.” It requires “affirmative action on the part of the condemning authority.” Thus, compensation in a direct taking is based on a relatively current valuation of the

32. Id. at 16–17.
33. See, e.g., Tulare Lake Basin Water Storage Dist. v. United States, 61 Fed. Cl. 624, 627 (2004) (“Just compensation . . . requires that the owner of the property be compensated not only for the value of the property on the date of the taking, but also for any delay in payment of that amount.”) (citing NRG Co. v. United States, 31 Fed. Cl. 659, 664 (1994)); see also Shosone Tribe of Indians v. United States, 299 U.S. at 497 (“Given such a taking, the right of interest or a fair equivalent, attaches itself automatically to the right to an award of damages.”); United States v. 429.59 Acres of Land, 612 F.2d 459, 464 (9th Cir. 1980) (holding that “[t]he payment of interest on deficiency awards in condemnation cases is designed to satisfy the constitutional standard of just compensation”); Formanek v. United States, 26 Cl. Ct. 332, 341 n.11 (1992) (“It is well established that plaintiff, as an owner of property taken by the Government pursuant to the Fifth Amendment, is entitled to interest computed from the date of the taking to the date of payment by defendant.”).
34. See Clarke, 445 U.S. at 257 (quoting D. Hagman, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 328 (1971)).
35. Id. at 255.
36. Id.
37. Id. at 257.
affected property. Moreover, a direct condemnation is less expensive to litigate, and the owner is paid more promptly than an inverse condemnation taking.

On the other hand, if the government refuses to compensate a property owner who must bring an inverse condemnation case for redress, the government necessarily shifts the burden to the landowner to “discover the encroachment and to take affirmative action to recover just compensation.” Because a taking is no less a taking simply because the government denies it occurred, a landowner “is entitled to bring [] an [inverse condemnation] action as a result of ‘the self-executing character of the constitutional provision with respect to compensation. . . .’” Inverse condemnation lawsuits are substantially more costly and burdensome than direct condemnation action.

For example, in Pete v. United States, one court explained the complexity of inverse condemnation proceedings. First, a successful plaintiff must “institute an action and establish the fact of a taking” over the government’s objection. It is only after a taking is successfully established that the “plaintiff can advance to the quantum stage to determine the value of the property for purposes of compensation.” As such, it is “inevitable that the successful plaintiff in the two-step inverse condemnation action will be forced to pay greater litigation expenses than would have been necessary if the federal agency had properly performed its function and condemned the property in question.” The length and burden of this procedure further justify compensating property owners for the loss of the value of their property.

38. See id. at 258.
39. Clarke, 445 U.S. at 257; United States v. Dickinson, 331 U.S. 745, 747–48 (1947) (“The Government could, of course, have taken appropriate proceedings, to condemn as early as it chose, both land and flowage easements. . . . The Government chose not to do so. It left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in the process of acquisition. . . . when the fact of taking could no longer be in controversy.”).
40. Clarke, 445 U.S. at 257 (quoting 6 P. Nichols, EMINENT DOMAIN 25.41 (3d rev. ed. 1972)); see also Kirby Forest, 467 U.S. at 5 (owners have a right to bring an “inverse condemnation” suit); and First English, 482 U.S. at 304 (“[W]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.”).
42. Id. at 568.
43. Id.
44. Id.
III. THE LEGISLATURE HAS NO AUTHORITY TO LIMIT THE
RATE OR AMOUNT OF INTEREST TO BE PAID AN OWNER

The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be or to prescribe any binding rule in that regard.45

Congress cannot limit the rate of interest necessary to provide a property owner full and just compensation. Instead, it is the courts’ exclusive province to determine the amount of interest necessary to “produce the full equivalent of that value paid contemporaneously with the taking.”46

From the earliest days of its Fifth Amendment jurisprudence, the Supreme Court has declared that determining the appropriate amount of “just compensation,” including interest, to be the exclusive task of a court—and not the executive or legislative branch. In Monongahela, the Supreme Court explained that “[t]he right of the legislature of the state by law to apply the property of the citizen to the public use, and then to constitute itself the judge of its own case, to determine what is the ‘just compensation’ it ought to pay therefor . . . cannot for a moment be admitted or tolerated under our constitution.”47 This is a foundational tenet of Fifth Amendment jurisprudence:

[C]ongress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.48

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45. New River Collieries, 262 U.S. at 343–44.
46. Seaboard Air Line, 261 U.S. at 306.
47. Monongahela, 148 U.S. at 327–28 (quoting Isom v. Miss. Cent. R. Co., 36 Miss. 300 (1858)).
48. Id. at 327 (emphasis added).
In *Jacobs*, the Court later emphasized that “the right to just compensation could not be taken away by statute or be qualified by the omission of a provision for interest where such allowance was appropriate in order to make the compensation adequate.” As a result, it is clear that “[i]t does not rest with Congress to say what compensation shall be paid or even what shall be the rule of compensation.”

Modern courts adhere to this principle. For example, the Federal and Ninth Circuits have both recently confirmed that “[c]onsideration of land taking claims is clearly the role of the judiciary according to the Constitution . . . [and] ascertainment of ‘just compensation’ is a judicial function.”

49. *Jacobs*, 290 U.S. at 17; see also *Phelps v. United States*, 274 U.S. 341 (1927) (holding that judgment in 1926 for the value of the use of property in 1918, without more, was not sufficient to constitute just compensation); Langenegger v. United States, 756 F.2d 1565, 1569 (Fed. Cir. 1985) (citing *New River Collieries* (“Consideration of land taking claims is clearly the role of the judiciary according to the Constitution, Amendment V, and ascertainment of ‘just compensation’ is a judicial function.”); Tektronix, Inc. v. United States, 552 F.2d 343, 354 (Ct. Cl. 1977) (citing *Ark. Valley Ry. v. United States*, 68 F. Supp. 727, 730 (Ct. Cl. 1946) (confirming that “determination of fifth amendment compensation is exclusively a judicial function”)); Verrochi v. Commonwealth, 477 N.E.2d 366, 369 (Mass. 1985) (citing *Miller* for the proposition that determination of the proper rate of interest is a judicial function).

50. *Miller v. United States*, 620 F.2d 812, 839 (Ct. Cl. 1980); see also *Jacobs*, 290 U.S. at 17 (citing *Monongahela*, 148 U.S. at 327 (“It does not rest with the public, taking the property, through congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.”)); *Seaboard Air Line*, 261 U.S. at 306 (“It is obvious that the owner’s right to just compensation cannot be made to depend upon state statutory provisions.”); *Schneider*, 285 F.3d at 794 (“We conclude, therefore, that because the just compensation remedy for a taking is constitutional in nature and thus a matter of judicial—not legislative—function, the statutory vehicle for providing that remedy is not determinative of the remedy itself.”); Tektronix, 552 F.2d at 353 (“Though Congress has from time to time established by statute the rate of interest for delayed compensation in certain situations and geographic areas, the norm is for the court to be without explicit statutory guidance in setting the interest rate.”) (Bennett, J., concurring); United States v. United Drill & Tool Corp., 81 F. Supp. 171, 172 (D. D.C. 1948) (“The Court of Claims was correct in reaching the conclusion that an approach to the market rate of interest was the proper measure of damages rather than using the analogy of statutory interest.”); *Ark. Valley*, 68 F. Supp. at 730 (refusing to adopt legal rate of interest established by the State of Kansas because “determination of just compensation under the Fifth Amendment is exclusively a judicial function” and thus “it is for the court to fix upon the rate that it will allow”); United States v. 677.50 Acres of Land in Marion Cnty., Kan., 239 F. Supp. 318, 322 (D. Kan. 1965) (“The landowner is entitled to his day in court, and the ascertainment of the amount to satisfy the constitutional requirement of just compensation is established by judicial inquiry under judicially determined rules of compensation.”).

51. Langenegger, 756 F.2d at 1569; *Schneider*, 285 F.3d at 794.
Because it is the exclusive role of the Court—and not the legislature—to determine the correct amount of just compensation, statutory interest rates can only set a “floor” on the amount of interest to be paid, and certainly cannot limit the government’s interest obligation. This is true even in direct taking cases. The rule is consistent with a long line of cases providing that a statutory enactment “prescribes a floor below which protections may not fall, rather than a ceiling beyond which they may not rise.” Thus, even if Congress adopts a statutory rate of interest, that rate must be independently reviewed to ensure that for any specific case, it is “reasonable and judicially acceptable” as one that fully compensates the owner.

IV. USING A STATUTORY INTEREST RATE TO ACHIEVE AN EFFICIENT AND UNIFORM RESOLUTION IS SUBORDINATE TO THE CONSTITUTIONAL REQUIREMENT OF JUSTLY COMPENSATING THE OWNER

The constitutional mandate in any Fifth Amendment taking case is that the owner be paid the fair-market value of that property which the government took, together with “such addition as will produce the full equivalent of that value paid contemporaneously with the taking.” Some courts have also expressed a “strong judicial policy

52. See Miller v. United States, 620 F.2d 812, 839 (Ct. Cl. 1980) (explaining that the Declaration of Taking Act sets a “[six] percent as a floor on the rate of interest, and the rate of interest actually awarded may rise depending on the economic conditions occurring after the taking”); United States v. 50.50 Acres of Land, 931 F.2d 1349, 1355 (9th Cir. 1991), citing Blankinship, 543 F.2d at 1275 (holding that the interest rate employed by Congress “cannot be viewed as a ceiling on the rate of interest allowable” but instead as a “floor”); Kirby Forest, 467 U.S. at 11 (noting that the federal government previously “acquiesced” in several decisions by the federal courts of appeal holding that the six percent rate of interest prescribed by Declaration of Taking Act was not a “ceiling” on the amount that “can and must be paid by the Government”); Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty., Md., 706 F.2d 1312, 1322 (4th Cir. 1983) (United States “conceding” that Declaration of Taking Act sets a floor in compensation cases); United States v. 329.73 Acres of Land, Situated in Grenada and Yalobusha Counties, Miss., 704 F.2d 800, 812 (5th Cir. 1983) (“We agree with the decisions of other federal appellate courts that the 6% delay damages provided by the Declaration of Taking Act [citation omitted], and by other federal condemnation statutes, sets a floor, rather than a ceiling, on the rate of interest payable on the deficiency.”); and Verrochi, 477 N.E.2d at 370 (collecting cases).


54. See Miller, 620 F.2d at 837. Because this is the case, the statutory rate must be independently reviewed even in cases where the DTA is specifically invoked, because there may be factual circumstances under which the statutory rate does not fully compensate plaintiffs.

in favor of the establishment of a uniform rate of interest . . . to avoid discrimination among litigants." But, the desire for uniformity is subordinate to the primary obligation to provide the owner a full measure of compensation.

Establishing a “uniform rate of interest,” however, has been a challenge easier said than done. Courts have adopted a myriad of “uniform” interest rates in pursuit of “uniform” results, including: statutory pre-judgment interest rates; the prime rate; the Internal Revenue Code’s tax-overpayment rate; the Contracts Disputes Act rate; the Declaration of Takings Act rate (which was originally 6% and is now indexed to the 52-week United States Treasury Bill) and the Moody’s Index of Long-Term Corporate Bonds. While each of these rates is a readily available benchmark interest rate, taken together they demonstrate just how difficult uniformity has been to achieve.

A. Statutory Pre-Judgment Interest Rates

For instance, the United States Supreme Court has upheld interest awards calculated at rates equal to those adopted by the state where the taking occurred for pre-judgment interest. In Seaboard, the Supreme Court reinstated and endorsed the trial court’s decision to award interest at South Carolina’s statutory pre-judgment interest rate, calling it a “palpably fair and reasonable method of performing the indispensible condition to the exercise of the right of eminent domain . . . .” The advantage of the South Carolina statutory interest rate was not challenged or considered in Seaboard. The use of a state’s statutory pre-judgment interest rate continues to find favor in many state courts. Compensating owners by a statutory rate,
however, seems to run counter to the Supreme Court’s teaching that it is for the courts, not legislatures, to determine just compensation.

B. The Tax-Overpayment Rate

The Federal Circuit has upheld at least one interest award based on the tax overpayment rate set forth in 26 U.S.C. § 6621(b). The use of the tax overpayment rate has not been widely adopted, and was recently criticized by one judge because, in some cases (in particular, those years where the investment climate is positive), it may “understate[] somewhat the interest owed.”

C. The Contract Disputes Rate

Some courts have used the interest rate provided in the federal Contract Disputes Act to compensate inverse condemnation claims, on the theory that inverse condemnation takings are akin to an implied lease or similar contract. During the early 1980s, the Court of Federal Claims more commonly used the Contract Disputes Act rate to calculate interest in a number of cases, but its application appeared to have fallen off in recent years. The court’s articulated determine and apply its own version of the reasonable economic rate, the results in each case would differ depending upon the evidence put forward by each party and the conclusions of each individual trier of fact”); State ex rel. Dept. of Transp. v. Penn Cent. Corp., 511 A.2d 382, 384 (Del. Super. 1986) (In Delaware, “[a]wards in condemnation proceedings carry the same rate which applies to judgments generally.”); Waukegan Port Dist. v. Kyritzis, 471 N.E.2d 217, 219 (Ill. App. 1984) (holding that Illinois claimant was entitled to statutory rate of interest in most eminent domain proceedings); Herman v. City of Wichita, 612 P.2d 588, 593 (Kan. 1980) (concluding that in inverse condemnation cases, courts should award legal rate of six percent under Kansas law); see also Struble v. Elkhart Cnty. Park and Recreation Bd., 373 N.E.2d 906, 909 (Ind. App. 1978) (legal rate of interest satisfies constitution so long as it is “not so unreasonably low as to deprive the landowner of just compensation”). These cases intimate a rebuttable presumption that use of a statutory pre-judgment interest rate is reasonable unless the owner can prove it is “unreasonably low.”

63. See Dynamics Corp. of Am. v. United States, 766 F.2d 518, 519 (Fed. Cir. 1985); Bendix Corp. v. United States, 676 F.2d 606, 616 (Ct. Cl. 1982); see also E. Minerals Int’l, Inc. v. United States, 39 Fed. Cl. 621, 631 n.13 (1997), rev’d and remanded on other grounds, Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001).


65. None of the courts that have applied the Contract Disputes Act rate have analyzed the question in light of the Supreme Court’s decision in Jacobs in which it determined that a Fifth Amendment taking should not be equated to an implied contract. See infra Part IV.C.

policy for using this rate was that it was “uniform” and fostered “judicial efficiency.” Then, in 2010, the Court of Federal Claims revived the Contract Dispute Act rate in a case involving the federal government’s use of certain private property near the U.S.–Mexico border.67 In *Otay Mesa*, the federal government had placed several seismic sensors on the plaintiffs’ property that were designed to assist policing the border. Finding that a taking had occurred and that interest was owed, the court concluded that the Contract Dispute Act rate best compensated the plaintiffs because “[i]f the Border Patrol originally had entered into a lease with Plaintiffs for the placement of sensors on the five parcels, such a lease would have been a binding contract.”68 From this, the court concluded the Contract Dispute Act rate of interest was “best suited to compensate Plaintiffs . . . on what should have been a contractual arrangement.”69

**D. The Prime Rate**

A few cases in the Court of Federal Claims have adopted the prime rate, the lowest short-term interest rate set by the Federal Reserve on financial depositories’ borrowing and lending funds overnight.70 No court has meaningfully analyzed the use of this rate as the basis to calculate “just compensation” for a Fifth Amendment taking. This rate appears to be inadequate as a measure of “just compensation,” however, because the “prime rate” does not reflect a true market-based rate determined from the perspective of an owner who has waited years for compensation. Indeed, we explain more fully below why any rate tied to a treasury instrument understates the proper rate of interest because, by definition, such a rate is a measure of the federal government’s cost to borrow money over the relevant term. As such, it does not measure the owner’s use of the principal during this period.

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67. See *Otay Mesa*, 93 Fed. Cl. at 491.
68. Id.
69. Id.
70. *Brunswick*, 36 Fed. Cl. at 219; see also *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 939 F.2d 1540, 1545 (1991) (upholding special master’s decision that plaintiff should obtain interest at the prime rate as not clearly erroneous).
E. The Declaration of Takings Act Rate

Some courts have calculated interest using the statutory interest rate provided in the Declaration of Takings Act, a statute enacted by Congress to apply in direct condemnation cases.\textsuperscript{71} When passed, the Declaration of Takings Act provided for interest at a fixed annual rate of 6%, but since Congress amended the DTA, it now provides for interest at the 52-Week T-Bill rate.\textsuperscript{72}

Use of this rate has been justified on the basis that Congress “considered [the issue of just compensation] in an analogous context” and thus “the court, when determining how to meet its own obligations, certainly cannot be barred from considering and applying the lessons that Congress has learned from its own study of the just compensation issue.”\textsuperscript{73}

But using the Declaration of Takings Act rate to establish compensation seems particularly inappropriate to compensate property owners who have been forced to pursue compensation through inverse condemnation. By its own terms and legislative history, the Declaration of Taking Act was expressly intended to apply only to direct takings\textsuperscript{74} where “payment is expected to follow quickly from the taking, rather than in situations where, as here, a significant amount of time has elapsed between the taking of the property and the payment of just compensation.”\textsuperscript{75} Congress simply never contemplated that the Declaration of Taking Act would apply in situations where “a significant amount of time has elapsed between the taking of the property and the payment of just compensation.”\textsuperscript{76}

The implied assumption for applying the Declaration of Takings Act rate to inverse condemnation claims is that the landowner, on the day of the taking, would have invested the fair-market value of

\textsuperscript{72} The Board of Governors of the Federal Reserve System changed the name of the “52-Week T-Bill” to the “average one-year constant maturity Treasury yield.” For convenience, we use the historical “52-Week T-Bill” designation.
\textsuperscript{73} Id. at 669.
\textsuperscript{74} There are substantial differences between a “direct taking” and inverse condemnation actions. See Pete v. United States, 569 F.2d 565, 568–69 (Ct. Cl. 1978); United States v. Clarke, 445 U.S. 253, 257. These differences mean owners are bringing protracted litigation before they are fully compensated.
\textsuperscript{75} Tulare Lake, 61 Fed. Cl. at 629–30.
\textsuperscript{76} Id.
his property in exclusively 52-Week T-bills, then rolled them over on the anniversary of the taking each year. In doing so, the owner (a) receives little interest, (b) no access to the principal; and, (c) zero diversification\textsuperscript{77} in one of the lowest possible yielding investments.

Such an “investment” strategy is contrary to every known tenet of the Prudent Investor Rule and Modern Portfolio Theory, discussed further below. Indeed, if a fiduciary for an Employee Retirement Income Security Act (“ERISA”) fund managed funds by investing them in a portfolio exclusively in 52-Week T-bills for eight years, that fiduciary may have violated federal law, and be subject to federal civil and criminal prosecution.\textsuperscript{78}

Moreover, the Declaration of Takings Act rate is flawed because it “contemplates an award of just compensation from the perspective of the government’s cost of borrowing rather than from the perspective of the claimant’s rate of return.”\textsuperscript{79} Using the government’s cost of borrowing money to establish the compensation due an owner violates Justice Holmes’s admonition that when determining the appropriate “just compensation” the government owes an owner, “the question is, What has the owner lost? not, What has the taker gained?”\textsuperscript{80}

\textsuperscript{77} The lack of diversification alone disqualifies the 52-Week T-bill as a valid proxy for the return a prudent investor would have obtained over eight years. The Library of Congress Federal Research Division prepared a study at the request of the federal Security and Exchange Commission which concluded, “Inadequate portfolio diversification, for example, violates the principles of best practice set out in Modern Portfolio Theory, which Nobel Prize-winning economist Harry Markowitz developed in the 1950s.” See \textit{Library of Congress Federal Research Division, Behavioral Patterns and Pitfalls of U.S. Investors (2010), available at http://www.sec.gov/investor/locinvestorbehaviorreport.pdf}.

\textsuperscript{78} The Uniform Prudent Investor Act (“UPIA”) expressly incorporates the concept of diversification in prudent investing. As a comment to the UPIA explains:

The 1992 Restatement of Trusts takes the significant step of integrating the diversification requirement into the concept of prudent investing. Section 227(b) of the 1992 Restatement treats diversification as one of the fundamental elements of prudent investing, replacing the separate section 228 of the Restatement of Trusts 2d. The message of the 1992 Restatement . . . is that prudent investing ordinarily requires diversification.


Congress has also adopted the prudent investor rule to govern investment advisors that run pension funds governed by ERISA. See 29 U.S.C. §§ 1104(a)(1)(b) and (c).

\textsuperscript{79} \textit{Tulare Lake}, 61 Fed. Cl. at 629–30.

\textsuperscript{80} Boston Chamber of Commerce v. City of Boston, 217 U.S. 189, 195 (1910); see also United States v. Causby, 328 U.S. 256, 261 (1946) (“It is the owner’s loss, not the taker’s gain, which is the measure of the value of the property taken.”); Pitcairn v. United States, 547 F.2d 1106, 1122 (“The yield on a series of hypothetical Government bonds is not relevant in
From the owner's perspective—the only perspective that constitutionally counts—an unliquidated inverse condemnation claim against the federal government is quite different from an investment in a government bond. This is so because “[y]ou can hold a bill until it matures or sell it before it matures” and “[w]hen the bill matures, you would be paid its face value. . . . Your interest is the face value minus the purchase price.”

On the other hand, a landowner with a Fifth Amendment claim against the government earns no interest during the pendency of the litigation and cannot sell their right to compensation. The landowner is an unwilling captive creditor, whose damages are compounded by the risk of either not succeeding on his claim, or having to wait up to a decade to do so. As such, the 52-Week T-bill inadequately compensates an owner for being “an involuntary lender to a debtor he would often prefer not to have.”

The 52-Week T-bill rate also fails to compensate a property owner for his loss of liquidity. The Ninth Circuit noted this point explicitly: “[T]he marketability of a claim against the United States for a deficiency under the Declaration of Taking Act is considerably less than that of a marketable public debt security of the United States. Some allowance for this feature by the trier of fact is not unreasonable.”

Nevertheless, the ease of applying the Declaration of Takings Act rate remains a strong enticement for its adoption in inverse condemnation actions. Judge Firestone, a highly respected member of the

ascertaining the injury plaintiff has suffered. It measures compensation only according to the point of view of the taker without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can.”); Miller, 620 F.2d at 839 (“The Government, not the unwilling condemnee, should be the one to bear the risk of any fluctuations in interest rates.”).


82. See 31 U.S.C. § 3727, which prohibits the holder of a claim against the government from selling this claim.

83. [O]ne whose land was forcibly taken by a public agency on the basis of a deficient cash deposit is no "prudent investor" who has evaluated the risk and benefits of extending credit to the government for the balance due. Rather, he is an involuntary lender to a debtor he would often prefer not to have. For this reason, the risk of any difference between the rates the government would normally pay, and those the condemnee could have achieved by prudent participation in the broader market, should fall on the former.


84. Tulare Lake, 61 Fed. Cl. at 630.

85. Blankinship, 543 F.2d at 1277.
Court of Federal Claims, recently considered this issue in *Textainer*, involving the owner of shipping containers that were leased to the U.S. Army by a third party. The owner brought an action seeking compensation for a Fifth Amendment taking, alleging that the Army lost some of those shipping containers. Judge Firestone considered the “measure of interest” the government would owe should it be found liable for the taking. The owner asked Judge Firestone to “measure the ‘the actual economic harm’ . . . by calculating the estimated income that the [container owner] would have earned by leasing the containers during the relevant period.” It argued that the compensation for the Army’s delay should be “[c]alculat[ed by] the estimated income earned by an owner/operator of a 20’ container during the time period 2005 to 2010.” This method, it was claimed, justified “an effective interest rate of 10.39%.”

On this record, Judge Firestone concluded that “the plaintiff’s theory of interest is not based on the prudent investor rule, but is based on a misconception regarding the purpose of interest as part of just compensation in a takings case.” She continued, and correctly explained, “interest is compensation for the lost use of the *takings award* between the date of the taking and the date of the payment. The plaintiffs’ theory of interest, however, seeks compensation, in effect, for the lost use of the *taken property* during the period. In essence, the plaintiffs seek rental payment for the containers in addition to the [buyout value of the containers].” This Court concluded such a rate would be “an impermissible windfall for the plaintiffs.”

The property owner having provided Judge Firestone with no meaningful alternative means for calculating interest, and having offered no evidence showing why the Declaration of Takings rate (or any other rate) would not provide just compensation, Judge Firestone concluded that “absent special proof, the statutorily-set rate in the DTA shall apply.”

86. *Id.* at 213.
87. *Id.* at 221.
89. *Id.* at 221.
90. *Id.* at 222.
91. *Id.* (emphasis in original).
92. In reaching this holding, Judge Firestone held that “the plaintiffs have presented no evidence supporting the application of the Moody’s Corporate Bond Index rate in this case.” The Moody’s rate—discussed further below—was adopted by several Federal Circuit cases.
Notwithstanding the *Textainer* plaintiff's failure of proof, courts that employ the Declaration of Taking Act rate to determine just compensation in inverse condemnation cases are using a standard that inherently fails to provide inverse condemnation claimants with just compensation. Inverse condemnation claims initiated by property owners are, by their very nature, a different animal than direct condemnation claims initiated by the government. In short, judicial adoption of the Declaration of Taking Act rate converts Congress's more defensible intention to justly compensate property owners subject to direct condemnations into a constitutionally suspect effort to minimize its obligation to justly compensate inverse condemnation complainants as well. As such, the Declaration of Takings Act rate, if applied as a ceiling on "just compensation," violates the Fifth Amendment and is no more constitutionally defensible than if Congress had passed a law declaring that it would pay no more than ten dollars an acre for land it has taken.

For most of the past decade the 52-Week Treasury bond rate has been dropping to essentially zero. This is an essentially nugatory rate which, as a factual matter, fails to satisfy the constitutional standard of providing "just compensation." The *Wall Street Journal* recently noted, "the 10-year Treasury yield is low and unattractive as it runs below the US inflation rate."93 This is a "negative yield" in which the yield on the bond is less than the rate of inflation. As such, an investor acquiring and holding such an investment to term is actually paying the government to take their money. The current 10-Year Treasury yield is at a historic low last seen in February 1946.94 The yield on a 52-Week Treasury bond is much lower than the 10-Year Treasury bond. The present 52-week Treasury rate is 0.17%.95

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94. *Id.*

comparison, the current Moody’s AAA rate is 3.67%. And, there is no indication that interest rates of essentially zero will not continue for the immediate future. Again, the Wall Street Journal reports, “The Fed has said since January that it plans to keep short-term interest rates at ‘exceptionally low levels’ at least through late 2014 and it didn’t alter that language. The central bank has held short-term rates near zero since December 2008 . . . .”

To determine “just compensation” using such essentially nominal interest rates when the owner could have earned a substantially higher rate of return on equally secure corporate bonds is to deny the owner compensation equal to what the owner could have reasonably received on the funds had the government paid him the money it owned him on the date the government took his property.

V. SEVERAL MODERN COURTS USE THE “PRUDENT INVESTOR RULE” TO DETERMINE A SUFFICIENT RATE OF INTEREST TO ASSURE THE OWNER IS PAID A “FULL EQUIVALENT” OF THE VALUE OF THE PROPERTY

Because a reasonably prudent investor would diversify his risk, it is proper to consider the rate of interest paid on different types of securities with different maturities.

No doubt reacting to the concerns with statutory ceilings discussed above, several courts have professed dissatisfaction with statutory rates of interest altogether, and instead follow a market-based approach using the prudent investor rule. In one such example, Tulare Lake Basin Water Storage District v. United States, various California water agencies challenged the taking of their contractual water rights. The government was found liable for the taking, and assessed damages with interest based on the 52-Week Treasury bond rate provided for in the Declaration of Taking Act.

98. See 429.59 Acres of Land, 612 F.2d at 465.
99. 61 Fed. Cl. at 626–27.
plaintiffs asked the court to reconsider, arguing that they were not justly compensated by its ruling. They asked, instead, for the Court to grant them interest based on the rates of return achieved on a diversified investment portfolio maintained during the relevant time frame.

On reconsideration, the Tulare Lake court agreed that it had inappropriately calculated delay compensation using the Declaration of Taking Act rate, concluding that rate offered no guidance in the context of an inverse condemnation action. It agreed that the Declaration of Taking Act requires immediate payment upon the issuance of a formal declaration of taking—and thus does not “in any way affect legislative takings.” Instead, Congress adopted a uniform, short-term interest rate for those cases where, having affirmatively declared that a taking had occurred, little or no time had elapsed between the time of condemnation and the payment of just compensation.

The Tulare Lake court went further, determining that calculating an interest award at any government bond rate—short or long term—impermissibly “contemplates an award of just compensation from the perspective of the government’s cost of borrowing rather than from the perspective of the claimant’s rate of return.” It found that the interest due was instead best measured by the “prudent investor” standard. That standard requires that a prudent investor protect

101. 61 Fed. Cl. at 626.
102. Id.
103. Id.
104. See id. at 629 (citing 132 Cong. Rec. S16844 (Oct. 16, 1986)):
MR. GORTON: Would this bill have any effect in situations where the Federal Government acquires land pursuant to a legislative taking?
MR. THURMOND: The bill does not in any way affect legislative takings. It is an amendment to the Declaration of Taking Act.
MR. GORTON: I understand that the Department of Justice asked for this bill. Does the Department agree that this bill has no impact whatsoever on a legislative taking?
MR. THURMOND: The committee has talked with the Department about your point, and the Department has given its complete assurance that the bill concerns only takings under the Declaration of Taking Act, and that neither the bill nor the Act have any effect on legislative takings.
105. See id.; see also Miller, 317 U.S. at 381 (holding that the DTA’s purpose is to “give the former owner . . . immediate cash compensation to the extent of the Government’s estimate of the value of the property.”).
106. Tulare Lake, 61 Fed. Cl. at 630.
107. Id. at 627.
the invested capital while considering both the potential for current income and the need for growth in excess of inflation. U.S. Treasury bond rates fall short of that standard, because they consider “compensation only according to the point of view of the taker [the government] without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can.”

In turn, this is consistent with the rule that whether a rate of return is reasonable must be determined from the perspective of the property owner, not the property taker.

Based on these factors, the Tulare Lake court concluded “the prudent investor rule requires a rate of return that more accurately reflects a diversified investment” than the government’s cost of borrowing funds, and concluded that the award should be made at the rate at which “a reasonably prudent person would have invested the funds to produce a reasonable return while maintaining safety of principal.”

Other courts have similarly used the Prudent Investor Rule to calculate interest owed in Fifth Amendment taking cases. In Redevelopment Agency of the City of Burbank v. Gilmore, the California Supreme Court reviewed a trial court’s award for a taking executed by a local government agency. California law, at the time, provided for a statutory rate of interest on all judgments, and the relevant eminent domain statute limited the interest rate to this statutory rate. The owners challenged the trial court’s ruling fixing their

108. Id. at 628 (citing Pitcairn, 547 F.2d at 1124).
109. This is true even in cases of direct condemnation under the Declaration of Takings Act. The Fifth Amendment allows a property owner to obtain whatever relief is appropriate upon demonstrating that a statutory rate does not reflect a reasonable market rate. A direct condemnation claimant’s proof that the Declaration of Takings Act fails to justly compensate him, for whatever reason, would presumably trump the statutory requirement.
110. Tulare Lake, 61 Fed. Cl. at 630, 627 (citing 429.59 Acres of Land, 612 F.2d at 464–65 (9th Cir. 1980)) (internal citations and quotations omitted); Gilmore, 700 P.2d at 805 (adopting prudent investor principle as a “sound basis for calculation of interest as just compensation”); United States v. 125.2 Acres of Land Situated in Town & Cnty. Of Nantucket, Mass., 732 F.2d 239 (1st Cir. 1984).
112. 700 P.2d at 798.
pre-judgment interest at the statutory rate, arguing that it did not offer just compensation under the facts of their case.\textsuperscript{113}

The Gilmore court agreed that “a statutory interest ceiling cannot prevail” where it falls short of the “just compensation” mandated by the Fifth Amendment.\textsuperscript{114} An adequate rate must instead “reflect conditions in the usual interest markets.”\textsuperscript{115} It held that the relevant interest market is not one that is “geared exclusively to that at which the condemning agency could have borrowed the unpaid funds in its usual financial markets,”—i.e., government bond rates.\textsuperscript{116}

The California Supreme Court reminded that after a taking, the former landowner becomes “an involuntary lender to a debtor he would often prefer not to have.”\textsuperscript{117} Thus, the “risk of any difference between the rates that the government would normally pay”—i.e., bond rates, and those that could have been achieved by “prudent participation in the broader market, should fall on the [government].”\textsuperscript{118} The prudent investor rule was the proper benchmark by which to appropriately compensate a property owner for his loss.\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id. at 800.
  \item \textsuperscript{115} Id. (citing Miller, 429.59 Acres of Land, Blankinship, and other cases holding similarly).
  \item \textsuperscript{116} Id.; see also Independence Park Apartments v. United States, 61 Fed. Cl. 692, 717 (2004) ("[T]he prudent-investor rule does not require that a reference be made only to a rate of interest on Treasury securities where the United States is the defendant. . . ."); rev’d on other grounds, Independence Park Apartments v. United States, 449 F.3d 1235 (Fed. Cir. 2006).
  \item \textsuperscript{117} Gilmore, 700 P.2d at 806.
  \item \textsuperscript{118} Id. (explaining that eminent domain is not “intended to make condemnees the unwilling financiers of public acquisitions”); see also A&S Council Oil Co., Inc. v. Saiki, Civ. A. No. 87-1969-OG, 1993 WL 787241, at *5 (D. D.C. Mar. 26, 1993) ("[I]f anyone should bear the risk of fluctuation in interest rates over time it should be the government, who has taken the property, not the unwilling owner."); Pitcairn, 547 F.2d at 1122 ("The yield on a series of hypothetical Government bonds is not relevant in ascertaining the injury plaintiff has suffered. It measures compensation only according to the point of view of the taker without reference to that of the owner since he is hardly likely to be able to borrow money at the rates the Government can."); Miller, 620 F.2d at 839 ("The Government, not the unwilling condemnee, should be the one to bear the risk of any fluctuations in interest rates."). See also supra note 83.
  \item \textsuperscript{119} Gilmore, 700 P.2d at 807; see also Concrete Machinery Co., Inc. v. City of Hickory, 517 S.E.2d 155, 159 (N.C. Ct. App. 1999) (explaining that trial court must consider evidence that “prevailing rates” are higher than an applicable statutory rate, as well as “investments of varying lengths and risk [which] typically [include] short, medium, and long-term government and corporate obligations”); Portland Nat. Gas Transmission Sys. v. 19.2 Acres of Land, 195 F. Supp. 2d 314, 327–28 (D. Mass. 2002) (applying rate of seven percent because “that was the prevailing money market rate”).
\end{itemize}
VI. THE FEDERAL CIRCUIT HAS ADOPTED THE MOODY COMPOSITE CORPORATE BOND RATE AS A PRESUMPTIVELY APPROPRIATE RATE OF INTEREST

Moody’s Composite Index rate should be applied (from now on) to just compensation cases without need of proof in the individual instance.120

Some courts—most prominently the Court of Appeals for the Federal Circuit121—have attempted to bridge the gap between the search for a “uniform” rate of interest that obviates the need for proof of the interest rate applicable in each individual case and the search for a market-based rate that may more fairly compensates an owner, but may commensurately require more evidentiary proof. In a series of decisions, the Federal Circuit’s predecessor court—the Court of Claims—adopted the Moody’s Composite Index of Long-Term Bonds as a presumptively appropriate interest rate that balanced the advantage of uniformity with the constitutional imperative of a market-based rate.

In United States v. Pitcairn, the Court of Claims held that “long-term corporate bond yields are an indicator of broad trends and relative levels of investment yields or interest rates. They cover the broadest segment of the interest rate spectrum.”122 In contrast, it rejected government bond rates for the same reason that they were rejected in Tulare Lake and Gilmore, holding that “just compensation in the constitutional sense is what the owner has lost, and not what the condemnor has gained.”123

For this reason, Pitcairn rejected the government’s contention that interest should be established based on “a series of hypothetical long term Government bonds.” The court found these government bond rates to be subjectively constructed by the government to

121. Prior to 1982, what is now the Federal Circuit was called the United States Court of Claims. The decisions of the Court of Claims are binding precedent in the Federal Circuit. See South Corp. v. United States, 690 F.2d 1368 (1982).
122. 547 F.2d at 1124.
minimize potential returns. The court went on to hold that the government’s use of government bond rates “ignore[d] any relationship” between the rate of interest and the constitutional principle of just compensation. Holding that the ultimate test was to ensure that “the plaintiff . . . receive just compensation,” the Pitcairn court adopted the Moody’s Composite Index.

Likewise, in Tektronix v. United States, the Court of Claims affirmed the Pitcairn standard, holding that Pitcairn’s rates “should be applied (from now on) to just compensation cases, without need of proof in the individual instance.” The court concluded that otherwise “it [was] too burdensome to require parties to make specific proof in every case as to the appropriate interest rate.” Instead, it would “further the goal of equal justice, reduce the costs and complexity of litigation, and facilitate decision (as well as settlement) to accept and establish the Pitcairn rates and method.”

And in Miller v. United States, the Court of Claims again found that the Moody’s Composite Index provided uniformity and resolved inequities among individual claimants, reiterating the “strong judicial policy in favor of the establishment of a uniform rate of interest applicable to condemnation cases in order to avoid discrimination among litigants.”

Other courts have also used the Moody’s Composite Index to establish compensation. In 1996, the Federal Circuit adopted Pitcairn’s endorsement of the Moody’s Composite Bond Index in Hughes Aircraft Co. v. United States, 86 F.3d 1566, 1572 (Fed. Cir. 1996), though its opinion was later reversed and remanded by the United States Supreme Court for other reasons.

124. Pitcairn, 547 F.2d at 1122, 1124.
125. Id. at 1121.
126. 552 F.2d at 352–53.
127. Id.
128. Id.
129. 620 F.2d at 838 and 840 (“Plaintiffs, without objection from defendant, have requested this court to take judicial notice of [the Moody’s Composite Index] for the years 1976–79.”).
130. See A & S Council, 1993 WL 787241, at *5 (“[T]he delayed compensation interest will be determined based upon the yield produced by good quality, long-term corporate bonds, as set forth in Moody’s Composite Index.”); Georgia-Pacific, 640 F.2d at 366 (citing Tektronix and Miller) (“We likewise take judicial notice of [the Moody’s Composite Index].”); Leesona Corp. v. United States, No. 130-70, 1978 WL 14862, at *24, *25 (Ct. Cl. May 1, 1978) (holding that interest should be awarded at “those rates set down by the court in Pitcairn” and stating that interest at corporate bond rates was appropriate where “competitively marketed AAA corporate bonds were available at higher yields” than government bonds).
The Court of Federal Claims has followed the Claims Court and Federal Circuit and has calculated the appropriate interest using the Moody’s Composite Index. In an unrelated case also called *Miller v. United States*, Judge Bruggink of the Court of Federal Claims considered and rejected the Declaration of Taking Act rate, finding it insufficient to “place [owners] in as good a position as they would have occupied if payment had coincided with the taking.” Instead, he concluded that “a rate based on [the Moody’s Composite Index for Moody’s AAA-rated bonds] more closely approximates what a prudent investor would have done” because it “produces a reasonable return and maintains safety of capital.”

Using the Moody’s Composite Index of corporate bonds—or a similar market-based rate of return consistent with the return that would have been generated as a presumptively appropriate interest rate—addresses the concern that litigation of the interest rate in each case would prove too costly for individual litigants. The Moody’s rate also represents a low-risk investment diversified by a portfolio of AAA-rated bonds, the highest available rating. Adoption of this benchmark rate allows individual claimants to obtain a rate of return that balances conservative investing principles with a potential for growth that government bonds do not offer.

VII. THE FIFTH AMENDMENT REQUIRES THAT INTEREST BE COMPOUNDED

*Simple interest cannot put the property owner in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation, because it undervalues the worth of the [property].*

Albert Einstein has been apocryphally quoted as saying that “the greatest invention of all time was compound interest.” Even if this

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133. *Id.* at *2.
134. *Id.*
136. There is no credible source validating this quote as really having been said by Einstein.
attribution is incorrect, the observation captures Benjamin Franklin’s advice to:

[R]emember that time is Money. . . . Remember that credit is Money. If a Man lets his Money lie in my Hands after it is due, he gives me the Interest, or so much as I can make of it during that Time. . . . Money is of a prolific generating Nature. Money can beget Money, and its Offspring can beget more, and so on. Five Shillings turn’d, is Six: Turn’d again, ’tis Seven and Three Pence; and so on ’til it becomes a Hundred Pound. The more there is of it, the more it produces every Turning, so that the Profits rise quicker and quicker.137

Judge Learned Hand likewise noted, “Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong.”138 Courts must assume that if “the full value of just compensation had been [paid when the taking occurred], the landowner would have been able to earn compound interest.”139 This is because “the government delays its payment for ‘taken’ property” for a substantially longer period of time than in direct condemnation claims.140 Denial of compound interest after a long delay “would effectively undercut the protections of the fifth amendment to our Constitution,” precisely because it would provide property owners with less than if they had been compensated at the time of the taking.141 Thus, the

137. BENJAMIN FRANKLIN, Advice to a Young Tradesman, Written by an Old One, in THE WRITINGS OF BENJAMIN FRANKLIN: PHILADELPHIA, 1726–1757 PHILADELPHIA (Benjamin Franklin & D. Hall, eds. 1748), available at http://www.historycarper.com/resources/twoh2/advice.htm. Franklin’s advice also establishes that compounding interest was understood and practiced in Colonial America at the time the Fifth Amendment was adopted.
139. Whitney Benefits, 30 Fed. Cl. at 415; Brunswick, 36 Fed. Cl. at 219 (“[I]nterest rates shall be compounded annually since no prudent, commercially reasonable investor would invest at simple interest.”).
141. Whitney Benefits, 30 Fed. Cl. at 415; see also Dynamics Corp., 766 F.2d at 520 (quoting Waite v. United States, 282 U.S. 508 (1931)) (“We are persuaded that, based on the facts and
usual “prohibition on [compound] interest against the government does not apply in fifth amendment takings cases.”

CONCLUSION: THE “JUST COMPENSATION” PROVISION OF THE FIFTH AMENDMENT REQUIRES THE OWNER TO BE PAID A FAIR-MARKET RATE OF INTEREST COMPARABLE TO WHAT THE OWNER COULD HAVE EARNED HAD HE BEEN PAID THIS MONEY ON THE DATE THE GOVERNMENT TOOK HIS PROPERTY

While it is easy to understand the appeal of statutory interest rates as a shorthand for determining just compensation, using statutory interest rates (like, for instance, the 52-Week T-bill rate found in the Declaration of Takings Act) sacrifices constitutional principle for purported simplicity and uniformity. Courts have adopted various rates as “reasonable,” but virtually every decision along these lines begs the question—reasonable compared to what? Most courts take the reasonableness of one or more of these rates for granted, but reasonableness generally depends on a host of factual issues—foremost of which are prevailing market conditions. For a court to


142. See Bowles v. United States, 31 Fed. Cl. 37, 52 (1994) (“Simple interest cannot put the property owner in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation, because it undervalues the worth of the property.”); Whitney Benefits, 30 Fed. Cl. at 414–15.

143. See Fuentes v. Shevin, 407 U.S. 67, 91 n.22 (1972) (citing Stanley v. Illinois, 405 U.S. 645, 656 (1972)) (“[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general . . . that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.”); Koa v. Cooper, 336 U.S. 77, 96 (1949) (“[I]t was Mr. Justice Holmes who admonished us that ‘To rest upon a formula is a slumber that, prolonged, means death.’”).
adopt a statutory rate of interest in a Fifth Amendment case without independently establishing that it matches a market rate of return the owner would have earned risks unconstitutionally delegating the determination of “just compensation” to Congress—a danger the Supreme Court has repeatedly warned against.

Any effort to determine just compensation must be governed by the fundamental principle that the condemnee, if compensated at the specified rate, will be “place[d] in as good a position pecuniarily as he would have occupied if the payment had coincided with the appropriation.”144 As various courts over time have pointed out, none of the congressionally established rates of interest bear any relationship to the proper constitutional consideration of compensating an owner for what the owner lost, not what the government took. These statutory rates—by definition—do not measure the owner’s lost opportunity to obtain a market-based rate of return. Indeed, a court seeking to apply a statutory rate would presumably have to test that rate against market conditions—thus undermining the very uniformity for which that rate was selected in the first place.

Meanwhile, as demonstrated above, the courts have emphasized uniformity in their decisions on interest rates, but have been undisputedly unable to achieve it. To the contrary, existing legal precedent supports various outcomes, depending on the arguments of the parties and the presiding court’s predilections. Even in the past twenty years, courts have measured interest (or delay compensation) in no less than six separate ways—all of which yield different results. As such, the oft-stated goal of uniformity remains aspirational, at best.

Thus, for all the purported effort courts have put into a unified theory of delay compensation in inverse condemnation litigation, the case law is littered with detours and false starts. Neither property owners nor the government can predict the value of their claims. The result is repeated litigation over the applicable interest standard—a legal battle that, at this point, threatens to further confuse rather than clarify the issues.

To remedy this situation, we recommend going back to the basic constitutional principles underlying just compensation. First, courts should apply the constitutional standard requiring that property owners be put in as good a position as they would have been had the

144. See supra note 24.
Taking not occurred. This requires courts to consider rates from the perspective of what is available to the property owner, leading them to the broad market-based approach reflected in the prudent investor rule. Indeed, market-based rates are, by definition, the only rates to which potential claimants have access, not being able to borrow money at the favorable rate at which the federal government borrows money. Once a reasonable market-rate of interest has been established for a certain time period, courts may take judicial notice of those decisions in the interest of efficiency and consistency.\textsuperscript{145}

The Federal Circuit’s predecessor court sought to accomplish something like this when it adopted a reasonable presumption in favor of the Moody’s Composite Index. While an owner remains free to introduce evidence that the Moody’s Composite Index unfairly minimizes his return, absent such a showing, the Moody’s Composite Index is a market-based index balancing growth against a conservative investment strategy. Its use would also seem to reflect a reasonable, market-based, rate of return consistent with constitutional principles.

On the other hand, it is never appropriate for a court in an inverse condemnation action to blindly defer to a statutory interest rate. Doing so is simply inconsistent with the courts’ constitutional responsibility. The amount of delay compensation derived from a taking is simply another question of valuation on which evidence must be taken and decided. No maxim of judicial convenience can, nor should, override the constitutional imperative of providing the owner “just compensation.”

This is of no small import. Courts that allow the government to pay compensation at an interest rate that is less than a fair-market–based rate for the relevant term create a perverse incentive for the government to further protract resolution of these claims. As the California Supreme Court observed, when the government takes private property from an owner by eminent domain, the owner becomes an unwilling, and now captive, creditor lending to a borrower he would prefer not to have as a debtor. It adds insult to injury to then deny that “captive creditor” a less than full market-based rate of return, even as the owner also is now financing the government’s acquisition of his property. Just compensation not only deter
takings, it deters the government from needlessly protracting litigation to take advantage of cheap financing for its takings forays.

Though well-meaning, the courts’ patchwork adoption of varying “uniform” interest rates—all done in the name of uniformity—has had quite the opposite effect. Adopting market-based rates of interest will allow both the government and individuals to predictably assess their entitlement to just compensation, provide a consistent method (if not a uniform rate) for establishing the amount of compensation owed, and encourage the resolution of Fifth Amendment claims.
INTERNATIONAL COMPARATIVE PROPERTY RIGHTS: 
A CROSS-CULTURAL DISCIPLINE COMES OF AGE

PATRICIA E. SALKIN* & DANIEL GROSS**

INTRODUCTION

The decision to hold the annual Brigham-Kanner Property Rights Conference in Beijing, China provided an opportunity for academics and practitioners from the United States to consider our notions of property rights in the context of a global economy. The topic is timely as just last year Professor Rachelle Alterman observed in her book, *Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights*, “[a]lthough this topic should be a prime target for cross-national research, very little has been published.”¹ Yet, it is critically important that in this era of globalization, we begin to understand the differences and similarities that exist in property rights regimes across the world as clients have become more “international” in both travel, business dealings, and investments. Opening up international trade has enriched much of the developing world, and helped rapid economic growth in developing countries, further helping the prosperity of these people living in these places.² However, as global economy grows and reaches new corners
of the world, it brings with it different factors, all of which can influence the property regime in each nation it touches upon. For example, strong protection of private property rights is believed by some to be the backbone of capitalism and explains why capitalism has been successful in developed nations compared to developing nations. This fact remains, despite the estimate that “the total value of the real estate held but not legally owned by the poor of the Third World and former communist nations is at least $9.3 trillion.”3 This makes it more important today for lawyers in the United States to be able to generally inform clients of potential risks when they desire to make investments in overseas real property. Although the ethical provision of legal advice may require partnering with foreign law firms and local counsel, the reality is that general descriptions of the real property regimes in emerging economic powers and/or in countries offering desirable labor forces and plentiful land require some basic knowledge for U.S. practitioners. However, the concept of “property” can differ so radically when viewed through cross-cultural lenses that it can present a number of difficulties for unfamiliar practitioners.

The right to property, specifically real property, is a global concept that directly affects people and nations in many different ways. All people view property rights through a different lens, and this has made the field of property rights a particular mix of social rights, economic rights, and civil rights across the world.4 This makes research in this area a fascinating blend of social norms, economic demands, civil rights, psychological needs, and political pressures. These often differing viewpoints on property sometimes clash and sometimes meld as we enter into the global age. Property rights regimes throughout the world are “closely intertwined with national identity, societal values, and sovereignty (or lack thereof, in the case of military conquests, imperialism and colonialism).”5 While in the United States we turn to the law to study the evolution of property rights, in other countries the history may be discovered in study of anthropology and other disciplines.6

6. For example, Annette Stomp, a Ph.D. candidate at the Swiss Federal Institute of Technology Lausanne (EPFL), reports that in her research “anthropology is often overlooked
Another challenge in researching and describing property rights from an international comparative perspective is the differences in descriptive language used to discuss this area of the law. For example, in the United States the land use planning and regulatory community organizes property rights discourse around two main themes: regulatory takings and eminent domain or condemnation law. In other countries, these descriptors can be meaningless and may be referred to as planning compensation rights, expropriation, and compulsory purchase. An additional factor is the disparate forms of treatment afforded to property owners in different countries, especially when comparing those given to citizens of that country compared to foreign investors. Some foreign governments may pose a significant threat to the property rights of foreign property owners through the use of expropriation; others may give greater protections to foreign property owners through international agreements, while others may not discriminate between the two classes.

This article is intended to provide an overview of the differences and similarities among a select group of nations through an examination of their real property protection regimes. The countries selected in this paper—South Africa, India, Chile, Singapore and Ghana—were chosen to illustrate how geographical, social, and economic diversity all contribute to different property rights cultures and legal approaches. Part I of this article examines general international or global factors that affect property rights. Part II offers a focused look at the historical and cultural development of property rights in the five selected countries. Part III follows with a discussion of some of the domestic factors present in these five different countries that contribute to or influence the development and enforcement of different property rights regimes. The article concludes with a discussion about the importance of understanding the property

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7. Rachelle Alterman, Regulatory Takings and the Role of Comparative Research, in Rachelle Alterman et al., Takings International: A Comparative Perspective on Land Use Regulations and Compensation Rights 8 (2010).
rights regimes in other countries to better enable practitioners to provide responsible legal counsel to clients.

I. INTERNATIONAL FACTORS AFFECTING PROPERTY RIGHTS

There are a number of international factors that affect property rights in nations across the world. What follows is a brief discussion of the influence from some of the declarations, treaties, agreements, and institutions that have international repercussions on property rights, which accordingly contribute to the need to address property rights on an international scale.

A. Section 17 of the Universal Declaration of Human Rights

Despite being referenced in a number of international policy documents, there is no succinct definition on the right to land in international law. However, a basis for the right to land in international law is arguably found in the Universal Declaration of Human Rights, developed by the Commission on Human Rights, which was tasked by the United Nations to draft an International Bill of Human Rights. The Declaration identified or referenced property as a human right in several sections. In particular, Article 17 states that “(1) [e]veryone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property.”

Despite these progressive concepts towards property ownership, Article 17 is viewed as more of a protection on liberal property rights, and not applicable to economic or redistributive land rights. As such, the Declaration does not further define what the right to own property encompasses or what an arbitrary deprivation of property includes. The vague language of Article 17 was included so that some provision for property rights was made in the Declaration, as the topic of property rights had become controversial during deliberations.

9. Smith, supra note 4, at 272.
11. Wickeri, supra note 8, at 1007.
12. Universal Declaration of Human Rights, supra note 10; Smith, supra note 4, at 273.
Earlier proposals for Article 17 had attempted to address the familiar American property law concept of “public purposes” and “just compensation,” while other proposals sought complete deferral to the in rem jurisdiction of the property.\(^\text{13}\)

The Declaration did not initially pass as a binding resolution on signatory states, as ideological differences amongst nations on “human rights in general or property rights in particular” made it impossible to get the necessary consent.\(^\text{14}\) Notably, apprehension towards socialism and land redistribution systems has stymied the expansions of a universal standard for international property rights protections.\(^\text{15}\) However, over the decades following its drafting, the Declaration eventually became customary international law,\(^\text{16}\) despite the fact that there has never been a universal agreement on the scope of Article 17, nor have subsequent human rights treaties included the right to property because of the wide disagreement on the language of a property provision.\(^\text{17}\) Regardless, it has been well documented that constitutions, statutes, and judicial opinions drafted in the latter half of the twentieth century have been influenced by, and sometimes have expressly adopted, the provisions of the Declaration.\(^\text{18}\)

\(^{13}\) Wickeri, supra note 8, at 1006–07.

\(^{14}\) Smith, supra note 4, at 272–73.

\(^{15}\) Wickeri, supra note 8, at 1006. Note that Article 1 of the First Protocol to the European Convention on Human Rights, applicable and enforceable by all citizens of all the forty-four European nations which have ratified the Convention, is outside of the scope of this paper, since we have focused on non-European states. Article 1 holds that “[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principals of international law.” See Amnon Lehavi & Amir N. Licht, BITS and Pieces of Property, 36 YALE J. INT’L L. 115, 136 (2011) (citing Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262).


B. Customary International Law

In some countries, property rights provide different protection for foreign investors and citizens of that country. Until World War II, customary international law required countries who hosted foreign investors and property owners to follow the “Hull Rule,” where if that host government expropriated the property of foreign investors, it was required to give “prompt, adequate and effective compensation” to the former, foreign owner.\(^{19}\) The Hull Rule remained in effect through the Second World War, as most of the states who objected to the “prompt, adequate, and effective” standard of compensation were colonies, still subject to rule of their master nations.\(^{20}\)

The Hull Rule fell out of favor in the post-colonial period following World War II. These newly established developing and communist states, who traditionally disagreed with the standard of compensation set forth by the Hull Rule, engaged in short-lived nationalization programs, seizing the property of foreign investors.\(^{21}\) This led to inevitable disputes between the new states, who favored the use of independent investment agreements (discussed below) between it and the foreign nation, and the home nations of foreign investors, who still sought the protection and compensatory regime provided by the Hull Rule.\(^{22}\)

Today, it is generally accepted in international law that a state has the right to expropriate a foreign investor’s property so long as: (1) it is for a public purpose, (2) it is not done in a discriminatory manner, and (3) compensation is paid.\(^{23}\) Although this may seem

\(^{19}\) Andrew T. Guzman, *Why LCDs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. 639, 641 (1998). The Hull rule was formulated by the United States former Secretary of State Cordell Hall in response to the growing number of expropriations the Mexican Government accomplished against United States investors between 1915 and 1940. Hull, corresponding with the Mexican Minister of Foreign Affairs, articulated the rule that would later carry his namesake as: “The Government of the United States merely adverts to a self-evident fact when it notes that the applicable precedents and recognized authorities on international law supports its declaration that, under every rule of law and equity, no government is entitled to expropriate private property without provision for prompt adequate and effective payment therefor.” *Id.* (quoting 3 Green H. Hackworth, *Digest of International Law § 228*, at 658–59 (1942)).

\(^{20}\) *Id.* at 646.

\(^{21}\) *Id.* at 647.

\(^{22}\) *Id.* at 642.

\(^{23}\) Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing
like an uncomplicated standard, in reality it is not; each of the three factors have been the subject of considerable debate. International tribunals have consistently struggled to define what a public purpose is because it “is a broad concept which is not readily susceptible to objective analysis and examination neither by states nor tribunals.”

Often, the public purpose reasoning will be lumped in with a finding of discrimination against the foreign investor on the part of the expropriating state. Similarly, the issue of compensation provides more questions than answers in international law, although it is generally held that there is a right to compensation in at least some amount. Developed states tend to adhere to the Hull Formula’s idea of “full compensation,” while developing states believe that compensation should be “appropriate,” and reflect the subjective and relevant circumstances facing the host state.

Although the standards and applications of customary international law are subject to debate, provisions of many constitutions address Customary International Law, making it relevant in the discussion of each country’s property regime. For example, Sections 231–233 of the South African Constitution, discussed in Part II of this article, includes various provisions for the inclusion of customary international law. The Indian Constitution similarly recognizes a “respect for international law,” as does the Ghanaian Constitution.


Id.


Hober, supra note 24, at 387.


India Const. art. 51(c).

C. International Investment Agreements

Although there are a number of international investment agreements ("IIAs") that affect property rights, the two most often discussed and most influential to property rights are Bilateral Investment Treaties ("BITs") and Free Trade Agreements ("FTAs," for example, NAFTA). These agreements are "essentially instruments of international law." Since the end of World War II there have been approximately 3,000 international investment agreements signed. Today, these agreements "[f]or all practical purposes, . . . have become the fundamental source of international law in the area of foreign investment."

The goal behind IIAs is to "protect and promote" international investment among the signatory nations. To accomplish this goal, IIAs generally consist of two basic promises among the signatory states: first, to treat investors and investments from other signatory states in accordance with the IIA, and second, each of the signatory states will agree on some sort of enforcement mechanism to see that the IIA is upheld.

These agreements are often criticized for the roles that foreign governments play in the domestic issues of developing nations. For example, following the 1994 APEC (Asia-Pacific Economic Cooperation) meeting, the United States encouraged its firms to invest in Indonesia at suspiciously favorable terms. When that Indonesian government was overthrown, in part due to widespread corruption, the United States pressured the new regime to fulfill the original contract.

1. Bilateral Investment Treaties

Bilateral Investment Treaties ("BITs") are agreements negotiated between two nations—usually developed and developing countries. BITs were developed to address foreign investors’ fears of losing their investments without compensation in developing countries which had launched large expropriation programs following World
By providing this protection to foreign investors, it also allowed developing nations to gain a new-found credibility to foreign investors, helping these new nations attract and gain more access to more foreign investment.

Today, BITs are the dominant form of regulation between countries engaged in international trade. There are currently over 2,500 BITs affecting the property rights of both foreign investors and host governments. Further, almost every country is involved in at least one BIT.

The content of BITs are usually distinct from each other, based on the needs and realities of the relationships of the two countries. However, there are usually similar provisions amongst them which usually address a few common topics: the treatment to be afforded to the property of foreign investors; that this treatment should be in accordance with international law standards; the relaxation of restrictions regarding capital transfers in and out of the host country; forum selection clauses which allow disputes to be subject to international binding arbitration; and—channeling the Hull Rule—that direct or indirect expropriation should be given prompt, adequate and effective compensation. However, the most important provision of every BIT is protection against expropriation. BITs commonly require host nations to provide compensation for expropriation.

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36. For example, in 1951 Iran expropriated British petroleum assets. In 1955, Libya expropriated American petroleum assets. In 1956, Egypt nationalized the Suez Canal to the dismay of its original Anglo-French owners. In 1959 Cuba nationalized a number of foreign-owned investments. From 1960 to 1972, 875 acts of expropriation occurred in 62 countries. The threat of expropriation continues to this day, as recent expropriations (both regulatory and direct) have occurred in Chad and Russia. Amnon Lehavi & Amir N. Licht, BITS and Pieces of Property, 36 YALE J. INT’L L. 115, 121 (2011) (citations omitted).

37. Guzman, supra note 19, at 642 (finding that, ironically, BITS, despite being favored by developing nations, tend to provide more protection to foreign investors than the traditional Hull Rule ever did).


40. Alvarez, supra note 38, at 957–58 (citations omitted).

41. Hober, supra note 24, at 380 (noting that “[f]rom the perspective of a foreign investor the most important provisions in any international treaty for the protection of foreign investment are the provisions dealing with protection against expropriation. These provisions do in fact constitute the heart and soul of every BIT. The ultimate purpose of every BIT is to protect against expropriation.”).

42. Jordan C. Kahn, Investment Protection Under the Proposed ASEAN-United States Free
2. **Free Trade Agreements**

Free Trade Agreements (“FTAs”) are agreements between two or more nations or regions that seek to open up economic activity between the participating countries. FTAs began to appear with more frequency during the late 1980s and early 1990s. There are currently over 300 FTAs worldwide.

Generally, FTAs address and build upon standards of international trade. However, some FTAs go so far as to address expropriation. For example, Section 1110 of the North American Free Trade Agreement (“NAFTA”) restricts expropriation, allowing it only when the host country acts with a public purpose and provides just compensation in the form of fair market value. NAFTA further applies this expropriation language to expropriation which “directly or indirectly” occurs.

D. **International Institutions**

International organizations have long been strong proponents of “well-defined and well-protected property rights” as a means of encouraging investment and overall economic prosperity. These organizations believe that effective articulation, protection, and enforcement of property rights are a fundamental characteristic of a strong economy. The three main international institutions affecting property rights, whom are often the target of scorn around the world, are the International Bank for Reconstruction and Development (otherwise known as the World Bank), and International Monetary Fund, and the World Trade Organization.
1. World Bank and International Monetary Fund

The World Bank and the International Monetary Fund (“IMF”) were established in 1944 by the United Nations’ Monetary and Financial Conference in Bretton Woods, New Hampshire. The World Bank was created with the primary purpose of rebuilding Europe after World War II. The IMF, on the other hand, was created to prevent future international economic depressions. Currently, each of these institutions lends money and provides economic guidance to developing nations, although many of these loans are subject to these nations taking and implementing the advice of both the IMF and the World Bank. In some cases loans from the World Bank to developing nations are conditioned on approval from the IMF, which often lobbies for developing nations to adopt certain policies involving rapid privatization of markets and discouraging government interference to trade barriers—sometimes before these new countries have an adequate regulatory framework in place. The World Bank has supported and provided financial incentives for developing countries to both formalize property rights and create titling systems. Both the IMF and the World Bank have been criticized for their belief in strong property rights systems and a means to encourage economic growth. All five nations discussed in Part II have voting power in the IMF.

51. Id. at 11.
52. Id. at 11.
53. Id. at 12.
54. Id. at 13.
55. Id. at 54.
56. Id. at 59 (emphasizing the importance of noting that the IMF has acknowledged that some of its policies have ultimately done more harm than good. However, it is important to keep these factors in mind when considering the legacy they may have, if any, in the property regimes of these developing nations.)
57. Id. at 73–74.
2. World Trade Organization

The World Trade Organization ("WTO") was established in 1995 as a result of international trade negotiations under the Uruguay Round Agreement Act and the General Agreement on Tariffs and Trade ("GATT"). The WTO currently has 153 member nations, who account for approximately ninety percent of the world’s trade, and further includes all five nations discussed in this paper. The WTO is run by the member nations, operates as a forum for trade negotiation among nations, and further has a system of trade rules. The trade rules of the WTO cover agreements for the basic areas of trade (goods, services and intellectual property), dispute settlement, and reviews of governments’ trade policies. The rules, which are actually agreements among the member nations, are renegotiated periodically among member nations. However, the WTO rules do not give foreign investors a cause of action for compensation when governments expropriate their property.

II. Property Regimes and Eminent Domain Throughout the World

In addition to the myriad of international factors, there are a variety of intranational factors which also can affect the property rights of citizens, as well as foreign investors. Property rights throughout

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61. Id.
63. World Trade Org., Annual Report 2, supra note 60.
65. Id. (demonstrating that many have been in the process of being negotiated since 2001, in the Doha Development Agenda).
the world can be guaranteed, or merely licensed to property holders through an applicable constitution, statute, custom, or a mix of the above. As already discussed, the property rights afforded through these legal regimes are a result of a variety of factors, although many nations have begun to give at least the statutory appearance to what American practitioners would recognize as eminent domain.

The five nations selected for review herein make different provisions for what constitutes a “public use” and “just compensation.” As demonstrated below, some countries provide in-depth explanations and procedures for both terms, some only deal with one term, while other nations purposefully either have left them undefined or unaccounted for. It is important to note that different historical, political, cultural and/or economic factors influence each country, and these have all contributed to that nation’s past or current interpretations of property rights.67 As with the thirteen mostly European Union (“EU”) countries studied by Professor Alterman, our findings also conclude that there is no universal approach or a dominant approach when it comes to comparisons on property rights laws.68 Alterman’s study organized the countries into clusters representing degrees of compensation rights and in rank order she reported on countries with minimal compensation rights (Canada, the UK, Australia, France and Greece); countries with moderate or ambiguous compensation rights (Finland, Austria, and the United States); and countries with extensive compensation rights (Poland, Germany, Sweden, Israel and the Netherlands).69 Rather than trying to neatly fit the five countries discussed below into any category, we highlight the practical problems facing these regimes and how those and other factors have not only shaped the relevant constitutional property provisions but also the application of these provisions in practice. With respect to application, many of the “takings clauses” look to provide strong protection on paper, but in reality these governments either have been unwilling, or unable to keep their end of the bargain when it comes to interpretation or enforcement of these provisions.

67. Professor Alterman reminds those who engage in comparative property rights analysis that, “Transplantation of laws, is of course, neither possible nor desirable. Laws are grounded in legal systems and institutions and reflect public policies. The latter are grounded in socio-political and cultural milieus that cannot—and should not—be replicated.” Alterman, supra note 7, at 8.
68. Id. at 13.
69. Id. at 23.
A. South Africa

The government of South Africa (“GOSA”) and the property rights regime established there is continually measured against the progress it has made in shedding the unfortunate legacy of Apartheid. Apartheid, however, has been exceptionally influential in terms of land ownership and the governmental attitude towards eminent domain.

By the end of Apartheid, white people owned 87% of all land, despite only making up 15% of the population.70 Not surprisingly, the inequitable distribution of land ownership made the redistribution of wealth—specifically through land reform—an obvious goal for the new post-Apartheid government, as land reform was believed to be the “bedrock of any true social transformation in South Africa.” 71 Consequently, a new Constitution was to be adopted by this new government. The question of including a provision on property rights became one of the most contentious issues during its drafting.72

The general public opposed any property clause in their new Constitution, fearing that a constitutional property guarantee would protect the rights of apartheidian land owners, or significantly hamper any land reform policies that the incoming government would seek.73 These concerns, if realized, would leave the new Constitution and its government without credibility and the object of scorn for the general population.74

Inside the actual constitutional debates the property issue was similarly contentious, although most delegates agreed that a property clause was necessary for the new Constitution.75 It was the exact formulation of the clause that garnered significant attention.76 The National Party (“NP”), largely representing the interests of the white

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72. Id. at 155–56.
73. Id. at 155.
74. Id. at 156.
75. Id. at 155 (noting “[t]hat there would be a property clause in the new constitution was virtually a foregone conclusion. Even the staunchest opponents conceded as much, directing their energies instead on content.”) (citations omitted).
76. Id. at 155–56.
minority, sought a high degree of protection for property rights, hoping to prevent any land redistribution. The African National Congress ("ANC") similarly sought a property clause; however, it wanted one which provided for a limited protection for property rights, one which made private property rights subject to the public interest and social obligations of the new nation.

These debates eventually led to the modern property clause, one which was criticized by both sides as being the product of compromises and "sheer exhaustion." Although neither the NP nor the ANC was satisfied with the final property clause, both realized "that they had run out of time and energy." The only compromises achieved were the provisions dealing with deprivations and expropriations, the rest would be left to the resolution of the Constitutional Court.

Drafted in 1996, Section 25 is the property clause of the current South African Constitution. Section 25 provides detailed treatment of the protections afforded to property, as well as the government’s power of eminent domain. Section 25 of the Constitution prohibits the deprivation of property “except in terms of law of general application and no law may permit arbitrary deprivation of property.” The section puts familiar restrictions on the usage of expropriation; allowing it only “for a public purpose or in the public interest”; and “subject to compensation.”

77. Id. at 156–57 (stating that “[t]he NP justified a high degree of protection for property rights by claiming that ‘the prospect of acquiring property is the principal incentive to hard work, thrift, responsibility and the development of the individual’s full potential.’”) (quoting Matthew Chaskalson, Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution, 11 S. Afr. J. Hum. RTS. 222, 224 (1995)).
78. Id. at 157.
79. Id. at 159 (finding that “[n]either side, those favoring a strong entrenched property right and those opposing anything that threatened fundamental land reform, was happy with the final product, but, pragmatically acceding to the twin realities that some kind of property clause was inevitable and that some room for land reform had to be created, both sides apparently could agree that they had run out of time and energy.”).
80. Id.
81. Id.
84. Id. § 25(2).
1. Public Purpose

Section 25(2) of the South African Constitution states that expropriation can only be done “for a public purpose or in the public interest.” This is informed by Section 25(4) which defines the public interest as including a social obligation on current property owners by stating that “the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.” By defining the “public purpose” provision in their property regime, the South African Constitution does not leave an uncertain interpretation to be adopted by their judiciary, and further “leave[s] no doubt that private property rights are subject to the social needs for a land [reform]” policy in South Africa.

The public purpose provision of Section 25 is further bolstered by the socioeconomic rights provisions in the South African Bill of Rights. These provisions plainly mandate that the new government engage in the redistribution of wealth, which illustrates the intent of the drafters that the South African Constitution be transformative in character. As part of this constitutionally sanctioned public interest, the GOSA has committed to redistributing up to thirty percent of farmland to black citizens by 2014 under this eminent domain power.

2. Compensation

Compensation is specifically addressed in Section 25(3) of the South African Constitution, which uses a factor based test to determine the amount of compensation due to anyone whose land is expropriated. Section 25(3) reads:

The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance

85. Id.
86. Id. § 25(4) (continuing to state that property is not limited to land).
87. Alexander, supra note 71, at 161.
89. Alexander, supra note 71, at 161.
between the public interest and the interests of those affected, having regard to all relevant circumstances, including—(a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.91

Subsection (b) is directly addressed to parcels of land which are remnants of Apartheid, as it allows the government to consider how the land was acquired and can thus discount the compensation due. Section 25(3), as a multifactor provision, shows that the fair market value of the land should be merely the beginning of what compensation is owed to the landowner, which should then be discounted or enhanced by the factors outlined in section 25(3). The factors laid out in 25(3) have been used with relative frequency by the courts, who often consider matters outside of the fair market value of the property when valuing a taking.92 South African courts have gone further, and even applied the multifactor compensation test of Section 25(3) to expropriated property which was unrelated to Apartheid—not giving market value compensation where it might be expected.93

3. Judicial Interpretation

Given the GOSA’s stated dedication to a land reform policy, onlookers have urged courts to “interpret section 25 in its broader social and political context.”94 Further stating that “the only sensible and legitimate interpretation of section 25 is therefore one that allows (and actually obliges) the courts to strike an equitable balance between the protection of existing rights and the public interest (which includes land reform goals.)”95 Currently, there is sparse case law,
both in lower courts and the Constitutional Court, which interprets Section 25. However, the Constitutional Court has set out an analysis for any constitutional property challenge under Section 25 in First National Bank of SA Ltd. v. Commissioner, South African Revenue Service ("FNB").

Although FNB dealt with commercial property, its holding is still relevant to most, if not all property rights in South Africa. In FNB, a car importer (debtor) had taken a loan out with First National Bank (creditor) and used the cars he imported as collateral on the loan. Complicating this, the debtor also owed a large amount of unpaid customs and duties to the South African Revenue Service ("SARS"). To secure payment, SARS put a lien on the motor vehicles—the same ones which were collateral for the creditor’s loan. The motor vehicles which SARS had put a lien on were unrelated to the outstanding debts, and the bank challenged that the statute which authorized the lien was an unconstitutional interference with the bank’s property.

Before analyzing the question, the Court noted that “[t]he purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions.”

The Court then answered the question by laying out a six-step analysis for constitutional property challenges under Section 25. First, the court must find whether the affected interest is actually “property.” Although the Court did not define property in the FNB case, it still noted that property would clearly include chattel and land. Second, the court must find whether there has been a deprivation of property by the state. The court again did not define deprivation in FNB, but has, in subsequent case-law, given a wide reading

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96. ALEXANDER, supra note 71, at 150.
98. Id.
99. Id.
100. Id. See also ALEXANDER, supra note 71, at 162.
101. First National Bank of SA Ltd. t/a Wesbank v. Commissioner, 2002 (4) SA 768 (CC) § 51 (noting that “[a]t this stage of our constitutional jurisprudence it is, . . . practically impossible to furnish—and judicially unwise to attempt—a comprehensive definition of property for the purposes of section 25. Such difficulties do not, however arise in the present case.”).
102. Id. at § 57.
to what constitutes a deprivation.\textsuperscript{103} The third and biggest step is that the court must determine whether the deprivation was arbitrary per Section 25(1). The court found that the meaning of “arbitrary” is “when the ‘law’ referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.”\textsuperscript{104} Accordingly, the court set out a multifactor analysis to help other courts determine the arbitrariness of the law, a step which leaves considerable judicial discretion.\textsuperscript{105} However, even if the court finds an arbitrary deprivation in step three, under step four courts are allowed to justify the arbitrary deprivation under section 36 of the Constitution. This step is considered to be redundant, as a court’s analysis here would focus on the same factors as in step three, and

\begin{itemize}
  \item\textsuperscript{103} ALEXANDER, supra note 71, at 166 (citing Mkontwana v. Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 CC).
  \item\textsuperscript{104} First National Bank of SA Ltd. t/a Wesbank v. Commissioner, 2002 (4) SA 768 (CC) § 100.
  \item\textsuperscript{105} Whether a law is arbitrary depends on:
    \begin{itemize}
      \item It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
      \item A complexity of relationships has to be considered.
      \item In evaluating the deprivation in question, regards must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
      \item In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property.
      \item Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
      \item Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purposes for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
      \item Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
      \item Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with “arbitrary” in relation to the deprivation of property under section 25.
    \end{itemize}
\end{itemize}

\textit{Id.}
“if a measure is held to be arbitrary because it is procedurally unfair or provides insufficient reason for the property deprivation, it will not meet the requirement of section 36.” Next, under step five, the court must determine if the deprivation constitutes an expropriation under Section 25(2). Again, this step is considered redundant, because the FNB court noted that expropriations are a narrower class of deprivations, and thus any law which takes property without compensating the owner will be found to be arbitrary under Section 25(1) (already addressed in step three) and Section 36 (already addressed in step four). Finally, the analysis concludes with step six: assuming the taking constitutes an expropriation, it will be justified so long as it is for a public purpose or in the public interest and is subject to compensation per Section 25(2); further, the amount of compensation must be just and equitable subject to Section 25(3).

The FNB decision, although leaving room for questions, has been applauded for its analysis of the property clause in the respect that it “leave[s] possibilities for future decisions with transformative potential open rather than close them down.” FNB is still “the most comprehensive consideration to date of the structure and application of [section] 25 to particular disputes. . . . As such, it remains . . . a valuable account of the framework for constitutional property protection and regulation in South Africa.”

106. ALEXANDER, supra note 71, at 169.
107. See S. Afr. Const. 1996 § 25(2) (explaining that “[p]roperty may be expropriated only in terms of law of general application—(a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court”).
108. ALEXANDER, supra note 71, at 170 (noting that this leaves less certainty to how courts in South Africa will deal with “inverse condemnations”).
109. The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
   (a) the current use of the property;
   (b) the history of the acquisition and use of the property;
   (c) the market value of the property;
   (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
   (e) the purpose of the expropriation.

111. Mostert, supra note 82, at 242.
4. Eminent Domain in Practice

Despite the sophisticated and progressive approach to property in South Africa, in practice the GOSA rarely uses its power of eminent domain. This hesitancy is due to both domestic and international factors. Domestically, government representatives—particularly those who represent rich white farmers—have lobbied against the use of expropriation, and instead favor the use of private compensation agreements if any land must be taken at all. This is in stark contrast with the majority of poor blacks and colored people, who would like a more aggressive eminent domain policy by the GOSA.

Although as the majority the poorer population does have notable political power, the GOSA has tended to side with the considerable economic power of the lobbyists and their wealthy constituents who are important for continued local investment—a source of economic well-being which the GOSA would not care to upset.

Internationally, the World Bank continues to discourage the use of an expropriation-based land reform policy by the GOSA, and instead also favors the continued use of private compensation agreements. Cumulatively, the use of private compensation agreements has delayed the GOSA's goal of redistributing thirty percent of farmland.

112. Smith, supra note 4, at 287 (finding that “[l]and reform efforts in South Africa are essential in moving away from an apartheid state, but are caught between protecting civil or economic rights.”).
114. Id. at 788.
115. Id. at 788, n.104 (pointing out that this arrangement of appeasing the rich minority in South Africa is notable—the ANC (the dominant political party in South Africa) faces no real electoral threat, so their continued compliance to negotiated land reform despite the wishes of the majority of the public shows a conscious policy choice on their part).
116. Id. at 786 (stating that “economists [from the World Bank] have set the tone for what other foreign donors and investors view as acceptable land reform policies. Since Southern African countries require foreign assistance and investment to complete their land reform programs, the governments are somewhat constrained by the neoliberal views of these influential economists.”). See also Klaus Deininger, Making Market Assisted Land Reform Work: Initial Experience from Colombia, Brazil, and South Africa, in Agriculture and the Environment: Perspectives on Sustainable Rural Development 156, 169 (Ernst Lutz ed. 1998) (noting that “[t]he choice of land redistribution rather than expropriation (which, as in Colombia, can still be used as an instrument of last resort) was based on the need to maintain public confidence in the land market and more generally to affirm the government’s respect for individual property rights. It also reflects the recognition that expropriation in other countries has been neither rapid nor cheap.”).
by 2014. By 2010, the GOSA had approved approximately 10% of the land required for this goal but the actual amount of land actually taken has been less. 117 More troublingly, 90% of the farms located on redistributed farmland have failed, sometimes resulting in that same land being sold back to its original owners at a discount. 118 From the inception of land reform until 2010, the GOSA has spent approximately $4 billion on the private compensation policy, which is now believed to require another $10 billion dollars as well as an additional decade to be completed. 119

However, in the rare instance the GOSA does use its eminent domain power, it is still not done in the manner envisioned by the Constitution. Most notably, the compensation paid is usually just the fair market value of the taking, instead of the pragmatic considerations outlined in Section 25(3) of the Constitution. This is the result of a variety of practical shortcomings. Frequently, property assessors in South Africa valuate property inaccurately—plainly forgetting to take into account the factorial framework of Section 25(3) and discount the price. 120 However, even when the assessors do value property correctly, the government is often forced to pay fair market value anyway, or else be forced to litigate in a court system that is “slow, understaffed, underfunded and overburdened.” 121 As one government official put it, “[the government] doesn’t like to refer disputes around price to the court because it will take forever. It can drag on for over two years before the matter is resolved.” 122

However, it is good news for foreign investors that the threat of expropriation remains low in South Africa. The United States Department of State has take notice that the GOSA rarely uses its eminent domain powers and instead continues to use compensation agreements with private landowners before any expropriation is

119. Id.
120. Atuahene, supra note 113, at 786.
122. Atuahene, supra note 113, at 790 (citing Interview with Blessing Mphela, Acting Chief Lands Claims Comm’r, Dep’t of Land Aff., in Johannesburg, S. Afr. (May 15, 2008)).
The GOSA has only twice used expropriation to get land—each time to take possession of farmland—and in each instance paid the owners the fair market value of the takings.

B. India

India, upon gaining independence, set out with a similar set of reform-oriented goals as South Africa, including land reform and the redistribution of wealth. Under the Indian Constitution, all fundamental rights, which are found in Part II of the Constitution, are guaranteed and protected by the Indian Supreme Court. Any law which offends a fundamental right is to be voided by the Court, which is politically insulated through both the Constitution and civil law system of India. However, Part IV of the Constitution contains “Directive Principles of State Policy” which directed the Government of India (“GOI”) to raise the quality of life in India through social reform. Part IV’s aim for social reform was directed to the legislature and the executive branches of the GOI, and were “not . . . enforceable by any court.” Together, these two sections created an uncomfortable tension in India’s original property regime.

Property was originally dealt with in Part II of the Indian Constitution, notably Articles 19 and 31 of the original constitution which provided that:

19(1) All citizens shall have the right—(f) to acquire, hold and dispose of property, and . . .

31(1) No person shall be deprived of his property save by authority of law.
31(2) No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertakings, shall be taken possession of or acquired for public purposes under any law authorizing the taking of such possession

124. Id.
127. Id. at 194–95 (citing INDIA CONST. art. 37 (1947)).
or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation, or specifies the principle on which, and the manner in which the compensation is to be determined and given.128

By placing property in Part II of the Constitution, it was designated as a fundamental right, giving it both the protection of the Indian Supreme Court as well as providing for compensation for expropriations.129 However, this protection was in stark contrast with some of the Constitution’s social reform policies in Part IV, which among other things provided the GOI with the goal of land reform and economic restructuring, creating a tension of the GOI’s attitude towards property and land rights.130

Surprisingly, this was not a drafting oversight by an overanxious new nation. Including property as a fundamental right was by design of the Indian Prime Minister, who intended that including property as a fundamental right would give judicial protection for only small expropriation projects, and “would apply only to limited government expropriations and not to large-scale social engineering programs.”131

This would not be the case, leading to years of contention between the judiciary and GOI.132 The Indian Judiciary, per Part II of the Constitution, immediately began treating all property as a fundamental right, often upending new legislation, even laws which were passed in the name of land reform133 and for the economic improvement of the nation.134 The legislature, desirous of engaging in redistributive land reform policies, per Part IV of the Constitution, grew frustrated by the judiciary’s zealous protection of property rights. This began a pattern of constitutional “one-upmanship” over the course

128. India Const. art. 31 (1947).
129. See Armour & Lele, supra note 125, at 511; Manoj Mate, The Origins of Due Process in India: The Role of Borrowing in Personal Liberty and Preventive Detention Cases, 28 Berkeley J. Int’l L. 216, 218 n.7 (2010).
130. Allen, supra note 93, at 195.
131. Alexander, supra note 71, at 50.
132. Id. (noting that “[m]any commentators believe that it was precisely the undemocratic consequences of judicial review of land reform measures in India] that led to the eventual demise of constitutional property in India.”). For a full history, see generally A.J. van der Walt, Constitutional Property Clauses: A Comparative Analysis 192–206 (1999).
134. Alexander, supra note 71, at 50.
of the next three decades, where Supreme Court decisions about the property clause would be met with legislation, and vice versa.\footnote{135}{See Armour & Lele, supra note 125, at 511.}

For example, after the Court found that it could review the compensation provided after expropriation,\footnote{136}{Id. (citing State of West Bengal v. Bela Banerjee (1954)).} the legislature amended the constitution to put compensation outside the realm of judicial review.\footnote{137}{Id. at 512 (citing Constitution (Fourth Amendment) Act (1955)).} Even after this amendment, the Supreme Court continued to review compensation, finding that although they no longer had the power to review compensation, they still did have the power to strike down laws which either didn’t provide, or provided only illusory compensation.\footnote{138}{Id. (citing Vajravelu v. Special Deputy Collector (1965)).} Eventually after years of going back and forth the issue, the GOI, frustrated with the judiciary’s “status-quoist [sic] and overprotective approach toward property rights”\footnote{139}{ALEXANDER, supra note 71, at 50 (quoting K.N. Goyal, Compensation: Down but Not Out, 38 J. INDIAN L. INST. 1, 2 (1996)).} passed the Forty Forth Amendment to the Constitution in 1978, which completely deleted property as a fundamental right.\footnote{140}{Id.} Critics argued that during the thirty or so years that property was a fundamental right in India, “no meaningful progress was made in redistributing land.”\footnote{141}{Id. at 51 (citing John Murphy, Insulating Land Reform from Constitutional Impugnment, 8 S. Afr. J. ON HUM. RTS. 362, 382–83(1992)).} The replacement statute, which is the current embodiment of India’s property regime, is found in section 12 of the Constitution.\footnote{142}{INDIA CONST. art. 300A.} The current constitutional property provision in India simply reads “[n]o person shall be deprived of his property save by authority of law.”\footnote{143}{Id.}

There are a variety of laws which govern the Indian takings process in addition to the constitutional provisions for property in India. Among these laws are: the Land Acquisition Act of 1894,\footnote{144}{Land Acquisition Act, 1894 (India) (amended 2007).} the National Highways Act, and the Indian Railways Act. Additionally, various states in India have their own takings legislation.\footnote{145}{Ashwin Mahalingam & Aditi Vyas, Comparative Evaluation of Land Acquisition and Compensation Processes Across the World, 46 ECON. & POL. WKLY. 94, 94–102 (Aug. 6, 2011).} Recently, various state governments in India have begun to compete over the inclusion of resettlement and rehabilitation policies for those affected by land acquisitions with the goal of garnering political support in the state and national elections. See also E-mail from Dr. Anil
However, the primary law that still governs land acquisition in India is the Land Acquisition Act of 1894 ("LAA"). The LAA is a statutory vehicle that allows the government to exercise its eminent domain power for public purposes in exchange for fair and reasonable compensation. The LAA has undergone periodic revisions, including a comprehensive amendment in 1984. The LAA sets forth four steps to accomplish expropriation. First, the GOI must make a determination that the property is required for a public purpose; second, the GOI must identify the affected parties; third, there must be a fair process where the affected parties are to be notified and given an opportunity to express their concerns about the project; and fourth, the GOI must negotiate with the affected party to reach an acceptable compensation agreement.

1. Public Purpose

The Land Acquisition Act ("LAA") includes explicit provisions for when an expropriation may be done in accordance with the public purpose, or even a private purpose. The LAA defines a public purpose broadly, allowing for the inclusion of many proposed projects to have a sufficiently public purpose. Notably, this definition states

Kashyap, University of Ulster, Belfast, to Patricia Salkin, Raymond & Ella Smith Distinguished Professor of Law, Associate Dean and Director of the Government Law Center of Albany Law School (discussing the State of Haryana’s (located in India’s capital region) development of policy initiatives for those affected by takings, notably paying market value for the taking, with further compensation incentives for those who forgo litigation over the taking; additionally, these benefits may include employment, tax exemptions, and replacement land for the affected landowner) (Oct. 4, 2011) (on file with the author).

147. Id. at 239.
149. Mahalingam & Vyas, supra note 145, at 94–102.
151. Id. § 40.
152. (f) [T]he expression "public purpose" includes:
   (i) the provision of village sites, or the extension, planned development or improvement of existing village-sites,
   (ii) the provision of land for town or rural planning;
   (iii) the provision for land for planned development of land from public funds in pursuance of any scheme or policy of Government and subsequent disposal.
that the acquisition of land for companies is not considered a public purpose. Instead, for private companies, the LAA provides a separate set of requirements for private companies seeking to acquire land under Part VII of the Act, mostly involving the acquisition of land to provide housing for employees. However, the distinction between public and private purposes under the LAA remains vague, even with judicial interpretation.

In practice, the distinction between a public and private purpose has become even vaguer. Despite the LAA’s promulgation that expropriation for a private company is not a public purpose, there have been many instances where the GOI has expropriated land on behalf thereof in whole or in part by lease, assignment or outright sale with the object of securing further development as planned;

(iv) the provision of land for a corporation owned or controlled by the State;
(v) the provision of land for residential purposes to the poor or landless or to persons residing in areas affected by natural calamities, or to persons displaced or affected by reason of the implementation of any scheme undertaken by Government, or any local authority or a corporation owned or controlled by the State;
(vi) the provision of land for carrying out any educational, housing, health or slum clearance scheme sponsored by Government or by any authority established by Government for carrying out such scheme, or with the prior approval of the appropriate Government, by a local authority, or a society registered under the societies Registration Act, 1860 (21 of 1860), or under any corresponding law for the time being in force in a state, or a co-operative society within the meaning of any law relating to co-operative societies for the time being in force in any State;
(vii) the provision of land for any other scheme of development sponsored by the Government or with the prior approval of the appropriate Government, by a local authority;
(viii) the provision of any premises or building for locating a public office, but does not include acquisition of land for companies.

Id. § 3(f)(viii).

153. Id. § 3(f)(viii).

154. The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 38-44B. See also § 40.

Public Enquiry: (1) Such consent shall not be given unless the [appropriate Government] be satisfied. [either on the report of the Collector under section 5A, sub-section (2), or] by an enquiry held as hereinafter provided:

(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workers employed by the Company or for the provision of amenities directly connected therewith, or
(b) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or
(c) that such work is likely to prove useful to the public.

of private companies under the broad language of subsection (iii), which allows the expropriation of land for a public purpose as long as it is sponsored by, or has the approval of the GOI.156 As long as the GOI provides some revenue towards the expropriation, it will qualify as a “public purpose” under the Act, allowing private companies to acquire land under the tenuous guise of a public purpose.157

The expropriation of land on behalf of private, for profit companies is a controversial subject in India.158 For example, in October 2010 the state government of Himachal Pradesh was accused of acquiring land on behalf of a power corporation seeking to clear a forest for the construction of a Dam. These land acquisitions were alleged to have continued even though the application for the project had been rejected by the Union Ministry of Environment and Forests and despite unpopularity among the public who feared displacement.159

2. Compensation

Landownership is source of prestige and reputation in Indian society; it is seen as both a wise investment, as well as a source of societal standing. Therefore, compensation is especially important to expropriated landowners in India.160 Despite not defining “compensation,”161 the LAA includes several considerations for determining the compensation of takings, including the market value of the land, assets present on the land, income made from the land, as well as giving government officials the discretion to raise the amount of compensation.162

However, compensation is often discounted by a number of practical factors in the expropriation process. Often, the GOI will only identify a minimum number of affected parties to the taking, completely barring sharecroppers, encroachers and laborers from any compensation on the land.163 This is problematic as in India the majority of people,

156. Id. at 244, n.45 (citing The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 3(f)(iii)).
157. Id. at 245.
158. Id. at 239 (citations omitted).
162. Mahalingam & Vyas, supra note 145, at 94–102.
163. Id.
especially the aforementioned sharecroppers, encroachers, and laborers who live in areas which are prone to expropriation, will usually not have legal title to their land, and will be passed over from receiving any compensation at all.\footnote{R. Rangachari et al., \textit{Large Dams: India’s Experience}, in \textit{WORLD COMMISSION ON DAMS CASE STUDY 111} (2000); see also Mahalingam & Vyas, \textit{supra} note 145, at 94–102.}

The required negotiations under the LAA can also take a long amount of time, in some cases up to three years even if the affected landowner has no objections to the taking. Further, the assessor of the land has up until two years after notifying the landowner of the taking on deciding on what compensation will be awarded.\footnote{The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 11.} However, in most cases no negotiation happens at all, as there is often little attempt by the GOI to engage in meaningful negotiation with the landowner.\footnote{Sanyal & Shankar, \textit{supra} note 146, at 245; Mahalingam & Vyas, \textit{supra} note 145, at 94–102.} Local officials are given a lot of discretion to value the property under the LAA, as there is no formula for determining compensation, which often leads to a subjective, and often undervalued, assessment of the property.\footnote{Sanyal & Shankar, \textit{supra} note 146, at 247. See also Satendra Prasad Jain v. State of Uttar Pradesh, A.I.R. 1993 S.C. 2517 (finding that “eighty percent of the estimated compensation was not paid to the appellants although [the LAA] required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the first respondent.”).} Further, although the LAA requires affected landowners to be paid before or during the taking,\footnote{The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 17.} that is rarely, if ever the case.\footnote{Sanyal & Shankar, \textit{supra} note 146, at 247. See also Satendra Prasad Jain v. State of Uttar Pradesh, A.I.R. 1993 S.C. 2517 (finding that “eighty percent of the estimated compensation was not paid to the appellants although [the LAA] required that it should have been paid before possession of the said land was taken but that does not mean that the possession was taken illegally or that the said land did not thereupon vest in the first respondent.”).} A landowner who is dissatisfied with their compensation can go to the judiciary, where courts often take years to issue decisions.\footnote{Heritage Foundation, India, in 2011 Index of Economic Freedom, \textit{available at} http://www.heritage.org/index/Country/India.} In the unlikely event a landowner does have the patience to take a claim to court, the court will apply a number of factors in determining the compensation owed, including the fair market value of the property (from when the landowner was notified of the expropriation), damages sustained by the landowner resulting from the expropriation, and the reasonable costs associated with moving.\footnote{The Land Acquisition Act, No. 1 of 1984; India Code (1993) § 17.} Cumulatively, compensation is often much lower than the fair market value.\footnote{Mahalingam & Vyas, \textit{supra} note 145, at 94–102.}
3. Recent Developments

Recently, the GOI has begun to adopt a national policy for rehabilitation and resettlement for people who are negatively affected by the involuntary dispossession of their land, in addition to other reforms in their use of eminent domain.173 With this in mind, in 2007 the GOI drafted the Land Acquisition (Amendment) Bill, which acknowledges the need for resettlement procedures, as well as increased compensation to disposed landowners. This includes additional forms of compensation, including replacement land, annuities, transportation allowances, and replacement housing in some instances.174 Additionally, the Bill provides an expanded definition for “public purposes” relative to the LAA.175 The bill remains highly controversial, both to private landowners concerned with both resettlement procedures and the giving of land to a private company as a public purpose, as well as with private corporations who find the bill to be impractical and anti-development.176

In terms of foreign investment, although there have been few instances of direct expropriation since the 1970s, the GOI has been accused of having “a poor track record of honoring and enforcing agreements with U.S. investors in the energy sector.”177 In 2006 the Supreme Court of India awarded a decision in favor of a U.S. firm which had done work in India during the 1980s.178 However, because the judiciary in India is notoriously backlogged, many foreign investors use alternative dispute resolution.179

178. Id. (noting that the GOI eventually paid a settlement that was “significantly less than the amount awarded under the Court’s order”).
C. Chile

Chile has been hailed as “the benchmark and model for growth in Latin America” containing constitutional stability as well as a “solid property rights regime.”180 Chile offers sound protection for private property and contract rights, and enforces this through an “efficient and transparent” judiciary.181 Although an ideologically diverse set of rulers presided over Chile during the twentieth century, the legal basis for its property regime has remained comparatively consistent.

Chile gained its independence permanently in 1818.182 The time period following independence was marked by political instability until the early 1830s.183 Various presidents took power and drafted their own constitutions, none of which lasted until the Constitution of 1833184 which gave the Chilean Constitution “modern” protections to its property clause, restricting the governmental power of expropriation unless it was done for a public purpose decided by law, and provided “indemnification” for the aggrieved party.185 However, the late nineteenth and early twentieth century saw Chile surrounded in a governmental system that was stalled in political stalemates, a politically active military, and a substantial labor and social unrest which was leading to a rapidly unionizing population.186 Military coups in 1925 led to the drafting of a new constitution, a task which focused on property as well as issues related to it.187

183. Id.
184. Id.
185. CHILE CONST. (1833), art. 12(5).
187. Id. at 1187–88 (providing an example of the socioeconomic impact of the nitrate industry in Chile).
By the time of drafting the Chilean Constitution of 1925, the attitude towards property rights in Chile had changed. The constitutional debates focused on the need for strong property protections, yet acknowledged the public’s disapproval of large land estates and uncultivated land. The new property provision hoped to provide strong security to property rights, while at the same time limiting it to accommodate the necessary progress required for the country.  

The 1925 Constitution reflected this attitude towards property through its inclusion of second section in the property provision. The new provision, Article 10(10), still provided for the classic public purpose and compensation framework, but additionally provided that property ownership was subject to “the maintenance and property of the social order.”

By including this new “social order” provision, new and previously unheard of land projects were now possible under the new Constitution. These projects, undertaken by the government over the course of the next forty years, were characterized by growing socialist government policy towards property, which included a large scale land and agrarian reform legislation during the 1960s.

Socialism was explicitly adopted as a platform by the incoming Chilean government from 1970 to 1973. During this time, President Salvador Allende engaged in Chile’s most aggressive policy of state ownership towards property, nationalizing industry and expropriating millions of hectares of land yearly. However, this aggressive

188. Id. at 1200–05.
189. Chilean Constitution (1925), art. 10(10).

The inviolability of all properties, without any distinction.

No one can be deprived of his property, or of a part of it, or of the right that he should have to it, except by virtue of a judicial sentence or of expropriation for reasons of public utility, qualified by law. In this case the indemnification that is arranged with him or that is determined in the corresponding trial will be previously given to owner.

The exercise of the right to property will be subject to the limitations or rules that the maintenance and the progress of the social order require, and in that sense, the law can impose obligations or impositions of public utility in favor of the general interests of the State, of the health of the citizens and of public welfare.

190. Mirow, supra note 186, at 1208 (explaining that “[Article 10(10)] led to proposals to limit large land estates, to ensure the exploitation of agricultural lands, and to direct urban development. The social-function norm of property had won the day.”).
191. Id. at 1211–12.
governmental takings policy would last until the successful military coup of 1973, led by General Pinochet.

The incoming Pinochet regime was noted for its economically liberal attitude towards property, and would have an economic legacy in Chile noted for its “neo-liberal, free-market reforms.”\textsuperscript{192} Most believed that the ideological philosophy of Pinochet, combined with the aggressive takings agenda by the previous government, would lead the new Pinochet-led government to frame property in a new constitution as “unassailable, absolute, natural right,” and do away with the “social order” provision of the 1925 Constitution.\textsuperscript{193} Surprisingly, that was not the case. When drafting a new Constitution the Pinochet government instead embraced the social order provision of the previous constitution. Ironically, the Pinochet government went even further than the previous property provision, defining a “social function”\textsuperscript{194} in the new Constitution, and further giving a more detailed provision for property, allowing the government close to complete control over property if necessary.\textsuperscript{195} The democratic governments which followed Pinochet, taking power in the 1990s, have in large part continued with this traditional Chilean property model.\textsuperscript{196}

1. Public Purpose

As discussed above, the current Chilean Constitution goes into greater depth than the classic notion of what constitutes a public purpose, by combining it with the “social function” concept born in the 1925 Constitution. The text of the 1980 Constitution gives a broad articulation on property rights, providing for intellectual as well as real property.\textsuperscript{197} Further, the Constitution gives the Chilean government “absolute, exclusive, inalienable and permanent domain” over

\textsuperscript{192} Id. at 1212 (noting that evidence of this attitude can be found in the current constitution, for example, article 19(21) of the Chilean Constitution guarantees all citizens “[t]he right to develop any economic activity which is not contrary to morals, public order or national security, respecting legal norms which regulate it.”).

\textsuperscript{193} Id. at 1214.

\textsuperscript{194} CHILE CONST. (1980) art. 19(24) (stating that “[o]nly the law can establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations which derive from its social function. This comprises all which the general interests of the Nation, the national security, public use and health, and the conservation of the environmental patrimony, require.”).

\textsuperscript{195} Mirow, supra note 186, at 1213–14.

\textsuperscript{196} Id. at 1214.

\textsuperscript{197} CHILE CONST. (1980), art. 19(24).
all mineral, fossil fuel and hydrocarbon on its territory,\textsuperscript{198} which can be subsequently licensed out by the government.\textsuperscript{199} Under Section 19(24) of the Constitution no one can “be deprived of his property, of the assets affected or any of the essential facilities or powers of ownership, except by virtue of a general or a special law which authorizes expropriation for the public benefit or the national interest, duly qualified by the legislator.”\textsuperscript{200} However, the social function obligation of the Constitution broadens the scope of what is considered a public purpose in Chile, and states that:

\begin{quote}
[o]nly the law may establish the manner to acquire property and to use, enjoy and dispose of it, and the limitations and obligations derived from its social function. Said function includes all requirements of the Nation’s general interests, the national security, public use and health, and the conservation of the environmental patrimony.\textsuperscript{201}
\end{quote}

Further, Section 19(24) provides the government with exclusive dominion over a majority of the nation’s natural resources, giving the State “absolute, exclusive inalienable, and imprescribable domain over all mines, including guano deposits, metalliferous sands, salt mines, coal and hydrocarbon deposits and other fossil substances, with the exception of superficial clays, despite the ownership held by individuals or [corporations] over the land which the above should be contained.”\textsuperscript{202} A person who suffers an expropriation will find similar depth in the due process they are afforded by the constitution.\textsuperscript{203}

2. Compensation

Compensation is also guaranteed, and outlined in great detail under the Chilean Constitution. Under section 19(24), “[the aggrieved

\begin{itemize}
\item \textsuperscript{198} Id.
\item \textsuperscript{199} Larry B. Pascal, \textit{Summary of Oil and Gas Developments in South America} (2006), 13 L. & BUS. REV. AM. 521 537 (2007).
\item \textsuperscript{200} \textit{CHILE CONST.} (1980), art. 19(24).
\item \textsuperscript{201} Id.
\item \textsuperscript{202} Id.
\item \textsuperscript{203} Id. (providing that “[t]he expropriated party may protest the legality of the expropriation action before the ordinary courts of justice. . . . In case of protest regarding the justifiability of the expropriation, the judge may, on the merit of the information adduced, order the suspension of the material possession.”).
\end{itemize}
party] shall, at all times, have the right to indemnification for patrimonial harm actually caused, to be fixed by mutual agreement or by a sentence pronounced by said courts in accordance with the law. In the absence of an agreement [to sell the property], the indemnification shall be paid in cash.”204 Section 19(24) further provides that compensation is to be determined, if an agreement cannot be reached between the landowner and the government, the compensation provided “shall be provisionally determined by experts in the manner prescribed for by law.”205 Section 19(24) further holds that expropriated property can only be conveyed once compensation, in the form of an advance cash payment, is made.206

Despite the extensive treatment that the Chilean Constitution gives to property protection, expropriation is extremely rare.207 Foreign investors should be especially confident to know that both the military regime, which ruled from 1973–1990, as well as the subsequent democratic governments have not nationalized industries, “and nothing suggests that any form of expropriation is likely in the foreseeable future.”208

D. Singapore

Singapore is one of the most densely populated countries in the world, with 7,126 people per square kilometer.209 Additionally, the total amount of land which makes up Singapore is less than three hundred square miles, making it only about three times the size of Washington D.C.210 Given the scarcity of land, land acquisition in

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204. Id. (continuing to mandate that the government may not take possession of the expropriated property until “total payment of the indemnification”).
205. Id.
209. See, Singapore Dep’t of Statistics, Statistics, http://www.singstat.gov.sg/stats/keyind.html (noting that there are over 5 million people residing on an area of land that is 712.4 sq. km.).
Singapore is viewed as “a necessity to facilitate development for economic progress.” The Government’s landholding in Singapore has steadily risen since its modern inception; in 1969 the state owned 49% of land, in 1975 the state owned 65% of land. Today, close to 90% of households in Singapore reside in structures that were built and once owned by the government.

Singapore was part of Malaysia from 1963 until 1965, when it separated over political friction with the central Malaysian government to form its own country. Upon separation, one of the largest concerns became whether or not to constitutionally guarantee property rights for its citizens, as was the case in Malaysia. Ultimately, the government decided against it, primarily concerned about litigation resulting from disputes over compensation in eminent domain cases. In particular, the government was concerned with certain compensation issues and drafted what would become the Land Acquisition Act (“LAA”) in light of these concerns. These concerns, articulated below, would set the tone for the Singaporean attitude towards property ownership throughout the course of its history:

Firstly, that no landowner should benefit from development which has taken place at public expense and secondly, that the price paid on the acquisition of land for public purposes should not be higher than what the land would have been worth had the Government not carried out development generally in the area . . .

Singapore’s languor for constitutionally guaranteed compensation reflected its belief that, given the scarcity of land, the public interest

212. NICHOLS ON EMINENT DOMAIN, Ch. 1A, § 1C.10 (Matthew Bender, 3d ed).
215. Nichols, supra note 212.
216. Id. (noting that “[a Constitutional guarantee to property would] leave open the door for litigation and ultimately for adjudication by the Courts as to what is or is not to be adequate compensation.”) (citing Singapore Parliamentary Debates, vol. 25, col. 1051).
of the nation would be best served by limiting the costs of development and infrastructure. The LAA reflected this policy of frugality, and originally determined compensation for expropriated landowners to be either: the market value on the notice date of the taking, or the market value on a statutorily determined date—November 30th, 1973—whichever was lowest. This led to problematic compensation for landowners, as Singapore’s property values steadily increased in the 1970s, before exploding in value into the 1980s. By the 1980s the statutory date was completely outdated, and resulted in inequitable compensation being paid to landowners. Finally, in 1986, the LAA was revised to update compensation values—although “after a number of major acquisitions had been [given notice they would be taken], as large tracts of lands were needed for infrastructure development such as the construction of the mass rapid transit system, drainage improvement, road widening and urban redevelopment in various parts of Singapore.” However, had the LAA updated the compensation due earlier, it could have resulted in vast fiscal problems for a young nation trying to acquire scarce lands to further the public interest. The compensation provisions of the LAA would continue to be updated, and in shorter intervals, up until 1995. The LAA underwent no review between 1995 and 2007 due to the 1997 financial crisis in Asia, and the outbreak of SARS in 2003—each of which forced property values to below their 1995 values.

It is important to note that during the 1980s and 1990s, despite what the Act provided, many landowners were able to get closer to fair-market value when their property was taken by the Government. The Government of Singapore did relieve a majority of inequitable

218. Id. at 170.
219. See id. at 170–71; NICHOLS, supra note 212.
220. Chew et al., supra note 211, at 171.
221. Id.
222. Id. at 172.
223. Id. (stating that “[c]learly the compensation regime in the early years was structured in favor of the tax-paying public, who had to bear the cost of public development rather than a small group of individual landowners. Although this was obviously unfair from the landowners’ point of view, it was nevertheless reasonable from the State’s perspective.”).
224. Id. (noting that “[t]he interval between the revision in 1973 and 1986 was 13 years. The interval between the review in 1986 and 1992 was a short period of six years. The 1992 and 1995 reviews were only three years apart. This showed a change over time to compensate at a value closer to the value at the date of [notice].”).
225. Id. at 173.
compensations by making *ex gratia* payments to aggrieved landowners, giving them additional compensation for their taking, which usually made up the difference between the statutory compensation and the market value compensation due for the property.\(^{226}\) *Ex gratia* payments originally began to help small landowners whose compensation was insufficient to find replacement housing; however, the concept was often progressively used to reflect changing circumstances.\(^{227}\) By 2001, *ex gratia* payments were given to all types of properties and a cap on the amount given was gradually increased to deal with any inequities resulting from statutory dating on compensation.\(^{228}\)

In 2007, the government of Singapore officially abolished their compensation provision in the LAA. The reason for this, per the government was that “Singapore today has become more developed and urbanized. Land acquisitions now affect far more people than those carried out in 1970s or 1980s. Today many more Singaporeans own private properties. It is often that Singaporeans sink a major portion of their life savings and future earnings into their property.”\(^{229}\)

1. **Public Purpose**

   Under the LAA, the President of Singapore may expropriate land when it is needed “(a) for any public purpose; (b) by any person, corporation or statutory board, for any work or an undertaking which, in the opinion of the Minister, is of public benefit or of public utility or in the public interest; or (c) for any residential, commercial or industrial purposes.”\(^{230}\) This provision gives the President broad discretion in the use of eminent domain power, and once a notification is entered in compliance with the LAA, it is considered to be “conclusive evidence that the land is needed for the purpose specified therein.”\(^{231}\) This provision leaves little room for judicial review of a “public purpose” in Singapore,\(^{232}\) though the state’s eminent domain power is subject to stringent procedural oversight at the executive level.\(^{233}\)

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\(^{226}\) Id. at 176.

\(^{227}\) Id.

\(^{228}\) Id.

\(^{229}\) Id. at 173 (quoting Singapore Parliamentary Debates, Official Report (11 April 2007) vol. 83 at col. 500 (Prof. S. Jayakumar, Deputy Prime Minister and Minister for Law)).

\(^{230}\) Land Acquisition Act, c. 152, § 5(1)(a)–(c) (1985) (amended 2007) (Sing.).

\(^{231}\) Id. § 5(3).

\(^{232}\) NICHOLS, supra note 212.

\(^{233}\) Singapore Parliamentary Debates, Official Report (11 April 2007) vol. 83 at cols. 377 and 378 (Prof. S. Jayakumar, Deputy Prime Minister and Minister for Law) (stating that “all
The judiciary is compliant with this broad grant of statutory power to the executive branch, and has acknowledged that “[t]he Government is the proper authority for deciding what a public purpose is. When the Government declares that a certain purpose is a public purpose, it must be presumed that the Government is in possession of facts which include the Government to declare that the purpose is a public purpose.”\textsuperscript{234} When it has had opportunity to comment, the Singaporean judiciary has supported a broad reading of a “public purpose” under the LAA. Specifically, the judiciary has found that a “public purpose” under subsection (5)(a) of the LAA was meant to have an expansive reading according to legislative intent, and “might conceivably include the acquisition of land for resale to private developers.”\textsuperscript{235} In practice, the government of Singapore has used its expropriation power on numerous occasions to give property over to private development.\textsuperscript{236} Despite the broad power given to the state in determining what would constitute a public purpose, it has spurred close to no litigation in Singapore.\textsuperscript{237}

2. Compensation

As discussed above, compensation has spurred plenty of controversy in Singapore. Compensation is currently determined by a multistep process, in which the government must first identify and notify all “persons interested” of the impending expropriation, and then negotiate an offer for the property before a taking may occur. After the President publishes the notification of an impending taking, “persons interested” are those who may seek compensation, and are defined as “every person claiming an interest in compensation to be made on

\begin{footnotesize}
\begin{enumerate}
\item Galstaun v. Attorney-General (1981) 1 M.L.J. 9 at 10, per Chua J.
\item Teng Fuh Holdings v. Collector of Land Revenue, 2006-3 Sing. L. Rep. 507, 523–24 (Sing. High Ct.).
\item See Chen, supra note 213, at 9, n.47 (giving examples of the government of Singapore taking land for private development).
\item Nichols, supra note 212.
\end{enumerate}
\end{footnotesize}
account of the acquisition of land under [the LAA], but does not include a tenant by month or at will.”238 Practically speaking, it includes “anyone with a legal or beneficial interest in the land.”239 All of the designated “persons interested” must appear before collectors within 21 days of receipt of notice, and give their own valuation of their own land.240 Based on this, collectors will issue awards of compensation.241

Compensation is determined under the LAA using a multifactorial approach which not only show factors which should be considered in the valuation, but also promulgates factors which should not be considered in the valuation. Compensation should only take into account: damages which may result from severing a piece from the land; damages from the taking which affect other property; the “market value” of the expropriated property;242 whether the party has to move his residence or place of business as a result of the taking; moving costs associated with a forced move; and increases in value to other land of the interested party which will result from the taking—not the increases in the taking itself.243 In some instances, the compensation has deducted from the compensation due based on what the expropriated land would be used for.244 On the other hand, compensation cannot take into account: the urgency of the taking; “any disinclination of the person interest to party with the land acquired”; damages sustained which would not support a valid cause of action against a private party; damage likely to be caused to the taking after the notice date; increases in the value of the land taken, improvements

238. Land Acquisition Act, c. 152, § 2(1) (1985) (amended 2007) (Sing.). See also id. § 2(2) (including trustees and guardians acting in their fiduciary capacity).

239. Nichols, supra note 212 (requiring that anyone designated as a “person interested” must appear before the collector within 21 days of notice).


241. Id. § 8(4).

242. See id. §§ 33(1)(a), 33(5)(e) (noting that market value is not defined, but instead determined by either the date of the acquisition of land, if made after 2/12/07 pursuant to § 33(1)(a) or the price which a bona fide purchaser would pay for the land, “after taking into account the zoning and density requirements and any other restrictions imposed [by law].”); Chew et al., supra note 211, at 174–75.

243. Land Acquisition Act, c. 152, § 33 (b)–(f) (1985) (Sing.).

244. Chen, supra note 213, at 11 (relating that “[i]n a land acquisition exercise for the construction of a mass transit station, the government acquired a small plot of land originally used as a car park on private residential property. A nominal S$1 was paid as compensation since the gains in the property value from the eventual construction of the mass transit station (estimated by industry sources to be $18,000,000) are much more than the value of the 220 square meters of land acquired.”) (internal citation omitted).
made to the land after notice of the taking was given; liens, assignments and other dispositions affecting the land unless registered with the government; and evidence of the value of comparable properties, unless they are from bona fide sales.\textsuperscript{245} Taken together, the compensation due usually is “the price that a bona fide purchaser might reasonably be expected to pay for the land on the basis of either its existing use or the purpose designated by post-acquisition zoning, again whichever is the lower figure.”\textsuperscript{246}

Once compensation is determined by the collector, in practice it is treated as an offer—one which can be accepted or rejected by the landowner. The government of Singapore recommends that any agencies which are planning to expropriate property should attempt to negotiate with the landowner, and only then, when negotiations fall through, the agency may use its eminent domain power.\textsuperscript{247} If the landowner rejects the offer, he may take his valuation to an Appeals Board which can increase, reduce or confirm the initial compensation award based on the factors discussed above.\textsuperscript{248} The Appeals Board’s subsequent decision on the amount of compensation owed is final and binding.\textsuperscript{249} Once compensation is determined and paid to the landowner, the government of Singapore may take possession of the expropriated property.\textsuperscript{250}

As previously noted, because Singapore’s property rights are found in legislation and are not protected by their Constitution, the judiciary has not recognized regulatory takings.\textsuperscript{251} As precarious as the statutory property rights system in Singapore may seem, Singapore has been a haven for foreign investment. Singapore has not expropriated foreign owned property, and further has no laws which mandate that foreign investors must hand ownership over to local interests. Further, Singapore has signed many Bilateral Investment Agreements with a

\begin{footnotesize}
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\item[245.] Land Acquisition Act, c. 152 § 34 (1985) (Sing.).
\item[246.] Id. § 33(5)(e).
\item[247.] Mahalingam & Vyas, supra note 145, at 94–102.
\item[248.] Land Acquisition Act, c. 152 § 23 (1985) (Sing.).
\item[249.] Id. §§ 29–30 (noting that there is a right to appeal to a court on a point of law, but otherwise this is the end of the inquiry for an aggrieved landowner).
\item[250.] Id. § 16.
\item[251.] Chen, supra note 213, at 12 (citing TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 4 (Tsuyoshi Kotaka & David L. Callies eds., 2002)) (noting that Japan and Korea are the only Asian Pacific nations which have doctrine similar to regulatory takings).
\end{enumerate}
\end{footnotesize}
wide range of countries, which promote and protect nationals and companies of countries—specifically prohibiting against expropriation for an initial fifteen year period, which is continued unless terminated. Additionally, the judiciary of Singapore is noted to be efficient and provides relatively good protection for private property.

**E. Ghana**

Today, Ghana is experiencing a period of relatively strong economic growth. However, this growth has illustrated to the rest of the world the problems of property ownership—particularly land ownership—in Ghana. Examinations of the country suggests that “getting clear title to land [in Ghana] is often difficult, complicated and lengthy,” and the process for getting title “includes six government offices, and three to four years.” Litigation over who has rightful title to land “has become so common that sellers make a point of emphasizing in their advertisements when a plot of land is for sale and its ownership is not contested.” Further complicating matters is the presence of customary law. In Ghana today, 80% of land is held on a customary basis and is not titled.

In pre-colonial Ghana, land rights included elements of economic, political and even religious standing. Land rights were viewed as a community asset, and the central authority of these communities rested with their chiefs, who distributed the land as they saw fit.

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255. Id.


258. Id. at 112, 114 (noting that “land cases are being filed at a rate higher than that at which they are decided, and the backlog in proceedings means that it may take five or six years to hear a case.”).

259. Id. at 113 (stating that the remaining 20 percent is owned by the government for development purposes, which has been further allocated to individuals).

260. Id. at 34.

261. Id. at 34, 114 (explaining that chiefs in Ghana have a responsibility to allocate land to
Upon the colonization of Ghana, however, these chiefs negotiated directly with the colonizing British settlers. With no central land registry, a number of problems ensued: chiefs often sold land they had no right to, or would pocket the proceeds of the sale rather than share it with the community, or would sign agreements which they did not understand. Regardless, property rights in Ghana took a major hit under this colonial system: chiefs were incentivized to continue the sale of land to the British, who not only paid them, but supported and propped up the chiefs as the central power in their communities.

The strong customary authority of both chiefs in Ghana has persisted into the present day.

Ghana’s property regime, notably its land law, continues to be heavily influenced by this customary law system, despite the appearance of a relatively simple constitutional and statutory framework. Traditional customary law has dominated the development of property rights in Ghana, instead of a more formal rule of law. Today customary law operates as a separate property rights regime over approximately 75% of the land in sub-Saharan Africa, and 80% of land in Ghana. Although customary law varies regionally within Ghana, customary law in western Africa generally views land from those who need it, as well as for community projects, and that chiefs also resolve disputes around land ownership in their communities and have the right to sell land.

262. Id. at 35.

263. Id. at 36 (emphasizing that “[i]n adopting a system of indirect rule [the British] buttressed up the authoritarian aspect of the power of chiefs who frequently abused it in a way that they could rarely have done in traditional society without deposition.” (citations omitted)).

264. Id. at 113.


266. Ryan Bubb, States, Law, and Property Rights in West Africa 3 (March 21, 2011) (finding that de facto property rights on either side of the border between Ghana and Côte d’Ivoire were extremely similar, especially in comparison with the property rights in different regions), available at http://www.law.stanford.edu/display/images/dynamic/events_media/States_Law_and_Property_Rights_in_West_Africa.pdf (last visited June 24, 2012).

267. JORHMAN, supra note 254, at 113.

a communal viewpoint. Not surprisingly, with this heavy influence, the Government of Ghana (“GOG”) has incorporated customary law into the Ghanaian land regime.

Customary law can be viewed as both a positive and negative attribute to the land rights of its constituents. As a flexible and dynamic system, customary law is beneficial to environmental conservation efforts in Africa. However, the use of customary law has emphasized the differences in regional land systems across Ghana, especially those governed by statute and those governed by customary law. Perhaps most problematically, customary law is unwritten, and is “defined by those who administer it, often for their own benefit”; leading to the enrichment of those few who possess the authority to interpret law and make land transactions. This has resulted in outbreaks of violence for these positions of power in customary law systems. This violence is further perpetuated by different ethnic groups seeking land ownership. The statutory and constitutional regime of Ghana is founded on notions of equality across the entire citizenship of Ghana, whereas customary law merely “was formed to organize and control ethnic groups; it is rooted in place and ethos.” Customary law therefore favors those with some form of ties to the community, disadvantaging and prejudicing land ownership among poorer or migrant classes in Ghana.

In addition to the challenge of a customary law system, Ghana has many practical problems with its statutory and constitutional law for managing property, particularly land. Reported problems include: ineffective land administration, indeterminate boundaries of land, inadequate land security, land racketeering. Land records can be incomplete or non-existent and, therefore, clear title may be

269. See Bubb, supra note 266, at 3.
270. See id.
271. JIREMEN, supra note 254, at 41.
272. Id. at 42.
273. Id. at 40.
274. Id. at 42 (stating that “[i]n 2008, struggles over succession in a Ghanaian chieftainship resulted in 20 deaths as well as a greater number of wounded people.”).
275. Id. at 43.
276. Sarpong, supra note 265, at 5.
277. Id.
impossible to establish.” The Ghanaian judiciary, due to resource constraints and inefficiencies, is slow and ineffective at enforcing decisions, and has “not been given, nor do they consider that they need a precise definition of customary law” and instead generalize customary law. However, “[t]he most telling evidence of [Ghana’s] statutory land law’s failure is the fact that most people ignore it whenever possible.”

In light of the institutional shortcomings of the Ghanaian property regime, many landowners in contemporary Ghana instead protect their property privately, through the use of “Land Guards.” Land Guards are simply individuals or groups of individuals—often former security or police officials—who are paid by landowners to protect their land. Land Guards protect land from encroachment by squatters and trespassers—often through the illegal use or threat of force. Despite its illegality, the use of force is considered “critical” to the Land Guards’ ability to protect the landowners property interest, yet there have been numerous reports of Land Guards using force against police, citizens, and even the Land Guards of neighbors. More problematically, some citizens with competing claims to land will sometimes hire Land Guards to protect their disputed land—Land Guards don’t care who the rightful owner of the land is, but who is paying them. Despite these problems, public opinion in Ghana is split on Land Guards: most people consider them necessary to the protection of land claims, yet they are also considered a threat to local governments, and the well-being of the nation.

278. U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—Ghana, http://www.state.gov/e/eib/rls/othr/ics/2011/157283.htm (last visited June 24, 2012). See also Sarpong, supra note 265, at 5 (noting that “several groups are affected by land tenure . . . stool who have customary freehold but not written agreement confirming their interest in the land; women, whose rights are usually secondary to those of their husbands, fathers, brothers or sons; and migrants without firm written claims to land.”).


280. Blocher, supra note 268, at 166 (citing GORDON WOODMAN, CUSTOMARY LAND LAW IN THE GHANAIAN COURTS 40 (1996)).

281. Id. at 189.

282. Id.

283. Id. at 115.

284. Id. at 112.

285. Id. at 116–18 (explaining that police in Ghana are traditionally thought of as corrupt and untrustworthy, although the Government has begun anti-corruption programs, especially among the police force. Regardless, it will take time to restore the public trust.).
However, even with the difficulties in the Ghanaian property regime, the GOG has prioritized attracting foreign investment through the use of domestic and international tools. To attract international investment, the GOG has passed and enforced a number of investment laws aimed at protecting foreign investment from expropriation. Although there have not been any recent cases of expropriations by the GOG, there have been a few instances where foreign investors have either filed for international arbitration against the GOG or agreed to sell investments to the GOG.\footnote{U.S. Dep’t of State, Bureau of Economic, Energy and Business Affairs, 2011 Investment Climate Statement—Ghana, http://www.state.gov/e/eb/rls/othr/ics/2011/157283.htm (last visited June 24, 2012).} Domestically, the GOG has guaranteed the protection of property rights in their Constitution.

The current Ghanaian Constitution guarantees the private ownership of land, and “[e]very person has the right to own property either alone or in association with others...”\footnote{GHANA CONST. (1992) § 18(1).} The government may only interfere with this right “in accordance with land and as may be necessary in a free and democratic society for public safety or the economic well-being of the county, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.”\footnote{Id. § 18(2).} The 1992 constitutional guarantees on property rights are meant to act as limits on previous legislation which empowered the GOG’s use of eminent domain. The GOG still maintains power to take land under a variety of previous legislation however, including the 1962 Administration of Lands Act, the 1962 State Lands Act, the 1963 Lands Act and the 1965 Public Conveyance Act, so long as the taking complies with the constitutional requirements of a public purpose and compensation.\footnote{Sarpong, supra note 265, at 5.}

1. Public Purpose

Under Section 20(1), property cannot be taken by the government unless two conditions are satisfied:

(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or

utilization of property in such a manner as to promote the public benefit; and
(b) the necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has an interest in or right over the property.

Section 20(1)(a) gives detailed, and rather broad language for governmental justifications which would be sufficient for a “public purpose” for the government to use its eminent domain power. If the GOG does not end up using the land in the public purpose, the former landowner is given the first option to purchase the property for the price of the original compensation or an amount which is “commensurate with the value of the property at the time of the reacquisition.”291

2. Compensation

Compensation is addressed in section 20(2) which provides that the GOG can only use its eminent domain power if done under a law which provides for “(a) the prompt payment of fair and adequate compensation; and (b) a right of access to the High Court by any person who has an interest in or right over the property. . . .” Further, under 20(3), if anyone is displaced by the taking, the GOG needs to “resettle the displaced inhabitants on a suitable alternative land with due regard for their economic well-being and social and cultural values.”292

These provisions were adopted in response to the pre-constitutional state of takings in Ghana where no compensation was paid.293 However, there is still concern that some takings have continued to occur in Ghana without any compensation being provided.294 Further, there is concern regarding the GOG’s use of its eminent domain power, specifically in the mineral rich mine towns.295 It has been reported that

292. Id. § 20(3).
293. Sarpong, supra note 265, at 4–5.
294. Id. at 5.
almost 80% of those affected by the GOG’s use of eminent domain were dissatisfied with the rendered compensation given.296

III. DOMESTIC FACTORS AFFECTING PROPERTY RIGHTS

The five nations highlighted above are each at different points in their development and each face different and significant challenges in the enforcement and implementation of their property rights regime. The unique domestic and international characteristics of these nations, however, may influence their approach to property rights. Some of these factors may be idiosyncratic, and others may be applicable to other nations throughout the world. It is interesting, and perhaps a point worthy of further research, when these factors—however idiosyncratic they may seem—appear to affect other countries in surprising ways. Based on only the five nations briefly described above, a number of factors appear to influence their property rights regime, including the application and enforcement of property rights, the constitutional guarantee of compensation for takings, the impact of each country’s judiciary, any stated governmental land policies, the history and tradition of that country or the people who reside there, as well as the social attitude towards property rights. Interestingly some of these factors have cross-national significance, affecting a number of nations in different ways; some factors, on the other hand, may be completely idiosyncratic. These factors are in no way to be considered exhaustive—even among the five countries discussed above—as they are in many ways a subjective observation based on a small sample size.

A. The Application and Enforcement of Property Rights

The application and enforcement of property rights is perhaps the broadest of these factors, and in some cases, the least transparent. Each of these countries has their own prerogatives and policies for spurring economic growth through both domestic and international sources. Each of these nations has done this through the protection of property in different ways, often faced with the practical realities of the political systems they have inherited.

296. Agyei-Baah, supra note 295 (citations omitted).
For instance, the consistency of a compensation policy has been an issue of contention in both South Africa and India. In South Africa the government is prone to pay fair market value for any expropriated property because of the variety of pressures it faces, including the amount of time litigation takes in the country, domestic and international political pressure, and even things as trivial as the frequently inaccurate valuation of property by property assessors. In India, its government is prone to pay well below market value because of the lack of oversight in the takings process, the amount of discretion government officials are given in determining compensation, as well as the futility of a landowner engaging in a meaningful appeal. Singapore, on the other hand, operates in a society where it is able to not only omit any constitutional guarantee, but where it is usually statutorily required to pay less than fair market value. However, the effectiveness of ex gratia payments to placate former landowners is certainly open to interpretation and further research.

On the other end of the spectrum, in Ghana the governmental shortcomings in the application and enforcement of private property rights at any level has been so profound it has spurred its own industry. The incomplete reach of the government, along with an ineffective judiciary, has led to the phenomena of many landowners paying for Land Guards to prevent encroachment and has put landowners in the uncomfortable position of paying for this necessary service, despite the social unrest they cause. Additionally, the legacy of customary law continues to transcend the population, further complicating property ownership.

B. Compensational Guarantee in the Constitution

The promise of compensation in a constitution was a similarly transcendent issue across a number of the countries examined. Three of the countries discussed have had the protection of their property rights influenced by the governmental decision of whether or not to guarantee the right to compensation in their constitutions. This has often been tied to that country’s concept of what a “public purpose” should include. For example, Singapore purposefully left a property clause out of their Constitution because of the belief that leaving out

297. See supra notes 116–26 and accompanying text.
298. See supra notes 166–74 and accompanying text.
299. See supra notes 286–90 and accompanying text.
compensation was in the best interest of the small country. The government had a simple fear of the escalating costs associated with the constitutional guarantee to compensation as well as concern with private landowners being unjustly enriched by governmental infrastructure development which was essential to the tiny nation.

Singapore’s concern over the compensation clause appears to be somewhat vindicated by the Indian experience with their property clause. Each was concerned over spurring efficient growth in their country, and India’s guarantee of property rights arguably obstructed its ability to take as many meaningful steps in development as it would have liked.

Ghana, on the other hand, consciously sought to include the guarantee of compensation in its recent Constitution in order to address the lack of compensation which originally characterized its takings law. The new Ghanaian Constitution went even further, including a provision that required displaced residents to be resettled on land which considers “their economic well-being and social and cultural values.”

C. Judicial Impacts

The role of the judiciary can significantly influence the strength of property rights protection. The judiciary, in most of the nations examined, has impacted the development of property rights, even when, in some cases, they can no longer reach many issues surrounding the right to property.

The most well-known example occurred in India, where the courts’ prolific attempts at championing the right to property eventually led to the legislature shutting them out of the property arena by amending the constitution.

In other nations, like Singapore, where the judiciary’s influence on property rights has been restricted, the judiciary has been largely compliant with the government, even when called upon to give their opinion. The Singaporean judiciary’s accommodating nature is probably surprising to many American readers, as the Singaporean government

300. Chew et al., supra note 211, at 170.
303. GHANA CONST. (1992) § 20(3).
304. See supra notes 136–47 and accompanying text.
makes extensive use of its eminent domain power. 305 Still in other nations, like South Africa, the courts have, for the most part, been on the same page as the legislature, tempering the property rights afforded to their citizens with the important land reform policy there. 306

Even in countries where the judiciary lacks many resources and is largely inaccessible to much of the population, it still affects property rights. For instance, in Ghana, the population’s reliance on Land Guards and customary law reflects the efficiencies of the judicial system.

D. Government Land Policy

Countries that had land policies often (unsurprisingly) saw these policies impact all of the property rights of that country. The rationale behind these land policies were not always the same. For some, it was focused on post-colonial social justice; for others, economic development and smart-growth were at the forefront of the land policy. The governments of four highlighted counties had an overt land policy: two based on social and economic reform through land distribution (Chile, India and South Africa) and the other largely focused on economic development (Singapore).

Of all the factors, a land reform policy is perhaps the most polarizing topic among the populace of the respective countries examined. As demonstrated through the South African, Chilean and Indian experiences, the constitutional debate surrounding property rights in these countries led to their modern concept of property.

Interestingly, South Africa and India, two nations with similar land reform policies and goals, each saw the constitutional protection of their property rights go in completely opposite ways. South Africa, a country concerned with shedding the shadow of Apartheid, framed property not only as a right but a social obligation. To avoid being tied to the legacy of Apartheid, they went further, giving a broad and detailed treatment to their property provision, making

305. Teng Puh Holdings v. Collector of Land Revenue, 2006-3 SING. L. REP. 507, 523–24 (Sing. High Ct.). Further, the Singaporean judiciary, like most Asian-Pacific countries, does not even recognize regulatory takings. See Chen, supra note 213, at 12 (citing TAKING LAND: COMPULSORY PURCHASE AND REGULATION IN ASIAN-PACIFIC COUNTRIES 4 (Tsuyoshi Kotaka & David L. Callies eds., 2002) (noting that Japan and Korea are the only Asian Pacific nations which have doctrine similar to regulatory takings)).

sure that a “public purpose” was defined to include the land reform policy.\textsuperscript{307} India, although similarly devoted to a land reform policy, eventually ended up removing the guarantee of property rights from their Constitution. Already nervous about including a property rights guarantee because of their desire to implement land reform, the original Indian Constitution defined property as a fundamental right only because the Prime Minister at the time had indicated to the legislature that a property guarantee would not interfere with their land reform policy.\textsuperscript{308} However, when the judiciary began to strike down land reform legislation based on the property clause of the Constitution, the legislature eventually removed property as a fundamental right, and stripped it down to the bare-bones constitutional provisions that exist today.\textsuperscript{309}

Similarly, in Chile, land reform was discussed during constitutional debates. The Chilean government and people had taken issue with the large estates of land ownership throughout the country in its early days. This was among the concerns which drove Chile to include the “social function” in its property provision, and similarly gave future governments the ability to engage in widespread land and agrarian reform in the 1960s.

Singapore, on the other hand, was only interested in a land use policy that would ensure its rapid development. Like India, Singapore avoided including compensation—or a right to property at all—in its Constitution.

\textit{E. History and Tradition}

All nations and governments are shaped by their history and tradition which influence property rights afforded to the citizens of that country. Although relatively recent government regimes have been highlighted in this article, it has illustrated that in some cases new traditions can be born affecting a nation’s property regime, such as in Chile; while in other cases tradition can be so engrained, it can resist any change to property rights, such as in Ghana.

In the case of Chile, although it has adopted a relatively recent “social function” obligation in property rights, this policy has continued.

\textsuperscript{308} Alexander, supra note 71, at 50.
\textsuperscript{309} See India Const. art. 300A.
Despite the vast economic ideological differences controlling governments have had in Chile—Socialism to laissez faire—each has continued the historical broad “social function” clause of the Constitution.

On the other hand, in Ghana property rights have been influenced by customary law for thousands of years. Customary law appears to be so engrained that it has been a source of conflict for property rights; over 80% of Ghana has included customary law in its property rights regime. Unfortunately, the influence of customary law in its property rights regime has still not completely melded with the current needs of a rapidly modernizing country, leading to many problems in urbanizing areas.

Landownership can also be a source of social and economic privilege. In Indian society, landownership is a source of standing and respect. Similarly, in Ghana landownership signals economic, political, and religious good standing.

F. The Social Obligation of Property

Many of the countries examined in this paper have gone noticeably far in their property rights regime, establishing “an overriding obligation” on the ownership of property. This social obligation has been a noticeable trend in constitutional law, one which arguably traces its roots to the German Basic Law. Under the German Basic Law, or German Grundgesetz, property rights, as well as land use, are subject to a social obligation which balances the interests of the general population against the individual and can allow the government more broad powers to use their eminent domain power.

For example, the Constitutions of South Africa and Chile have explicitly acknowledged the social obligation of property ownership. Each of these clauses originated, at least in part, with the call for land

310. JOIREMAN, supra note 254, at 113.
311. See supra notes 200–06 and accompanying text.
313. JOIREMAN, supra note 254, at 34.
314. ALEXANDER, supra note 71, at 7.
315. See Mostert, supra note 82, at 245, 255 (citing Grundgesetz für die Bundesrepublik Deutschland, art. 14).
reform as an influential issue during the drafting of each nation's respective constitution. In South Africa in particular, the social obligation concept of German property law has been particularly influential, in both the actual constitutional text of property, as well as the developing jurisprudence of property cases in the South African Judiciary.\(^{318}\)

Singapore, despite lacking a constitutional protection of property, appears to have somewhat taken notice of this social obligation to property, as the people and judiciary have largely been compliant with the government's broad grant of authority and extensive use of eminent domain.\(^{319}\)

**CONCLUSION**

There are many factors that influence the property rights regime in a given nation, making it difficult to conduct meaningful comparative analysis if the purpose of such inquiry is to determine whether concepts and protections may be portable from one jurisdiction to another. However, an examination not just of the words that comprise constitutional and statutory property rights protections in developing countries, but also an awareness of the domestic and international influences leading to certain protection policies, can aid practitioners in better assessing the strength and weaknesses of the not only the protections afforded but the available enforcement mechanisms and the potential for likely fiscal compensation when appropriate, to best advise clients who possess global marketplace interests. Most of all, however, property rights are a fascinating combination of social ambitions tempered by practical realities. The property rights of every country are forged from traditions that are often older than the country itself, yet are still molded to accommodate the future of a society. As the world grows smaller and practitioners face the increased pressure to be aware of the cultural influences that can shape a property regime, all must be aware that the essence of a given society's property regime is often made from a complex array of socioeconomic factors.

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\(^{318}\) For more detailed treatment on the social obligation of property in South African jurisprudence, see Mostert, *supra* note 82, at 255, 268.

\(^{319}\) See Nichols, *supra* note 212, at Ch. 1A, § 1C.10; Galstaun v. Attorney-General (1981) 1 M.L.J. 9 at 10, per Chua J.
INCORPORATION OF THE RIGHT TO JUST COMPENSATION:
THE FOURTEENTH AMENDMENT VS. THE TAKINGS CLAUSE

ALAN T. ACKERMAN*

INTRODUCTION

The Fourteenth Amendment, the most litigated and arguably important amendment to the U.S. Constitution, was drafted during Reconstruction by a select committee of six senators and nine representatives called the Committee of Fifteen.1 While the Committee’s secret meetings were not transcribed, a record of their proposals and their votes survived in a clerk’s journal.2 Before the Committee approved the final version of the Fourteenth Amendment as it stands today,3 Representative John Bingham of Ohio offered an addition,4 which mirrored the Fifth Amendment’s Takings Clause5:

[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.6

The Committee rejected this construction by a seven-to-five vote.7 Notably, Bingham offered this amendment by itself, not as part of a larger provision, which the Committee may have rejected for other

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2. Id.
3. Id. at 82.
4. Id. at 82, 85.
5. See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
6. KENDRICK, supra note 1, at 82–85.
7. Id. at 106.
reasons. The Committee then adopted the Fourteenth Amendment as it stands today, without a specific “takings clause.”

What does this rejected addition say about the Fourteenth Amendment and eminent domain jurisprudence? Does the Committee’s rejection indicate its belief that the right to just compensation did not bind the states? Or did the Committee assume that since the Fourteenth Amendment incorporated the entire Bill of Rights, the Fifth Amendment’s taking clause would have applied to the states anyway, making a separate clause in the Fourteenth redundant? Many still debate whether the framers of the Fourteenth Amendment adhered to this “total incorporation” theory. Perhaps the Committee believed that because the right to just compensation was so fundamental, it was part of “natural rights” that need not be enumerated.

Unfortunately, we can only speculate as to the true mindsets of these framers. Nonetheless, while the rejection of the Bingham Amendment seems like a curious historical footnote, it warrants re-examining. Confusion over the framers’ intentions and the Supreme Court’s interpretation of the Fifth and Fourteenth Amendments has caused a “muddling” of substantive due process and the Takings Clause, leading to confusing Supreme Court precedent. In modern eminent domain cases, most courts cite the Takings Clause, the part of the Fifth Amendment which reads: “[N]or shall private property be taken for public use, without just compensation.” However, the Fifth and Fourteenth Amendments’ Due Process Clauses also mention “property,” stating, that no person shall be deprived of “life, liberty, or property, without due process of law.” Which of these two clauses governs eminent domain? Are they reconcilable?

Over the years, the Supreme and inferior courts have produced a confusing eminent domain doctrine that draws on substantive due

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8. Id.
9. Id.
12. U.S. CONST. amend. V.
process in some situations and the just compensation principle in others. The simplest interpretation is that the Due Process Clause requires process, i.e., notice and hearing, while the Takings Clause requires just compensation, even after adequate notice and a fair hearing. However, after the ratification of the Fourteenth Amendment, the Supreme Court began to enforce “substantive due process,” which enforces substantive rights, not merely the right to notice and hearing. Professor Kanner, factoring in substantive due process, believes a proper reading of these provisions is that the Due Process Clause restricts the police power, which is “regulatory and noncompensable,” while the Takings Clause restricts eminent domain, which is “acquisitory and compensable.” However, this has not been the Court’s practice. The Due Process Clause was used in its substantive form to enforce the right to compensation against state action, at least until 1978. The Bill of Rights originally restricted only the federal government, as stated in the 1833 case *Barron v. City of Baltimore.* As Professor Bradley C. Karkainnen aptly points out, until the 1978 decision in *Penn Central Transportation Co. v. City of New York,* most Supreme Court cases striking down state “takings” actions cited the Due Process Clause, not mentioning the Takings Clause. Citing an 1897 case, *Chicago, B. & Q. Railroad Co. v. City of Chicago,* the Supreme Court held that the Takings Clause was “of course” applicable to the states. The trouble with this statement is that *Chicago, B. & Q.* did not even mention the Takings Clause. It relied on the Fourteenth Amendment’s Due Process Clause, as did most cases until *Penn Central’s* definitive incorporation. The Fourteenth Amendment’s Due Process Clause served as the vehicle through which the “natural right” protecting property was enforced, at least until 1978, when *Penn Central* definitively incorporated the Takings Clause against the states. Additionally, the fact that the public use component of the Takings Clause “was originally understood to be

15. Id. at 211.
19. 166 U.S. 226 (1897).
20. 438 U.S. at 122.
merely descriptive and impose no independent limit on legislative authority also indicates that until the late twentieth century, American courts primarily applied the natural right to just compensation through substantive due process. The public use clause—the one element that sets the Takings Clause apart from due process—has never been substantive in eminent domain jurisprudence. Recently, in *Kelo v. City of New London*, the Supreme Court confirmed the public use clause as nullity. While many criticize this ruling, it merely comports with centuries under which only the common law right to just compensation applied to the states.

Adding to the confusion, the Court has recently breathed new life into the Takings Clause, allowing it to fill the void left when the Court retreated from “economic” substantive due process in the wake of the New Deal. The Takings Clause has been used to restrict the police power since *Pennsylvania Coal Co. v. Mahon* in 1922, the first “regulatory takings” case. “Regulatory takings” are regulations that limit use of land, but do not take title from the original owners. This contrasts with occupations of land, which are per se takings no matter how small the impact. Today, the Takings Clause has a broad scope, encompassing takings of land, zoning, wetlands, and other land use and environmental restrictions, and even regulations affecting non-real property, such as intellectual property and a law compelling


23. 260 U.S. 393 (1922).


25. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (even a de minimis physical occupation is still a “taking” under the Fifth Amendment). However, this rule is not as clear-cut as it seems. In *Yee v. City of Escondido, California*, 503 U.S. 519 (1992), the Court refined the line between physical invasions and regulatory takings. The petitioner was a mobile home park who argued a rent control ordinance was a “physical occupation” because it prevented them from evicting delinquent tenants. Id. at 523. However, the Court wrote: “The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. This element of required acquiescence is at the heart of the concept of occupation.” Id. at 527 (quoting FCC v. Fla. Power Corp., 480 U.S. 245, 252 (1987)).

corporations to pay into a pension fund (which was found to constitute a taking). Some call for the Supreme Court to reconcile the two clauses and form a unified doctrine; others call for a “decoupling.” Indeed, the Court’s willingness to strike down almost any regulation of “property,” real or otherwise, as an uncompensated “taking,” is almost a resurrection of the infamous *Lochner v. New York* era, in which the Court used the Fourteenth Amendment’s due process clause to strike down virtually any state regulation of economic activity.

Considering that the Court’s modern Takings Clause jurisprudence stems from substantive due process, it is unsurprising that after the repudiation of *Lochner*, the Court now applies the Takings Clause to so wide a swath of police power actions. When the Supreme Court interprets the Takings Clause against state action, it is really applying substantive due process to restrict police power. The Court should begin viewing its eminent domain jurisprudence through this lens, to avoid making the Takings Clause something it is not. It is impossible to “decouple” the condemnation aspects of the Takings and Due Process Clauses because they both originated from common law “natural rights” principles dating back centuries before the framing of the Fifth and Fourteenth Amendments.

While many scholars have generated vigorous discussion about the implications of the Supreme Court’s mingling of due process and the Takings Clause, this paper examines the historical context that allowed this muddling to happen. In pre-colonial America and in England, the right to just compensation when property was taken was a fundamental “natural right,” predating both the Fourteenth Amendment and the Bill of Rights. No doubt this fact influenced the framers of the Fourteenth Amendment, who may not have adhered to the “total incorporation” theory of the Bill of Rights but at least recognized a fundamental right to just compensation when property was taken. So fundamental was the right that enumerating it separately in the Fourteenth Amendment was unnecessary. Bingham’s

31. See Tunick, supra note 29.
32. See Karkkainen, supra note 11; Krotoszynski, supra note 30; Tunick, supra note 29.
proposal to include the takings analogue may have been simply a misstep from a man whose thoughts on the Fourteenth Amendment were often unclear and jumbled. Another interpretation is that regulation of property had always been an issue of state police power, and the framers of the Fourteenth Amendment did not want to disturb this precept. However, considering how willing the framers were to restrict state power after the Civil War, it may be they recognized the right to compensation as a fundamental natural right.

This article will examine the pre-colonial and antebellum period in Part I, to determine the genesis of the just compensation principle in American law, and to determine what may have inspired the framers of the Fourteenth Amendment. Part II will analyze the drafting of the Fourteenth Amendment itself, and exactly what the framers had on their minds when they considered a takings clause analogue. Part III will examine takings cases following the Fourteenth Amendment up to *Penn Central* in 1978, and will conclude that until that case, natural rights principles were predominant. Finally, Part IV will analyze the impact of the *Penn Central* decision and its progeny, and whether they accord with what the framers may have intended.

**I. JUST COMPENSATION BEFORE THE CIVIL WAR: INFLUENCES ON THE COMMITTEE OF FIFTEEN**

From the founding of the country, the right to just compensation was woven into the fabric of natural law. It is hard to believe this fact did not influence John Bingham and his colleagues on the Committee of Fifteen. Prior to the ratification of the Fourteenth Amendment, two broad themes emerged in American law. First, the Takings Clause of the federal constitution was not a source to restrict state infringements on property rights. Second, the common law “natural right” to just compensation was a justification to restrain state exercises of eminent domain. The prevailing force in restricting state condemnations in the nineteenth century was substantive due process. However, whether “natural rights” or the specific language of the Takings Clause should govern eminent domain has been the subject of debate. In fact, the importance of natural rights in constitutional law has been questioned since early American legal history. The debate on the significance of “natural rights” in
constitutional law dates back at least to *Calder v. Bull*, in which Justices Chase and Iredell famously debated whether the Court had the power to overturn a statute based on “natural justice.” Referring to the Social Compact, Justice Chase stated,

> There are acts which the Federal, or State, Legislature cannot do, without exceeding their authority. There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.

Justice Iredell responded that

> The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Nonetheless, Iredell agreed that a legislative act violating the Constitution would be void. In essence, the debate between Chase and Iredell continues to this day, especially in the context of eminent domain. Since *Calder v. Bull*, the Supreme Court has struck down state and federal exercises of eminent domain under both natural law principles and with specific reference to the Fifth Amendment’s Takings Clause.

To examine this issue, it is necessary to explore the historical origins of “natural rights” and limitations on eminent domain. The power of eminent domain emerged in the Roman Empire, possibly earlier. In early history, the sovereign had ultimate dominion over

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33. 3 U.S. (3 Dall.) 386 (1798).
34. Id. at 388.
35. Id. at 399 (Iredell, J., dissenting).
36. Id.
all property. Aristotle believed the State was “the highest form of community, existing to achieve the highest good for its citizens.”

His republican ideas migrated to England, where scholars such as Grotius argued that sovereign states had original and absolute ownership of property, prior to possession by citizens. Grotius coined the term *dominium eminens*. As England colonized America in the seventeenth century, republican ideals prevailed. Individual possession of property came only by grants from the State, which implicitly reserved the right to resume ownership of property.

The principle of just compensation for eminent domain emerged with the philosophy of John Locke, a contemporary of Grotius. Locke, whose liberal theories advocated individual property rights. However, the idea of an individual, “natural” right to property ownership saw its genesis much earlier. In 1215, the Magna Carta limited the sovereign’s power by granting inalienable individual rights, among them the right to possess property:

> NO Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him, but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right.

This clause, the genesis of “substantive” due process, influenced the legal philosophers Blackstone and Coke. They recognized the existence of certain “natural rights” that limited the power of government whenever its actions conflicted with the common law or the laws of “the Creator.” Notions of unwritten “natural” or “universal”
rights would form the basis for “substantive” due process in American constitutional law. John Locke expanded “natural rights” to protect an individual’s right to hold property. He rejected the notion that all property ultimately belonged to the sovereign, postulating that individuals had an absolute right to hold property; governments could only take land with the owner’s consent.

Scholars debate the degree to which Locke’s liberalism usurped traditional republicanism in the minds of the Founding Fathers and post-Revolution American states. William Michael Treanor argues that two competing schools of thought both contributed to the development of early American law. He summarized the two schools:

Liberalism begins with the belief that individuals are motivated primarily, if not wholly, by self-interest and with the belief that rights are prepolitical. Government exists to protect those rights and the private pursuit of goals determined by self-interest. Republican thinkers, in contrast, see the end of the state as the promotion of the common good and of virtue. Rights, rather than being prepolitical, are created by the polity and subject to limitation by the polity when necessitated by the common interest. Whereas liberals are comfortable with economic self-interest, republicans have a profoundly ambivalent stance toward private property.

English eminent domain law split the difference between the liberal and republican approaches. Customarily, courts awarded compensation for total takings of property, though not for property damaged...
by state activities. Further, litigants could not challenge the government's determination that property was needed for a "public use." Thus, while the law protected the individual right to property to some extent (liberalism), the law also forced individuals to sacrifice to the greater good (republicanism).

In contrast, American colonial and early state governments drifted more toward republicanism. No pre-Revolution colonial charter or document included any compensation for takings, except John Locke’s 1669 Fundamental Constitutions of Carolina, which the state never fully implemented. Some colonial laws required a judicial or administrative procedure, but without guaranteed compensation. These trends continued after the Revolution. Only a handful of state documents mandated compensation requirements: The Vermont Constitution (1777), Massachusetts Constitution (1780), and Northwest Ordinance (1787). In one scholar’s words, “The first round of state constitutions had given legislatures virtually absolute power. The corollary was that the executive branch was left with very little power. In the context of takings, most state constitutions required only legislative consent—a limit on the executive, not the legislature.” States confiscated and redistributed the estates of loyalists, expropriated goods and services without payment, and upset "commercial relationships through paper money schemes and debtor-relief legislation." Undeveloped property was taken and transferred to other private properties, or private, unimproved property was simply taken to build roads or to otherwise promote economic growth. Use of property was not always reserved for the "public." Private property was taken to build private "mills, private roads, and [for] the drainage of private lands." One historian estimates divestment acts and bills

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49. Id.

50. Treanor, The Original Understanding, supra note 47, at 785–86.

51. Id.

52. SCHULTZ, supra note 45, at 25–27; Treanor, The Original Understanding, supra note 47, at 790–91.

53. Goho, supra note 21, at 64.


56. Sturtevant, supra note 37, at 206 & n.37 (citing 2A NICHOLS ON EMINENT DOMAIN § 7.01[3], at 7–17).
of attainder confiscated twenty million dollars of real estate, which was ten percent of the total real estate in the country. State legislatures and courts made clear that it was the state’s right to seize land. Citizens “were bound to contribute as much [land], as by the laws of the country, were deemed necessary for the public convenience.” Compensation was merely a “bounty given . . . by the State” out of “kindness.” Uncompensated takings were justified by “ancient rights and principles” and the “supreme authority of the state.”

The Takings Clause of the Fifth Amendment sat largely idle during the first 150 years of the United States’ existence and did nothing to limit these state excesses in the antebellum period. Chiefly concerned with the federal government’s tyranny, the framers of the Constitution were content leaving disputes over improper exercises of states’ taking power to their internal political processes. The Fifth Amendment restricted only the national government, as the Supreme Court made clear in the 1833 case Barron v. City of Baltimore. It was the first “anti-incorporation” case, and held that the Bill of Rights applied only to the federal government. The case bolstered state autonomy by dismissing a Fifth Amendment Takings Clause challenge against the City of Baltimore, holding that the clause only applied against the federal government.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the states. In their several constitutions, they have imposed such restrictions on their respective governments, as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no further than they are supposed to have a common interest.

Perhaps motivated by the slavery controversy, the Court in Barron v. Baltimore ensured that states had almost plenary power over all

57. Treanor, The Original Understanding, supra note 47, at 790 & n.44 (citing Forrest McDonald, Novus Ordo Seclorum: The Intellectual Origins of the Constitution 91–92 & n.71 (1985)).
58. Treanor, The Original Understanding, supra note 47, at 824.
61. Lindsay v Comm’rs, 2 S.C.L. (2 Bay) 38, 50, 57 (S.C. 1796).
63. 32 U.S. (7 Pet.) 243 (1833).
64. Id. at 247–48.
property within their borders. This created a strongly federal policy on property rights, serving as a precursor to later cases upholding slavery and segregation such as *Dred Scott v. Sandford*.\(^{65}\) *Barron v. Baltimore* and other “anti-incorporation” cases\(^{66}\) reinforced the strong police powers guaranteed by States under the Constitution and Tenth Amendment of the Bill of Rights. Kent points out that *Barron v. Baltimore* and other reasons meant the Takings Clause had little impact on states in the nineteenth century.

Unfortunately, there is little direct application of the Takings Clause by the courts of this era for two reasons. First, in *Barron v. Baltimore*, the Supreme Court held that the Clause applied only to the federal government, and not to the states. Second, until the late nineteenth century, the federal government normally had the states condemn on its behalf or else paid compensation by private-bill legislation. As such, there was little opportunity to develop a body of thorough precedent regarding the Takings Clause.\(^{67}\)

Thus, the Takings Clause sat largely unused, and states were relatively free to abuse the power of eminent domain. It was equally unused against the federal government. Treanor identifies only a handful of Supreme Court cases (besides *Barron v. Baltimore*) involving Takings Clause claims, all against the property owner’s interest.\(^{68}\)

Indeed, the Takings Clause appears to have been a low priority, and the reason for its inclusion in the Bill of Rights is a mystery. Neither the framers of the Constitution nor state legislatures seemed concerned that the federal government would unjustly seize property:

So far as we know, no delegate to the Constitutional Convention in 1787 made any mention of the need for protecting against the government’s taking power. Similarly, although the state ratifying conventions proposed over eighty different amendments to be incorporated into the Bill of Rights, not a single request was made for the Takings Clause or any equivalent measure. In light of

\(^{65}\) 60 U.S. 393 (1856).
\(^{66}\) See Livingston’s *Lessee v. Moore*, 32 U.S. 469 (1833); Gibbons v. Ogden, 22 U.S. 1, 53–54 (1824).
\(^{67}\) Kent, *supra* note 54, at 93.
\(^{68}\) Treanor, *The Original Understanding*, *supra* note 47, at 794–97 & nn.69–81 (citing Gibson v. United States, 166 U.S. 269 (1897); Transportation Company v. Chicago, 99 U.S. 635 (1879); Smith v. Corporation of Washington, 61 U.S. (20 How.) 135 (1858)).
these facts, one scholar famously has wondered “how [the Clause] got into our constitutions at all.”

Kent notes that the Takings Clause “seems entirely to have been the product of James Madison . . . . But Madison left no documentary evidence to explain his reasons for the provision, nor did the provision produce any meaningful discussion in Congress or the state legislatures.”

It seems that Revolution-era lawmakers believed that a specific enumerated right to just compensation was unnecessary, or at least not a high priority. Of course, they may have thought that at that time, the right to just compensation had become so “fundamental” and “natural” that its inclusion in the Bill of Rights warranted little discussion. Professor Richard A. Epstein argues, however, that the Founding Fathers were guided by Lockean Liberalism’s affection for property rights because “the founders shared Locke’s and Blackstone’s affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights.” Additionally, Otterstedt notes that the Declaration of Independence is essentially a Lockean document, highly protective of property rights.

Having considered Lockean rights and the Lockean theory of government, let us turn to their expression in the “central document of American history,” the Declaration of Independence:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed . . . .

Viewed through a Lockean lens, the Declaration’s meaning seems clear: all people have equal, natural rights pre-existing the state by virtue of their common humanity; government’s purpose is to protect these pre-existing rights. Furthermore, at least two requirements must be met for a government to be just: its primary

69. Kent, supra note 54, at 92 & n.33 (quoting Stoebuck, supra note 46, at 595).
70. Id.
function must be the protection of natural rights, and it must be a government formed by the consent of the governed.\footnote{Paul J. Otterstedt, A Natural Rights Approach to Regulatory Takings, 7 Tex. Rev. L. & Pol. 25, 35–36 (2002) (citing The Declaration of Independence para. 2 (U.S. 1776)).}

Nonetheless, Treanor maintains that the Takings Clause was essentially James Madison’s pet project. He attributes the remaining Founders’ lack of concern for property rights to the people’s faith in legislatures because “[a]s the voice of the people, the legislature could be trusted to perceive the common good and to define the limits of individual rights.”\footnote{Id. at 695.} Additionally, “[t]he absence of a just compensation clause in the first state constitutions accorded with the faith in legislatures that was a central element of republican thought and with the position held by many republicans that the property right could be compromised in order to advance the common good.”\footnote{Id. at 701.} It is not to say that either is correct. Nathan Alexander Sales offers alternative reasons for why state legislatures were so wanton regarding private property rights.

Several possible explanations exist as to why the compensation requirement was not enshrined in early state constitutions. First, the notion that the government necessarily owed compensation when it took real property was so fundamental that it may have been thought unnecessary to express it. The absence of compensation requirements would thus be symmetrical with the lack of express constitutional grants of eminent domain power. Just as state constitutions did not enumerate the power of eminent domain because it was deemed an inherent attribute of sovereignty, neither did they provide for compensation, which was assumed due as a matter of natural law. Second, early Americans were not accustomed to relying on constitutions, charters, or other foundational legal documents to protect the people’s rights. Instead, popularly elected legislatures were deemed competent to do so. Finally, the British had not abused their eminent domain power, and Americans therefore saw no need expressly to restrict that of their representatives.\footnote{Nathan Alexander Sales, Note, Classical Republicanism and the Fifth Amendment’s “Public Use” Requirement, 49 Duke L.J. 339, 360–61 (1999).}
Thus, the inaction of state legislatures did not necessarily indicate that early Americans did not ascribe to a Lockean, liberal framework that supported a natural right to just compensation.

After a brief period of state excesses, in the early nineteenth century states began gradually adopting compensation requirements through constitutional amendments and statutes. However, the majority of such protections came through the courts. The Takings Clause or its state analogues were not bases for these protections. Rather, to justify these new limits on state power, judges relied on concepts of “natural” and “universal” laws—self-evident fundamental limitations on state power. In *Gardner v. Village of Newburgh*, for example, New York statute allowed a village to establish a water system using a spring. The statute mandated compensation for the owners of the spring and the land upon which the village laid pipes, but not for the landowners upstream who lost riparian rights. The chancellor voided the statute without citing the state constitution, which did not mandate compensation. He merely stated that “natural equity” demanded compensation for those who sacrifice their property. Similarly, in another eminent domain case, a New Jersey court mandated compensation despite the lack of a specific statute or constitutional provision. In *Sinnickson v. Johnson*, the court stated:

This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist

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78. See, e.g., Sinnickson v. Johnson, 17 N.J.L. 129, 145 (N.J. 1839) (“This power to take private property reaches back of all constitutional provisions; and it seems to have been considered a settled principle of universal law, that the right to compensation, is an incident to the exercise of that power: that the one is so inseparably connected with the other, that they may be said to exist not as separate and distinct principles, but as parts of one and the same principle”); Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816) (even if statute authorizing taking power was constitutional, “natural equity” demanded compensation for those who lost riparian rights to state water system).
79. 2 Johns. Ch. at 162.
80. Id.
81. Id.
82. 17 N.J.L. at 129.
not as separate and distinct principles, but as parts of one and the same principle.83

None of these antebellum cases cited the Takings Clause as a direct source of law, although Treanor argues that “the Takings Clause proved immensely influential . . . . In particular, it influenced state court decisions to impose a compensation requirement on state actions in the absence of state takings provisions.”84 Further, “[l]awyers representing individuals whose property had been taken by a state without payment contended that the Fifth Amendment was a national declaration of respect for property rights.”85 Treanor notes that in Gardner v. Newburgh, the presiding chancellor quoted the Fifth Amendment:

But what is of higher authority, and is absolutely decisive of the sense of the people of this country, it is made a part of the constitution of the United States, “that private property shall not be taken for public use, without just compensation.” I feel myself, therefore, not only authorized, but bound to conclude, that a provision for compensation is an indispensable attendant on the due and constitutional exercise of the power of depriving an individual of his property.86

Nevertheless, Treanor also notes that James Madison, the driving force behind the Takings Clause, “intended the clause to apply only to direct, physical taking of property by the federal government.”87 Thus, while the Takings Clause was not specifically applied in state courts, it may have served as inspiration to state courts to enforce a “natural” right to just compensation, which was simply fair.

Whatever the source of their inspiration, “[b]y 1868, every state but North Carolina had a takings clause in its state constitution.”88 As the Civil War approached, most states recognized a common law natural right to just compensation, either through constitutions,

83. Id. at 145 (citations omitted).
84. Treanor, The Original Understanding, supra note 47, at 840.
85. Treanor, The Origins and Original Significance, supra note 48, at 714.
86. Id. at 715 (citing 2 Johns. Ch. at 167).
87. Id. at 711.
statutes, or the courts. Steven G. Calabresi and Sarah E. Agudo set out to determine which rights most Americans recognized when the Fourteenth Amendment was ratified in 1868 by surveying the law in each state. They found that thirty-three of thirty-seven states had takings clauses in their constitutions, meaning ninety-one percent, a “huge supermajority,” lived in states with takings clauses.89 Interestingly, they note: “Of course, the other states may just have assumed that it was obvious that takings for private use were forbidden and that there was no need to state it explicitly.”90 Regarding regulatory takings, while there were no specific measures, constitutions did allow recourse to the courts. “Seventy-three percent of all Americans in 1868—slightly less than three-fourths—lived in states that had provisions of this sort in their state constitutions.”91 They agree their study “suggests that the framers of the Fourteenth Amendment may have believed in natural law” rather than positive law.92

Meanwhile, the right to a judicial determination of “public use,” which the Supreme Court considers an essential part of the Takings Clause,93 varied greatly from state to state.94 Of course, it is not surprising that state law focused mainly on the common law right to just compensation, and not the specifically enumerated right that property only be taken for public use. The Supreme Court has described the Takings Clause as consisting of two requirements: that the state provides just compensation, and that takings are only exercised for proper “public” uses.95 While the just compensation right dates back to common law England, the determination of public use was generally left to the legislative branch. As one would expect, in antebellum America courts did not enforce a right to a judicial determination of public use.

The Mills Acts, statutes for building roads and bridges,96 and state constitutions all defined public use differently or not at all.97 Some

90. Id.
91. Id. at 74.
92. Id. at 91.
94. See Calabresi & Agudo, supra note 89.
95. See 545 U.S. at 477.
96. Id. at 480 n.8.
97. See SCHULTZ, supra note 45, at 27.
courts mentioned public use in the mid-nineteenth century. However, none held that “public use” was an inalienable natural right, like the right to just compensation. Justice O’Connor’s dissent in Kelo v. City of New London noted that some states required public use, while other “early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads.”

Some courts implied public use for these statutes, others did not; there was significant disagreement among courts and legislatures regarding the nature and extent of “public use.” There are few examples of state courts applying a strict “actual use by the public” test, but generally, the presence of a valid “public benefit” justified transfers to private owners. The Mill Acts and the private road acts, both of which delegated taking power to private individuals, were “crucial evidence that the founding generation accepted the public-benefit theory.” Reluctant to interfere with states’ internal political processes, this test essentially reduces the “public use” inquiry to a rational basis evaluation of state action.

One seeming exception to this trend is demonstrated by Missouri Pacific Railway Co. v. Nebraska, in which the state compelled a railroad to grant a group of private individuals the right to build a grain elevator on the railroad’s right of way. The Court, referring to Davidson’s A. to B. language, found that this violated the Fourteenth Amendment’s Due Process Clause because

This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in

98. Id. at 28–29. The debate among these courts divided two schools of thought: (1) the public or some portion of it must have a use or right of use over the property or; (2) there must be a judicial determination that they are equivalent to the public benefit, utility, advantage or what is productive of public benefit. JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 221 (Chicago, Callaghan & Co. 1900).

99. 545 U.S. at 513 (Thomas, J., dissenting).

100. Id.

101. See Sales, supra note 75, at 346–47 (citing Bloodgood v. Mohawk & Hudson R. R. Co., 18 Wend. 9 (N.Y. 1837)).

102. 545 U.S. at 480 (citing Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158–64 (1896)).

103. Sales, supra note 75, at 366.

104. SCHULTZ, supra note 45, at 25–26; see Treanor, The Origins and Original Significance, supra note 48, at 698–99.

105. 164 U.S. 403 (1896).

question, so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the fourteenth article of amendment of the constitution of the United States.107

However, the Court indicated this was an extreme situation, where there was no taking of private property for a public use under the right of eminent domain. The petitioners were merely private individuals voluntarily associated together for their own benefit. They do not appear to have been incorporated by the state for any public purpose whatever, or to have themselves intended to establish an elevator for the use of the public.108

Overall, public use only factored in where the most extreme state actions, vastly lacking in justification, were at hand.

One can debate endlessly the degree to which the Founding Fathers were inspired by Lockean Liberalism or whether the Takings Clause was merely a pet project of James Madison. One can also debate the exact reasons why states initially seized property excessively but then gradually adopted just compensation requirements. The point of the above discussion is that, when Reconstruction congressmen set out to draft the Fourteenth Amendment, they lived in a legal world where the right to just compensation was universally accepted. At the same time, however, that legal world strongly accepted the notion that states, rather than the national government, were supreme in their domain concerning the disposition of property. This framework would guide the framers of the Fourteenth Amendment.

II. THE AFTERMATH OF THE CIVIL WAR AND THE FOURTEENTH AMENDMENT

Fundamentally, the Civil War was fought over states' rights. The right to keep slaves was long protected by a weak federal government

107. 164 U.S. at 417.
108. Id. at 416.
and a Bill of Rights that, since *Barron v. Baltimore*, did not apply to state regulation of property. The aftermath of the War saw a much more powerful federal government that limited state police power to prevent future rebellion. The Fourteenth Amendment was largely the vehicle that accomplished this goal. It also had large implications for eminent domain jurisprudence and other areas of the law. This section explores why this is so, considering that eminent domain was likely a low priority issue for the framers.

The Fourteenth Amendment is the most litigated amendment in the Constitution and has been the source of numerous famous cases, which gradually increased the body of civil liberties to which all citizens are entitled. Section 1 of the Amendment states:

1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;
2. nor shall any State deprive any person of life, liberty, or property, without due process of law;
3. nor deny to any person within its jurisdiction the equal protection of the laws.

The Equal Protection Clause, though very important in integration of minorities and women’s rights, is not pertinent to the present incorporation discussion. The Privileges and Immunities Clause, as will be discussed, has largely been rendered meaningless by the Supreme Court. This leaves the Due Process Clause an analogue of the same clause in the Fifth Amendment, which ended up standing for more than merely procedural due process (i.e., notice and a hearing). The Clause was essential to fundamental or “natural” rights in two respects. First, the Due Process Clause allowed the Supreme Court to reverse *Barron v. Baltimore* by “incorporating” provisions

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109. U.S. Const. amend. XIV, § 1. The remaining four sections are Civil War–specific, dealing with apportionment and voting rights of freed slaves, readmission to the Union, and so forth. They are not relevant in this paper.

110. This clause, also found in U.S. Const. amend. XIV, § 1, states “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” For a case testing the limits of the Equal Protection Clause, see United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4. (1938) (noting that racial and religious groups are protected, but that other “discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities,” and may also be subject to protection under the Clause).

111. See Slaughter-House Cases, 83 U.S. 36 (1872) (rejecting that the Privileges and Immunities Clause applies the Bill of Rights against the states). This case, for most purposes, is still good law today.
of the Bill of Rights. However, the Court slowly incorporated the first eight Amendments piecemeal over a long period. In fact, the Second Amendment’s right to bear arms was only incorporated in 2010 in *McDonald v. City of Chicago*. Three other provisions have not yet been incorporated: the right to a grand jury hearing (Amendment VII), the right against housing of soldiers (Amendment III), and the right against excessive bails and fines (Amendment VIII). The debate on incorporation continues today. The Supreme Court admits it has not adopted one perspective on incorporation to the exclusion of any other. The incorporation debate is discussed in detail later.

Second, the Due Process Clause limited state power through “substantive” due process, which protects “natural” or “universal” rights—unwritten but fundamental protections of the law. Potentially, any time state activity places “life, liberty, or property” in jeopardy, substantive due process is implicated. So far, the Supreme Court has indicated that the following rights, though not explicitly protected by the Constitution, are protected through the general notion of substantive due process: the right to privacy, the right to abortion, and the right to marry. Additionally, in a much-derided era of the Supreme Court’s history, it also found that substantive due process protected “freedom of contract” through the “liberty” portion of the Fourteenth Amendment. This prevented states from enacting almost any regulation of economic activity. However, *Lochner* has

112. 130 S. Ct. 3020 (2010).
114. *But see* Engblom v. Carey, 677 F.2d 957 (2d. Cir. 1982) (holding that the Third Amendment was indeed incorporated against the states).
115. While the portion of the Eighth Amendment dealing with excessive bail and fines has not yet been incorporated, the Court has incorporated the Amendment’s prohibition of cruel and unusual punishments. Robinson v. California, 370 U.S. 660 (1962); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).
116. 130 S. Ct. at 3033–34 & n.9 (2010) (Supreme Court has not adopted one perspective on incorporation to the exclusion of any other); see RAOUL BERGER, supra note 10; Amar, supra note 10; Maltz, supra note 10.
117. See Palko v. Connecticut, 302 U.S. 319, 325 (1937) (holding that rights that are “of the very essence of a scheme of ordered liberty” may not be abolished because to do so is to “violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”).
since been overruled and the Court is normally only strict with regulation that affects fundamental civil rights. However, as some scholars point out, the Takings Clause is now being invoked whenever property—real or otherwise—is affected, leading to decisions bearing “disturbingly close resemblance to Lochner-era substantive due process review.”

This multifaceted nature of the Fourteenth Amendment led to the conflation of substantive due process and the Takings Clause that we see today. This conflation arose partially because of the Supreme Court’s reliance on the framers of the Fourteenth Amendment, primarily the Committee of Fifteen. Their uncertain position leads one today to question their intentions in passing the Fourteenth Amendment. In fact, it is unclear whether the Committee of Fifteen intended any “incorporation” of the Bill of Rights. Some evidence indicates the Committee only intended the Fourteenth Amendment to enforce “natural” rights and provide a constitutional backbone for a civil rights bill that the President had vetoed, not to directly incorporate the Bill of Rights against the states. This indicates that the Takings Clause was not properly incorporated by the Fourteenth Amendment. In addition, there is the issue of the Bingham amendment, which would have added a specific takings clause analogue to the Fourteenth Amendment. The history and deliberations of the Committee are examined in detail below.

President Andrew Johnson and his allies in Congress hoped to carry out a swift Reconstruction, requiring only that Southern states ratify the Thirteenth Amendment abolishing slavery, repudiate all war debts, and void ordinances of succession. However, the Radical Republicans, led by the “Dictator of Congress,” Representative Thaddeus Stevens, wanted to grant freed slaves full civil rights, both out of moral sentiment and to create a Republican power base in the South. Apportioning votes based on the black population but not extending blacks the franchise would have given the South a disproportionate amount of Democratic seats in Congress. Some

122. Karkainen, supra note 11, at 908.
123. Kendrick, supra note 1, at 134.
124. He was also the chair of the House Ways and Means Committee and a leader of the effort to impeach President Johnson. See Hans L. Trefousse, Thaddeus Stevens: Nineteenth-Century Egalitarian (1997).
125. Kendrick, supra note 1, at 134.
126. Id.
radicals also wanted to consolidate power in Congress and limit the expansive power the President had obtained during wartime.\textsuperscript{127} Southern states did not intend to welcome the newly freed black populations into their midst. They passed laws that sustained slavery in all but name. The “Black Codes” required freed blacks to enter unconscionable farm labor contracts, with imprisonment and corporal punishment as penalties for breaking them or refusing to work.\textsuperscript{128} Other laws hindered the movement of freedmen and denied them entry into states.\textsuperscript{129} Meanwhile, Supreme Court precedent favoring states’ rights regarding slavery and segregation still stood as good law.\textsuperscript{130}

The conduct of Southern states infuriated the Radicals, especially Stevens, who felt the rebels should be punished.\textsuperscript{131} However, moderates forced a more relaxed solution.\textsuperscript{132} First, President Johnson rebuked even moderate Republicans by vetoing a bill in February 1866 that would have extended the life of the Freedmen’s Bureau.\textsuperscript{133} Further, to combat the Black Codes, the Radicals passed a civil rights bill,\textsuperscript{134} which President Johnson also swiftly vetoed.\textsuperscript{135} This may have been President Johnson’s biggest blunder, as it only infuriated the

\begin{itemize}
  \item\textsuperscript{127} \textit{Id.} at 136–37.
  \item\textsuperscript{128} \textit{Id.} at 213; \textsc{William A. Dunning, Reconstruction, Political and Economic, 1865–1877 54–59 (Harper & Row 1962); Eric Foner, Reconstruction: America’s Unfinished Revolution, 1863–1877 186–210 (Perennial 2002).}
  \item\textsuperscript{129} \textsc{Philip Hamburger, Privileges or Immunities, 105 N.W.L Rev. 61, 83–86, 115–19 (2011)}.
  \item\textsuperscript{130} \textsc{See Dred Scott v. Sandford, 60 U.S. 393 (1856); Den ex dem. Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).}
  \item\textsuperscript{131} \textsc{Foner, supra note 128, at 228–39.}
  \item\textsuperscript{132} \textit{Id.}
  \item\textsuperscript{133} \textsc{Earl M. Maltz, The Fourteenth Amendment as Political Compromise—Section One in the Joint Committee on Reconstruction, 45 OHIO ST. L.J. 933 (1984).}
  \item\textsuperscript{134} \textsc{An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication (Civil Rights Act of 1866), ch. 31, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (2006)). The Act protected “such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.” This Act would later become influential in the drafting of the Fourteenth Amendment.}
  \item\textsuperscript{135} \textsc{President Johnson’s Veto of the Civil Rights Act, 1866 (Mar. 27, 1866), available at http://wps.prenhall.com/wps/media/objects/107/109768/ch16_a2_d1.pdf.} \end{itemize}
Radicals and encouraged them to impeach him. The bill passed over the President’s veto. Further, the Radicals introduced another bill to bolster the federal government’s ability to enforce the Comity Clause. However, after Johnson’s veto, it was clear that Congress would need a constitutional mandate to protect civil rights. Further, an amendment would ensure that a future Democratic Congress would not repeal any civil rights acts. The Radicals, using a clever concurrent resolution that did not require Presidential approval, formed a joint Committee of Fifteen—nine representatives and six senators—to oversee Reconstruction. The resolution’s passage usurped control from the President and gave the Radicals significant influence on the nation’s progress following the Civil War and on what would become the Fourteenth Amendment. At this point, there was no talk of an amendment to extend the Bill of Rights to the states, nor any talk of eminent domain. Rather, the debate thus far had revolved around whether blacks would get the franchise and other issues relating to war debt and punishment of Southern states for the rebellion.

The Committee’s secret meetings became public after a clerk’s journal was discovered in the early twentieth century by political science professor Benjamin Kendrick of Columbia University Law School. The clerk’s minutes are terse and mostly document attendance and the language of drafts presented and their subsequent revisions. Members of the Committee offered draft constitutional amendments for an up or down vote, which the journal recorded. Unfortunately, the journal does not record any of the debate among Committee members. Nonetheless, the proceedings still offer some useful information regarding incorporation of the Bill of Rights and the Takings Clause. It appears the Committee’s initial focus was on securing rights for freed slaves, not expanding individual liberties in

137. *Id.*
138. H.R. 437, 39th Cong. § 1 (1866).
139. U.S. CONST. art. IV, § 2, cl. 1 (also known as the Privileges and Immunities Clause: “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”).
140. *Foner*, *supra* note 128, at 251–54.
141. CONG. GLOBE, 39TH CONG., 1ST SESS. 4–6 (1865).
142. KENDRICK, *supra* note 1, at 140–41, 144–45.
143. *Id.* at 17–21.
144. *Id.* at 37–129.
general as the Fourteenth Amendment eventually would do. Rather than citing the Bill of Rights, the first drafts of the Fourteenth Amendment mirrored language in the recently passed Civil Rights Act of 1866.\textsuperscript{145} Subsequent drafts spoke in terms of individual and equal rights, giving Congress the power to “make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property,”\textsuperscript{146} to secure “to all citizens of the United States in any State the same immunities and also equal political rights and privileges,”\textsuperscript{147} and providing that “[a]ll laws, state or national, shall operate impartially and equally on all persons without regard to race or color.”\textsuperscript{148}

Eventually, however, the Committee then shifted its focus from “natural” rights to specific enumerated rights in the Constitution, drawing inspiration from the Bill of Rights. Representative John Bingham of Ohio offered a new draft:

\begin{quote}
The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the several States equal protection in the rights of life, liberty and property (5th Amendment).\textsuperscript{149}
\end{quote}

This draft reveals the specific constitutional protections the Drafters sought to enforce against the states. “Art. 4 Sec. 2” refers to the Comity Clause of the U.S. Constitution.\textsuperscript{150} “5th Amendment” of course refers to the Fifth Amendment in the Bill of Rights. The Committee rejected this draft and went on to draft the final version of the Fourteenth Amendment on April 21, 1866.

\begin{footnotes}
\item 145. An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication (Civil Rights Act of 1866), ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981(a) (2006)) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”).
\item 146. KENDRICK, supra note 1, at 46.
\item 147. Id. at 56.
\item 148. Id. at 46.
\item 149. Id. at 61.
\item 150. U.S. CONST. art. IV, § 2, cl. 1 (“The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”). The Privileges and Immunities Clause is also commonly known as the Comity Clause.
\end{footnotes}
After the Committee drafted the final version of the Fourteenth Amendment, Representative John Bingham of Ohio offered an addition, which mirrored the Fifth Amendment’s Takings Clause:

[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation.

The Committee rejected this construction by a seven-to-five vote. Notably, Bingham offered this amendment by itself, not as part of a larger provision, which the Committee may have rejected for other reasons. The Committee then adopted the Fourteenth Amendment as it stands today, without a specific “takings clause.” Thus, while the Fourteenth Amendment lacked a specific takings clause enforceable against the states, it still enforced the rights to “due process,” which eventually would come to include property protections. The Supreme Court would refer specifically to the Committee’s rejection of the Bingham amendment in *Davidson v. City of New Orleans*, where the Court held the Takings Clause was not incorporated against the states.

We can only speculate as to why the Committee rejected Bingham’s takings clause. With a country torn apart, it may seem eminent domain was the last issue on the minds of Reconstruction Congress. However, property rights did come into play. Treanor addressed the Committee’s rejection of Bingham’s analogue. He attributes the introduction of Bingham’s amendment to a desire for protection of unionist property.

During the course of the committee meetings about the Fourteenth Amendment, Bingham proposed imposing on the states just compensation and equal protection requirements (and not due process or privileges and immunities), and the support for this unsuccessful proposal reflected this perceived need to safeguard Unionist property after former rebels returned to power.

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151. *Kendrick*, supra note 1, at 82.
152. Id. at 82, 85.
153. U.S. Const. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).
155. Id. at 106.
156. Id.
157. 96 U.S. 97 (1877).
But, of course, this version was not passed. It was rejected by a vote of seven to five, and the committee opted instead for the broader language of Section One. Incorporationist scholarship indicates the framers adopted this language in order to subject the states to the same restraints as the federal government. Thus, passage of the Fourteenth Amendment does not reflect a separate consideration of what specific property interests needed protection from the government. Incorporationist scholarship therefore leads to the same conclusion as non-incorporationist scholarship: The period in which the Fifth Amendment’s Takings Clause was proposed and ratified is the only time at which the nation considered which property rights needed protection from the government. The translator should therefore focus on the concern with process failure animating the Fifth Amendment’s Takings Clause. Having determined that the Takings Clause was originally intended to remedy certain kinds of process failure, she should offer a reading of the clause that serves the same ends in today’s society.158

Treonor relied heavily on Earl M. Maltz, who suggested that Bingham had the protection of unionist property in mind. Maltz notes that Bingham was the primary force behind the rejected amendment, which would have given Congress authority to “make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states; and to all persons in the several States equal protection in the rights of life, liberty and property,” in addition to the takings clause analogue attached to this proposed amendment.159

The Radicals suggested confiscation of Southern property, with redistribution to freedmen or administration under the authority of the Freedmen’s Bureau.160 The discussion over what to do with seized property may have informed the rejected takings clause amendment to the draft Fourteenth Amendment. Perhaps the Committee felt the Fourteenth Amendment would “totally incorporate” the entire Bill of Rights, and thus an additional takings clause would have been redundant to the Fifth Amendment. On the other hand, the Committee may have assumed that because the right to just compensation was such a well-settled part of common law, it was in

158. Treanor, The Original Understanding, supra note 47, at 862–63.
159. Maltz, The Fourteenth Amendment, supra note 133, at 945.
inherent in the “due process” portion of the Fourteenth Amendment. A third possibility: the Committee may have been concerned with infringing upon states’ rights to control property within their borders. Bingham may have offered the takings clause in response to Radical plans to confiscate property from former Confederates.\(^\text{161}\)

Equally uncertain is whether the Committee intended the Fourteenth Amendment to “incorporate” any parts of the Bill of Rights at all, or any type of “substantive” due process. However, the comments of congressmen, and John Bingham in particular, have been the source of academic controversy. There is abundant evidence that the framers intended the Fourteenth Amendment to incorporate the Bill of Rights, and evidence that they intended the Amendment only as a mechanism to enforce the Civil Rights Bill. Perhaps seeking to allay concerns of states’ rightists, some remarks indicate Congress did not intend to incorporate the Bill of Rights. Senator Lyman Trumbull of Illinois explained that Section 1 was a “reiteration of the rights set forth in the Civil Rights Bill.”\(^\text{162}\) Thaddeus Stevens described Section 1 as being derived from the Declaration of Independence and organic law, not the Bill of Rights.\(^\text{163}\) The bills would grant Congress power to ensure that the “law which operates upon one man shall operate equally upon all.”\(^\text{164}\) Section 1 would not secure any new rights beyond the Civil Rights Act, but was needed to ensure that a future Democratic Congress would not repeal the statute.\(^\text{165}\) On the other hand, Senator Jacob M. Howard of Michigan declared on the Senate Floor that the “privileges and immunities” in the Fourteenth Amendment would include “the personal rights guarantied [sic] and secured by the first eight amendments of the Constitution.”\(^\text{166}\) Bryan H. Wildenthal notes that there was “little doubt” that the Fourteenth Amendment, albeit through the Privileges and Immunities Clause, would incorporate the Bill of Rights, “and not a single member of either House of Congress, throughout all the debates, ever contradicted [Bingham and Howard’s] plainly

162. \textit{Joseph B. James, The Framing of the Fourteenth Amendment} 161 (Univ. of Ill. Press 1965).
164. \textit{Id.}
165. \textit{Id.}
expressed understanding.”167 Wildenthal dismisses the fact that “[t]he anti-incorporationists contend that . . . applying the Bill of Rights to the states would supposedly have been shocking and inconceivable to Americans of the day.”168 But it is possible that in a world where the Bill of Rights was held to clearly apply to the federal government, the widely accepted notion was that the Bill of Rights in no way bound the states.

The most contentious and often-cited source in the incorporation debate is the remarks of John Bingham. His draft became Section 1, and his rejected amendment contained the analogous takings clause.169 Unfortunately, Bingham has been called a “muddled thinker”170 due to the inconsistency of his statements on incorporation. Charles Fairman, writing in 1949, espouses that by “Bill of Rights” Bingham meant the Fifth Amendment and Article IV’s Privileges and Immunities Clause. Richard L. Aynes argues, however, that Fairman derived this theory from “a single speech that Bingham gave before the House of Representatives . . . the shortest of all Bingham’s speeches on the Fourteenth Amendment, barely filling one and one-half columns of the Congressional Globe.”171 However, there is evidence supporting Fairman’s position. Bingham explained before Congress that Section 1 of the Fourteenth Amendment was an attempt to codify the Civil Rights Act’s assurance of interstate equality and certain natural rights that had existed for some time.172 When asked what “due process” meant in Section 1, he responded without reference to the Bill of Rights, saying “courts have settled that long ago.”173 Regarding property rights, Bingham clarified that Section 1 left acquisition and transmission of property to “the local law of the States.”174 The Fourteenth Amendment only ensured that

167. Wildenthal, supra note 166, at 1074.
168. Id. at 1074–75 (citing RAOUl BERGER, supra note 10, at 82–87; Fairman, supra note 10, at 68–126, 137–38; Charles Fairman, A Reply to Professor Crosskey, 22 U. CHI. L. REV. 144, 154–55 (1954)).
169. KENDRICK, supra note 1, at 82–85.
172. CONG. GLOBE, 39TH CONG., 1ST SESS. 1089 (1866).
173. Id.
174. Id. at 1089 (“As to real estate, every one [sic] knows that its acquisition and transmission under every interpretation ever given to the word property, as used in the
any person who had “acquired property not contrary to the laws of
the State, but in accordance with its law” should be “equally pro-
tected in the enjoyment” of his property.\textsuperscript{175} Congress first debated
whether the Amendment’s Privileges and Immunities Clause would
incorporate the Bill of Rights. The wording eventually came to re-

do Bingham described the clause simply as “that part of the amend-
ment which seeks the enforcement of the second section of the fourth
article [the Comity Clause] of the Constitution of the United States.”\textsuperscript{177}
He cited Oregon and Missouri laws, which denied entry to black cit-

Responding to Fairman’s argument, Aynes argues Bingham espoused “compact theory,” which

holds that even before the adoption of the Fourteenth Amend-
ment, the Constitution prohibited states from abridging the first
eight amendments. According to Bingham, Article IV, Section 2
applied the provisions of the Bill of Rights against the states, but
the absence of an express clause granting Congress enforcement
authority meant that while a compact existed that bound the
states to comply with Section Two, no remedy was available when
the states breached this obligation.\textsuperscript{179}

Bingham did say that the Fourteenth Amendment would “arm the
Congress . . . with the power to enforce the \textit{bill of rights} as it stands
in the Constitution today.”\textsuperscript{180} Bingham said in a speech,

The fourteenth amendment, it is believed, did not add to the
privileges or immunities before mentioned, but was deemed
necessary for their enforcement as an express limitation upon
the powers of the States. It had been judicially determined that
the first eight articles of amendment of the Constitution were

\begin{footnotes}
\footnote{Constitution of the country, are dependent exclusively upon the local law of the States, save
under a direct grant of the United States.” The Fourteenth Amendment only ensured that any
person who had “acquired property not contrary to the laws of the State, but in accordance
with its law” should be “equally protected in the enjoyment” of his property).}
\footnote{Id. Bingham would later retract his statements and claim that the clause included the
first eight Amendments.}
\footnote{Hamburger, \textit{supra} note 129, at 61.}
\footnote{\textit{Cong. Globe}, 39th Cong., 1st Sess. 1089 (1866).}
\footnote{Id.}
\footnote{\textit{Id.}, supra note 171, at 71 (citing \textit{Cong. Globe}, 39th Cong., 1st Sess. 2542 (1866)).}
\footnote{\textit{Cong. Globe}, 39th Cong., 1st Sess. 1088 (1866) (emphasis added).}
\end{footnotes}
not limitations on the power of the States, and it was apprehended that the same might be held of the provision of the second section, fourth article.\[181\]

In a footnote, Aynes states “Bingham did not refer to specific ‘judicial[] determin[ations]’ but was undoubtedly referring to Barron v. Baltimore . . . and Livingston v. Moore . . . . In his February 28, 1866, speech, Bingham cited these cases when asserting the same position.”\[182\] Further, William Crosskey, a critic of Fairman, “described Bingham as an able person whose theories were ‘the common faith’ of the Republican Party and argued that the historical evidence reveals that the framers of the Fourteenth Amendment intended the Amendment to enforce the Bill of Rights against the states.”\[183\] Further, “[p]rominent judges, lawyers, and members of Congress shared Bingham’s conviction that the Constitution prohibited the states from abridging the privileges and immunities protected by Article IV, Section 2, but that Congress could not enforce the provision.”\[184\]

Nevertheless, if Bingham truly believed the compact theory, why did he say in 1871, “These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment”?\[185\] More importantly, if he believed the Bill of Rights had always applied to the states (compact theory) or would apply through the Fourteenth Amendment (incorporation theory), why would he have proposed adding an analogue to the Takings Clause of the Fifth Amendment, which would have been redundant? Was he attempting to literally overrule Barron specifically? Further, if the Committee of Fifteen espoused total incorporation, the Due Process Clause of the Fourteenth Amendment would also have been redundant with the same clause in the Fifth Amendment. While it is difficult to discern exactly what the framers of the Fourteenth Amendment intended, in the eminent domain context the rejection of Bingham’s proposed takings clause analogue and statements

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182. Id. at 73 n.93 (citing 32 U.S. (7 Pet.) 243 (1833); 32 U.S. (7 Pet.) 469 (1833); Cong. Globe, 39th Cong., 1st Sess. 1089–90 (1866)).
183. Id. at 59 (citing William W. Crosskey, Charles Fairman, “Legislative History,” and the Constitutional Limitations on State Authority, 22 U. Chi. L. Rev. 1 (1954)).
184. Id. at 78.
185. Id. at 74.
espousing states’ rights indicated the Committee probably did not intend to incorporate the Takings Clause against the states.

III. POST-RECONSTRUCTION: CHICAGO, B. & Q. TO LOCHNER TO PENN CENTRAL

The Supreme Court quickly decided against incorporation and compact theory. In 1873, the *Slaughter-House Cases*\(^ {186}\) rendered the Privileges and Immunities Clause of the Fourteenth Amendment nearly a dead letter, struck down as a means of enforcing civil rights, and held that these were the province of state law. The Court held that the Clause only protected narrow “federal” rights such as the right to protection on the high seas. This five-to-four decision has been widely criticized, but the Privileges and Immunities Clause is still largely dormant to this day.\(^ {187}\) Attempts to raise these arguments through the Due Process Clause also failed.

The Court also dismissed the Due Process Clause as a means of incorporation. In fact, the Committee of Fifteen’s rejection of Bingham’s takings clause analogue clearly influenced the Supreme Court’s interpretation of the incorporation debate. In *Davidson v. City of New Orleans*,\(^ {188}\) the Supreme Court specifically cited the Committee of Fifteen’s rejection of Bingham’s amendment in striking down a challenge to a state taking based on the Fourteenth Amendment.

[The taking] may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when then *fourteenth amendment* was adopted, the provision on that subject, in immediate juxtaposition in the *fifth amendment* with the one we are construing, was left out, and this was taken.\(^ {189}\)

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186. 83 U.S. 36 (1872).
187. Saenz v. Roe, 526 U.S. 489 (1999). *Saenz v. Roe* held that the Privileges and Immunities Clause protected a right to relocate to another state and become a citizen of that case, but besides this the Supreme Court has relied on the Due Process Clause to enforce individual rights against the States.
188. 96 U.S. 97 (1877).
189. *Id*. at 105 (emphasis added).
Rather, the Fourteenth Amendment enforced *due process* against the states, meaning

> those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.\(^{190}\)

While the Fourteenth Amendment gave courts the opportunity to enforce these “settled usages and modes” against the states, the Court made clear that the Bill of Rights was not necessarily part of these “usages and modes.” The Court ruled similarly in *Hurtado v. California*,\(^{191}\) where it held that the Grand Jury Clause of the Fifth Amendment was not part of these “settled usages and modes.” The Court expressed frustration at the feeding frenzy of litigation stemming from the recently passed Fourteenth Amendment:

>[T]here exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded. If, therefore, it were possible to define what it is for a State to deprive a person of life, liberty, or property without due process of law, in terms which would cover every exercise of power thus forbidden to the State, and exclude those which are not, no more useful construction could be furnished by this or any other court to any part of the fundamental law.\(^{192}\)

*Davidson* seems to indicate the Court did not believe that the right to just compensation was not a “natural right.” However, the subject

\(^{190}\) Hurtado v. California, 110 U.S. 516, 528 (1884) (citing Den *ex dem.* Murray v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1855)).

\(^{191}\) 110 U.S. 516 (1884).

\(^{192}\) 96 U.S. at 104. “It is proper now to inquire whether the due process of law enjoined by the *fourteenth amendment* requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.” Chicago, B. & Q. Railroad Co. v. City of Chicago, 166 U.S. 226, 235 (1897).
matter was not a traditional taking. The Court upheld a state tax assessment for draining of swamplands. The Court retained fundamental due process notions, holding that a statute could not declare “that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby transferred in B.” This “natural rights” basis would lead to the “incorporation” of the right of just compensation against the states, and this would pave the way for the Court to apply substantive due process principles to eminent domain about fourteen years later. Thus, the natural right to just compensation had survived Reconstruction and the Court’s interpretation of the Fourteenth Amendment.

In 1897 the Supreme Court decided Chicago, B. & Q. Railroad Co. v. City of Chicago, which according to Penn Central Transportation Co. v. City of New York held the Takings Clause “of course” applicable to the states. In reality, Chicago, B. & Q. did not come close to overturning Barron v. Baltimore, failing to even mention the Takings Clause or the Fifth Amendment. It was a purely substantive due process decision, building on the dicta of Davidson and the fact that the framers of the Fourteenth Amendment specifically rejected a takings clause analogue. Further, it reaffirmed that state police power is free from interference by federal courts.

Chicago passed an ordinance authorizing the opening and widening of certain streets, which required condemning a portion of land owned by the railroad upon which it operated rail tracks. The Court upheld the jury’s nominal award of one dollar, because the difference in value had not changed; the railroad could continue operating its tracks. On the Takings Clause issue, the Court noted,

There is no specific prohibition in the federal constitution which acts upon the states in regard to their taking private property for any but a public use. The fifth amendment which provides, among other things, that such property shall not be taken for public use without just compensation, applies only to the federal government, as has many times been decided.

193. 96 U.S. at 102.
194. 166 U.S. 226 (1897).
196. 166 U.S. at 230–32.
197. Id. at 256–58.
The Court did state just compensation was a universal natural right, which demonstrates why substantive due process and the Takings Clause would become entangled in the future. After reviewing the decisions of state and federal courts, and legal commentary, that just compensation was an essential and historic due process limitation on state power. The Court in Chicago, B. & Q. stated that

The requirement that the property shall not be taken for public use without just compensation is but “an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government, almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.”

However, the Court held this principle did not apply in the matter at hand, which was a legitimate exercise of state police power. The Court disregarded the railroad’s alternative arguments that Chicago should at least have to pay the cost of maintaining a required railroad crossing and flagmen, holding that the state does not need to compensate owners for losses suffered due to exercises of police power:

And as all property, whether owned by private persons or by corporations, is held subject to the authority of the state to regulate its use in such manner as not to unnecessarily endanger the lives and the personal safety of the people, it is not a condition

199. 166 U.S. at 229, 235–39 (citing Sweet v. Rechel, 159 U.S. 380, 398 (1895); Searl v. School Dist., 133 U.S. 553, 562 (1890); Davidson v. City of New Orleans, 96 U.S. 97, 102 (1877); Mt. Hope Cemetery v. City of Boston, 158 Mass. 509, 519 (Mass. 1893); Sinnickson v. Johnson, 17 N.J.L. 129, 145 (N.J. Sup. Ct. 1839); Gardner v. Village of Newburgh, 2 Johns. Ch. 162 (N.Y. Ch. 1816)).

200. Id. at 236 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *138–39; THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 559 (Boston, Little, Brown & Co. 1868); 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1790 (Boston, Hilliard, Gray & Co. 1833)).

201. Id. at 241. Of course, Chicago, B. & Q. did cite Scott v. City of Toledo, 36 F. 385, 396 (C.C.N.D. Ohio 1888), which mentioned that the Fourteenth Amendment was “clearly intended to place the same limitation upon the power of the states which the fifth amendment had placed upon the authority of the federal government.” 36 F. at 395. However, the breadth of both decisions is dedicated to due process.

202. Id. at 236 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *138–39; COOLEY, supra note 200, at 559).
of the exercise of that authority that the state shall indemnify the owners of property for the damage or injury resulting from its exercise. . . . The expenses that will be incurred by the railroad company in erecting gates, planking the crossing, and maintaining flagmen, in order that its road may be safely operated—if all that should be required,—necessarily result from the maintenance of a public highway under legislative sanction, and must be deemed to have been taken by the company into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state.203

This comported with previous decisions such as Mugler v. Kansas,204 which held that exercises of police power, such as nuisance abatement, do not require compensation. Indeed, Chicago, B. & Q. cited Mugler and similar cases.205 Chicago, B. & Q. also failed to question the Court’s decision one year earlier in Fallbrook Irrigation District v. Bradley.206 There, the Court rejected landowners’ due process challenges to a state irrigation tax, partly on the ground that the irrigation program would confiscate land for the benefit of private parties. The Court did find exercises of police power were compensable where they lacked a legitimate objective, such as in Pumpelly v. Green Bay & Mississippi Canal Co.207 There, the Court held that when a state statute authorized the permanent flooding of a landowner’s property so that it was unusable, this constituted a taking for which compensation had to be paid. Lawrence Berger distinguished this case from Mugler: “Thus Mugler stood for the proposition that though a value-destroying regulation could not be a taking requiring compensation, it could be a deprivation of property without due process of law if it did not have a legitimate police power objective, such as the suppression of a nuisance.”208

The only link between Chicago, B. & Q. and the Takings Clause is tenuous at best. In Scott v. City of Toledo,209 a case on which the

203. Id. at 252–55.
204. 123 U.S. 623 (1887).
205. 166 U.S. at 255.
206. 164 U.S. 112 (1896).
207. 80 U.S. (13 Wall.) 166 (1871).
209. 36 F. 385 (C.C.N.D. Ohio 1888).
Chicago, B. & Q. court relied, a U.S. District Court struck down a condemnation on due process grounds. However, the majority of Justice Jackson’s opinion reiterated the same natural law concepts ripe in Chicago, B. & Q. itself. “In a general sense, ‘due process of law’ is identical in meaning with the phrase, ‘law of the land,’ as used in the constitutions of the several states.” Justice Jackson called Ohio’s action a “defect in the supreme organic law of the land,” stating that

The conclusion of the court on this question is that since the adoption of the fourteenth amendment compensation for private property taken for public uses constitutes an essential element in “due process of law,” and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution.

Like Chicago, B. & Q., Justice Jackson did not mention the Fifth Amendment. Essentially, Chicago, B. & Q. stated that there had been no taking, merely an exercise of police power that caused the railroad to spend additional money on the crossing and flagmen. However, the Court did note that the principles of Davidson, taking property from A. to give to B., would be compensable under substantive due process—an extreme situation—as would damage to property with no legitimate objective. As Karkainen points out,

Chicago B & Q thus perfectly mirrored the well-established nineteenth-century understanding that the state’s powers, as constrained by due process, were bifurcated. When it exercised the eminent domain power, it owed just compensation. When it enacted a valid police power regulation, however, there was by definition no deprivation of property because all property rights were held subject to the inherent police power limitation, and no compensation was owed. In subsequent years, Chicago B & Q

210. 166 U.S. at 238–39.
211. 36 F. at 393 (citing COOLEY, supra note 200, at 432).
212. Id. at 395.
213. Id. at 396 (emphasis added).
214. 166 U.S. at 235.
215. Id.
would be cited as frequently for this latter proposition as for the companion holding that due process did require compensation in cases of eminent domain. 216

This pro-states’ rights logic may have been the same force behind the Committee of Fifteen’s rejection of Bingham’s takings clause analogue. Chicago, B. & Q. left the federal courts in a difficult position. The Fourteenth Amendment gave them the power to restrict state exercises of eminent domain through substantive due process, but this power was to be used sparingly. Indeed, it did not even apply in cases where the government physically and permanently occupied property and provided a single dollar in nominal compensation. Further, this power to restrict state takings did not appear to stem from the Takings Clause of the Constitution, but rather from evolving notions of natural rights, whatever those were.

The Court also showed broad deference to state police power on decisions regarding appropriate “public uses.” While Scott v. City of Toledo stated, “the sovereign right of eminent domain involves these two essential elements, viz., that the property must be taken for the public benefit, or for public purposes, and that the owner must be compensated therefor,” 217 Chicago, B. & Q. did not reference this language. In the period after Davidson, the Court often repeated that “taking the property of one man for the benefit of another . . . is not a constitutional exercise of the right of eminent domain.” 218 However, these cases never defined the contours of public use and nearly all of them upheld state decisions to condemn as valid public uses. While Fallbrook held that the Fifth Amendment applied only to the federal government, 219 it noted that the Due Process Clause of the Fourteenth Amendment raised “the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state, instead of the federal, government.” 220 But the Court was chiefly concerned that citizens have access to fair procedural due process, satisfied “when the ordinary course is pursued in such proceedings . . . that has been customarily followed in the state, and

216. Karkainnen, supra note 11, at 850.
217. 36 F. at 394.
220. Id.
where the party who may subsequently be charged in his property has had a hearing, or an opportunity for one, provided by the statute. Nonetheless, this due process review was strictly limited, and the Court offered the agency great deference and upheld the taking.

What is a public use frequently and largely depends upon the facts and circumstances . . . [and although] the irrigation of lands in states where there is no color of necessity therefor [might be invalid], . . . in a state like California, which confessedly embraces millions of acres of arid lands, an act of the legislature providing for their irrigation might well be regarded as an act devoting the water to a public use, and therefore as a valid exercise of the legislative power.

Subsequent decisions followed Fallbrook’s deference to state definitions of public use, from the early twentieth century to the present.223

221. Id. at 168.
222. Id. at 159–60.
223. See, e.g., Joslin Mfg. Co. v. City of Providence, 262 U.S. 668, 678 (1923) (the necessity and expediency of taking property for public use is a legislative determination and “not a judicial question”); Rindge Co. v. Los Angeles Cnty., 262 U.S. 700, 706 (1923) (upholding condemnation of land for private road and regarding “with great respect the judgments of state courts upon what should be deemed public uses in any state”); Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (dicta stating that the Fifth and Fourteenth Amendments merely “presuppose” that takings are for public use, and mandate only compensation); Green v. Frazier, 253 U.S. 233 (1920) (rejecting Fourteenth Amendment taking challenges to taxation, which was based on the grounds that the taxes benefitted private economic development); Hendersonville Light & Power Co. v. Blue Ridge Interurban Ry. Co., 243 U.S. 563 (1917) (rejecting public use challenge based on railroad using surplus power from condemned river to sell as electricity); Mt. Vernon–Woodberry Cotton Duck Co. v. Ala. Interstate Power Co., 240 U.S. 30 (1916) (rejecting public use challenge to condemnation by power company); Union Lime Co. v. Chicago & Nw. Ry. Co., 233 U.S. 211, 218 (1914) (upholding condemnation, stating: “The state, through its highest court, declares the use to be a public one, and we should accept its judgment unless it is clearly without ground.”); Hairston v. Danville & W. R.R. Co., 208 U.S. 598, 606–07 (1908) (in upholding condemnation for a private spur track, the Court stated that although determining public use “is ultimately a judicial question,” recent decisions “show how greatly we have deferred to the opinions of state courts on this subject, which so closely concerns the welfare of their people”); Offield v. New York, New Haven & Hartford R.R. Co., 203 U.S. 372 (1906) (upholding condemnation of shares of railroad stock despite public use challenge); Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 530–31 (1906) (rejecting a public use challenge, concluding that so long as state law authorized a taking, there was no violation of due process); Clark v. Nash, 188 U.S. 361, 369 (1905) (citing 164 U.S. at 159) (rejecting a public use challenge because “the people of a state, as also its courts, must, in the nature of things, be more familiar with such facts, and with the necessity and occasion for the irrigation of the lands, than can any one be who is a stranger to the soil of the state, and that such knowledge and familiarity must have their weight with the state courts”).
This included *Wight v. Davidson*, in which the Court rejected the notion that Fifth Amendment decisions applied to Fourteenth Amendment takings analysis.\(^{224}\) It was not until 1930, in *City of Cincinnati v. Vester*,\(^ {225}\) that the Court struck down a condemnation on public use grounds, holding “it is well established that . . . the question [of] what is a public use is a judicial one.”\(^ {226}\) However, in *Vester* the City Council’s ordinance and resolution stated *no* purpose for excess takings and thus did not comply with the authorizing statute.\(^ {227}\) The Court’s decision would violate the rational basis standard the Court uses today in economic substantive due process cases.\(^ {228}\)

While *Chicago, B. & Q.* indicated that a weak substantive due process empowered federal courts to restrict state exercises of eminent domain, other exercises of state police power were treated less leniently. The Court may not have been inclined to apply the Bill of Rights, but it went wild with substantive due process after *Chicago, B. & Q.*, taking notions of “life, liberty, and property” to extremes and turning *Davidson* on its head. In fact, in the same year *Chicago, B. & Q.* was decided, the Court held in *Allgeyer v. Louisiana*\(^ {229}\) that the Fourteenth Amendment prevented the state from interfering with “freedom of contract.” This idea was taken to an extreme in *Lochner v. New York* in 1905,\(^ {230}\) where the Court held maximum working hours law violated the “liberty of contract” as protected by the Due Process Clause of the Fourteenth Amendment. Regarding incorporation, however, the Court reaffirmed *Barron v. Baltimore* in 1908. In *Twining v. New Jersey*,\(^ {231}\) the Court rejected an argument that the Fourteenth Amendment incorporated the Bill of Rights, specifically the self-incrimination clause of the Fifth Amendment. In *Adkins v. Children’s Hospital of the District of Columbia*,\(^ {232}\) the Supreme Court held that minimum wage laws violated substantive due process.

Prior to 1900, there is very little mention of regulatory or inverse condemnations. After *Mugler* the Court made clear that the police

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224. 181 U.S. 371, 384 (1901).
225. 281 U.S. 439 (1930).
226. Id. at 446.
227. Id. at 449.
228. See supra note 110 (discussing Carolene Products).
229. 165 U.S. 578 (1897).
230. 198 U.S. 45 (1905).
231. 211 U.S. 78 (1908).
power generally won over property rights, except concerning actual physical invasions of property. This began to change with *Mahon.* In 1922 the Court issued *Pennsylvania Coal Co. v. Mahon,*\(^2\) in which it interestingly struck down the Commonwealth of Pennsylvania’s attempt to force coal companies to shore up property under which they held easements. While it is not surprising that the Court struck down an exercise of police power during this time, it is interesting that the Court referred to the Takings Clause instead of substantive due process. Before the decision, the Takings Clause—or at least just compensation principles—had only applied to physical confiscations or invasions of land, a “taking” in the most literal sense. Once *Mahon* opened the door to regulation as takings, almost any government activity was subject to the Takings Clause if it involved what could be considered “property.”\(^2\) This added another layer of confusion—in cases like *Chicago* and *Davidson,* which clearly involved the government taking title to real property, only substantive due process was at issue. But in cases where property was merely regulated instead of confiscated, the Takings Clause would apply.

The much-derided *Lochner* era was short-lived, ending unofficially with *Nebbia v. New York*\(^2\) in 1934 and with *West Coast Hotel v. Parrish*\(^2\) in 1937, which expressly overruled *Adkins.* In 1955, *Williamson v. Lee Optical*\(^2\) definitively stated that the Court would not return to this era. Additionally, in 1925 in *Gitlow v. New York,*\(^2\) the Court definitely stated a provision of the Bill of Rights, in this case the First Amendment, applied to the states.\(^2\) The Court found that “we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”\(^2\) A 1937 case, *Palko v. Connecticut,*\(^2\) refined the standard for which rights in the Bill of

\(^2\) See *Kent,* supra note 54; *Krotoszynski,* supra note 30.

\(^2\) The petitioner’s conviction was still upheld, as the right to free speech did not include the right to advocate violent overthrow of the government. *Id.*

\(^2\) *Id.* at 666.

\(^2\) 302 U.S. 319 (1937).
Rights would be incorporated: only those that embody “the very essence of a scheme of ordered liberty.” The Palko rule contrasted with “total incorporation,” the idea that the Fourteenth Amendment incorporated the entire Bill of Rights wholesale. Today, the Supreme Court has yet to create a bright-line test for incorporation. There is little consensus on whether “total incorporation,” Frankfurter’s “fundamental fairness and ordered liberty,” Brennan’s “selective incorporation,” or any other theory is correct. The issue is largely moot, because as mentioned, nearly the entire Bill of Rights has been incorporated.

Justice Douglas wrote,

The process of the ‘selective incorporation’ of various provisions of the Bill of Rights into the Fourteenth Amendment, although often provoking lively disagreement at large as well as among the members of this Court, has been a steady one. It started in 1897 with Chicago, B. & Q.R. Co. v. Chicago . . . in which the Court held that the Fourteenth Amendment precluded a State from taking private property for public use without payment of just compensation, as provided in the Fifth Amendment.

However, clearly this is a misconception, as Chicago, B. & Q. did not mention incorporation or any part of the Bill of Rights. With the exception of Mahon and its progeny, up to 1978, the Court’s interpretation of the Fourteenth Amendment comported with long-standing natural rights theory and the likely intentions of the framers of the Fourteenth Amendment. The Court held there was a substantive due process right to just compensation, but only in the most egregious circumstances: the rest was left to states’ internal processes.

242. Id. at 325.
244. See 332 U.S. at 59–68 (Frankfurter, J., concurring); Felix Frankfurter, Memorandum on “Incorporation” of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965).
246. For a detailed discussion of these perspectives, see Amar, supra note 10.
247. See supra notes 110–16 and accompanying text.
The Takings Clause was not incorporated, in accord with the framers’ vote against the Bingham amendment.

IV. **Penn Central to Present: Is There Really an “Overlap”?**

*Penn Central* “officially” incorporated the Takings Clause, but it did not have much effect regarding appropriation of land. The strong deference to state police power, to which the framers of the Fourteenth Amendment largely adhered, remained in place. On regulatory takings, however, the decision had a profound effect, allowing the Court to resurrect a back door *Lochner*ism, as aptly described by a number of scholars.249 The vast majority of Supreme Court decisions on traditional state exercises of eminent domain, i.e., appropriations, spoke in terms of substantive due process250 until *Penn Central* in 1978, a fact Justice John Paul Stevens acknowledged in a recent case.251 This makes sense because as discussed above, it was never really the intent of the framers to incorporate the Takings Clause against the states. In 1978, however, *Penn Central* tersely stated,

The issues presented by appellants are (1) whether the restrictions imposed by New York City’s law upon appellants’ exploitation of


250. Interestingly, an 1894 case seems to indicate that the equal protection clause of the Fourteenth Amendment incorporated the Takings Clause. In *Reagan v. Farmers’ Loan and Trust Co.*, 154 U.S. 362 (1894), the Court decided a case regarding tariff rates for carriages. The Court stated that

While it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriages, it is within the scope of judicial power, and a part of judicial duty, to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guaranty against the taking of private property for public purposes without just compensation. The equal protection of the laws, which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public.

*Id.* at 399.

the Terminal site effect a “taking” of appellants’ property for a public use within the meaning of the *Fifth Amendment*, which of course is made applicable to the States through the *Fourteenth Amendment*, see *Chicago, B. & Q. R. Co. v. Chicago*.252

Justice Rehnquist’s dissenting opinion was similarly brief on the issue of incorporation.

The guarantee that private property shall not be taken for public use without just compensation is applicable to the States through the *Fourteenth Amendment*. Although the state “legislature may prescribe a form of procedure to be observed in the taking of private property for public use, . . . it is not due process of law if provision be not made for compensation.”253

Justice Stevens later explained why *Penn Central* was in error, and that *Chicago, B. & Q.* was not an incorporation case, but a *Lochner*esque application of substantive due process:

The Court begins its constitutional analysis by citing *Chicago, B. & Q. R. Co. v. Chicago* . . . for the proposition that the *Takings Clause of the Fifth Amendment* is “applicable to the States through the *Fourteenth Amendment*. That opinion, however, contains no mention of either the *Takings Clause* or the *Fifth Amendment*; it held that the protection afforded by the *Due Process Clause of the Fourteenth Amendment* extends to matters of substance as well as procedure, and that the substance of “the due process of law enjoined by the *Fourteenth Amendment* requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a State.” It applied the same kind of substantive due process analysis more frequently identified with a better known case that accorded similar substantive protection to a baker’s liberty interest in working 60 hours a week and 10 hours a day. *See Lochner v. New York*.254

Interestingly, Justice Stevens does not explain how the Court came to look at *Chicago, B. & Q.* as an incorporation case, stating

253. *Id.* at 142 n.3 (Rehnquist, J., dissenting) (quoting 166 U.S. at 236).
only: “Later cases have interpreted the Fourteenth Amendment’s substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment’s Takings Clause.”

Several scholars blame Penn Central for causing a confusing muddling of due process and the Takings Clause. Tunick proposes a “decoupling” of due process from takings jurisprudence, and Lawrence Berger notes that “the Court has failed to maintain clear lines of demarcation between the substantive due process and takings rules and has introduced some unnecessary overlap and confusion in their application.” He noted that:

Had the Court never held that the Takings Clause applies to states through the Fourteenth Amendment, state regulations of private property would be permissible—even if they took property—so long as they were not arbitrary or capricious, assuming that, as economic regulations, they would be evaluated under minimal scrutiny.

Nevertheless, despite Penn Central’s definitive though brief incorporation of the Takings Clause, it did not fundamentally change the Court’s analysis of appropriations of land—the “traditional” taking. The Court’s decisions continued to comport with Reconstruction-era ideas about state sovereignty and decisions after the Fourteenth Amendment, which only limited state power where egregious violations of rational basis occurred. In other words, land appropriations have been “evaluated under minimal scrutiny.” This is especially evident in the Court’s “public use” challenges. As discussed above, with the exception of Vester in 1930, the Court has universally deferred to state interpretations of what uses count as “public.” This trend continued in 1984 with Hawaii Housing Authority v. Midkiff, where the state of Hawaii attempted to break up a land oligopoly through its takings power. The Court upheld the program, stating

255. Id. (citing Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 481, n. 10 (1987)).
256. See Berger, supra note 17; Karkainen, supra note 11; Tunick, supra note 29.
257. See Tunick, supra note 29.
258. Lawrence Berger, supra note 17, at 844.
259. Tunick, supra note 29, at 891.
that “[t]he ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers” and that “where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.” As with all exercises of state police power not concerning non-fundamental rights, the analysis was similar to that of rational basis. *Midkiff* cited a number of non-condemnation decisions relating to rational basis in holding that “whether in fact the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature rationally could have believed that the [Act] would promote its objective.” *Midkiff* was very similar to *Vester* and other cases of that era in its reluctance to strike down state exercises of police power based on public use.

The contentious decision *Kelo v. City of New London* validated *Midkiff* by treating a state condemnation as any other exercise of police power not affecting fundamental rights. *Kelo* attempted to backtrack from *Midkiff*, but ultimately indicated the Takings Clause and substantive due process are redundant. Although the “question presented is whether the city’s proposed disposition of this property qualifies as a ‘public use’ within the meaning of the *Takings Clause of the Fifth Amendment to the Constitution*,” the Court’s analysis looked suspiciously like simple rational basis.

The disposition of this case therefore turns on the question whether the City’s development plan serves a “public purpose”. Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field . . . . Our earliest cases in particular embodied a strong theme of federalism, emphasizing the “great respect” that we owe to state legislatures and state courts in discerning local public needs . . . . For more than a century, our public use

262. *Id.* at 240 (citing *Berman v. Parker*, 348 U.S. 26, 31–33 (1954)).
263. *Id.* at 241.
265. 281 U.S. 439 (1930).
266. 545 U.S. 469 (2005).
267. *Id.* at 472 (citing U.S. CONST. amend. V) (emphasis added).
jurisprudence has widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.\footnote{268}{Id. at 480, 482–83, 483 n. 11 (citing Strickley v. Highland Boy Gold Mining Co., 200 U.S. 527, 531 (1906); Clark v. Nash, 198 U.S. 361, at 367–68 (1905)).}

\textit{Kelo} referenced Davidson’s prohibition on transferring property from A. to B., but did not find that egregious situation present in the case.\footnote{269}{Id. at 487.} The Court implied that it was merely applying a due process rational basis test. It cited Vester,\footnote{270}{281 U.S. 439 (1930).} which held that a taking was invalid for lack of a reasoned explanation, and Midkiff’s application of rational basis.\footnote{271}{545 U.S. at 487–88 (citing Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 242–43 (1984)).}

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community . . . [g]iven the comprehensive character of the plan, the thorough deliberation that preceded its adoption, and the limited scope of our review[].\footnote{272}{Id. at 483–84.}

Further, the property owners’ proposed test of a “reasonable certainty” that public benefits accrue from a taking represented an even greater departure from our precedent. “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.”\footnote{273}{Id. at 487–88 (quoting 467 U.S. at 242).}

This is a textbook application of substantive due process that dates back to Davidson. The \textit{Kelo} majority did identify two takings that would never pass constitutional muster: “purely private” takings\footnote{274}{Id. at 477–78, 478 n.5 (citing Missouri Pac. Ry. Co. v. Neb., 164 U.S. 403 (1896); Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)).} and takings under the “mere pretext of a public purpose.”\footnote{275}{Id. at 478.} But these types of takings would be excludable under due process anyway.
The latter situation is an example of the type of condemnation the Court struck down in *Vester*.276 In other words, the Takings Clause is essentially meaningless—except perhaps for the fact that it includes the compensatory right. However, the right to just compensation, as discussed earlier in this article, was a fundamental “natural” right, which we would expect substantive due process to protect.

The *Kelo* dissenters believed the Supreme Court had reduced the Public Use Clause to “little more than hortatory fluff.”277 Justice Thomas’s vigorous dissent argued that the majority’s broad deference to legislative judgment was “effectively to delete the words ‘for public use’ from the Takings Clause of the Fifth Amendment.”278 History seems to be on the majority’s side, however, as one struggles to find a Supreme Court case that struck down a condemnation—either state or federal—so long as the agency had a mere rational basis for its decision to condemn. Justice Thomas acknowledged that the Court had been applying this deference test since the nineteenth century, but that all such decisions were simply wrong.279 Justice Thomas’s vigorous dissent, railing against cases dating back to *Fallbrook*, argued that *Kelo* was “simply the latest in a string of our cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning.”280 Arguing that “[t]he Court adopted its modern reading blindly,”281 Justice Thomas reasoned that *Fallbrook* and its progeny were simply wrong.282 “*Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States.”283 But the ultimate federalist seems to have forgotten that even after the Fourteenth Amendment was passed, the Court retained essential federalism principles that began with *Barron v. Baltimore*. Justice Thomas’s dissent ultimately fails to point out where the Court had not equated eminent domain power with the police power of the states.

276. *Id.* at 487 n.17. The Court noted this taking was invalid for “lack of a reasoned explanation” and that “[t]hese types of takings may also implicate other constitutional guarantees.” *Id.* The Court cited Village of Willowbrook v. Olech, 528 U.S. 562 (2000) (per curiam) (taking invalid on equal protection grounds).

277. 545 U.S. at 497 (O’Connor, J., dissenting).

278. *Id.* at 494.

279. *See id.* at 505–23 (Thomas, J., dissenting).

280. *Id.* at 506 (Thomas, J., dissenting).

281. *Id.* at 515 (Thomas, J., dissenting).

282. *Id.* at 515–16 (Thomas, J., dissenting).

Justice O’Connor, in contrast, struggled to distinguish *Midkiff* and *Berman* from the facts of *Kelo*. Like the majority, she believed the “public use” went further than normal due process limits on police power. Justice O’Connor wrote in dissent,

To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings “for public use” is to wash out any distinction between private and public use of property—and thereby effectively to delete the words “for public use” from the Takings Clause of the Fifth Amendment.284

Looking at history, however, the *Kelo* majority was simply applying *stare decisis*, following centuries of case law in which the Supreme Courts defer to the states and the legislative and executive branches to determine what constitutes a valid public use. The only instances where the Court has struck down takings are where government behavior was so egregious it constituted a violation of fundamental due process, such as a taking with no stated purpose whatsoever, let alone a public purpose.285 Justice O’Connor’s dissent tried to find a middle ground that would not render “the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action.”286 Noting that *Midkiff* made “[t]he ‘public use’ requirement . . . coterminous with the scope of a sovereign’s police powers,”287 she stated:

*Berman* and *Midkiff* simply did not put such language to the constitutional test, because the takings in those cases were within the police power but also for “public use” for the reasons I have described. The case before us now demonstrates why, when deciding if a taking’s purpose is constitutional, the police power and “public use” cannot always be equated.288

O’Connor tried to distinguish those cases as eliminating a harmful use of land, whereas *Kelo* was taking property from productive owners.289 Ultimately, however, her opinion failed to consider that all these cases were part of a long line of precedent deferring to states

284. *Id.* at 494 (O’Connor, J., dissenting).
287. 467 U.S. at 240 (citing *Berman v. Parker*, 348 U.S. 26, 31–33 (1954)).
288. 545 U.S. at 501–02 (O’Connor, J., dissenting) (quoting 467 U.S. at 240; 348 U.S. at 32).
289. *Id.*
on public use, and that contrary to Justice O'Connor’s opinion, *Kelo* did not “delete the words ‘for public use’ from the Takings Clause.” O'Connor cannot reject *Kelo* and try to uphold *Midkiff*. “While Justice O'Connor is correct that the majority removed the Public Use Clause from the Fifth Amendment, her attempt to distinguish *Berman* and *Midkiff* does not hold up under close analysis.”

The *Kelo* majority delivered an opinion that conformed to the framers’ intention that the Fourteenth Amendment does not incorporate the Takings Clause against the states, leaving the power to dispose of property to states’ internal processes. *Penn Central*’s fleeting incorporation did little to change the law concerning takings involving appropriation of land. Regulatory takings, on the other hand, do not fit neatly into this model. *Penn Central* was a regulatory takings case, and it merely expanded on *Mahon*’s pronouncement decades earlier. However, this citation to *Mahon* may have been misguided. In discussing the “the substantive due process origins of ‘regulatory taking’ theory,” Patrick McGinley concludes that in *Mahon*, Justice Holmes was not in fact construing the Takings Clause. Rather, Justice Holmes was making a “metaphoric illusion[] to the Due Process Clause.” “Commentators who support this theory suggest that the source of confusion in constitutional ‘taking’ analysis has been the judicially fueled doctrinal convergence and intertwining of the Due Process and Just Compensation/Eminent Domain Clauses.”

“Then, like *Chicago, B. & Q.*, *Mahon* was plucked from relative obscurity and anachronistically recast as a Fifth Amendment Takings Clause precedent by *Penn Central* and its progeny. In that guise, it came to serve as one of the pillars of contemporary regulatory takings jurisprudence.”

Tunick is correct, however, that a “decoupling” is necessary where regulatory takings are involved. Notably, *Penn Central* deferred to the condemning agency, once again respecting state exercise of police power. New York was allowed to prevent the building expansion

290. *Id.* at 494.
293. *Id.*
294. *Id.* (citing Williamson Cnty Reg’l Planning Comm’n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108, 3122–23 (1985)).
without providing just compensation. However, it set a precedent that allowed a resurrection of *Lochner's* economic substantive due process, as well-documented by Karkainnen:

Thus it fairly may be said that every major element in the Court’s modern Fifth Amendment regulatory takings jurisprudence, with the possible exception of *Loretto*, was founded in whole or in part on Fourteenth Amendment substantive due process precedents, and reflects substantive due process concepts and principles. *Penn Central*'s phantom incorporation of the Fifth Amendment Takings Clause against the states effected, in fact though not in name, a “reverse incorporation” of *Lochner*-era substantive due process jurisprudence into modern Fifth Amendment takings law.296

Karkainnen further argues that *Penn Central* had two major effects: (1) eliminating the “police power defense,” i.e., depriving states of their right to define property; and (2) allowing “reverse incorporation’ of substantive due process concepts and principles into Fifth Amendment takings law.”297 Both of these effects apply exclusively to regulatory takings. As an example, the Court recently struck down a federal law that required coal companies to pay medical benefits to miners in *Eastern Enterprises v. Apfel*.298 Of course, this case was not exactly analogous to *Lochner* in that it involved federal law, not state police power. But the fact that the Court was willing to find an uncompensated taking in a law that required relinquishing money, not property, indicates it was willing to go far to protect property rights. *Apfel* shows that one consequence of the Court’s “incorporation” is a resurrection of extreme substantive due process, in the regulatory takings context. Judging from the public use decisions cited above, however, this extreme position does not apply where more “traditional” takings, i.e., appropriation of land, are involved.

There is an indication, however, that the Court is moving toward a “decoupling.” The Court recently addressed the overlap between the two clauses and attempted to make some distinctions. In *Lingle v. Chevron*,299 the Court addressed whether a Hawaii statute aimed at

296. *Id.* at 888 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982)).
297. *Id.* at 831–32.
protecting independent gas station owners amounted to an unconstitutional taking. The law prevented oil companies from converting independent and lessee-operated stations to corporate-owned and-operated stations. The law also limited the rent an oil company could charge lessee-operators. The lower courts held the statute failed to substantially advance a legitimate state interest and therefore was an unconstitutional taking. The Supreme Court reversed, holding the “substantially advances” test applied only to due process, and was thus not a valid test to determine the presence of a taking.300 This was one of the first times when the Court clearly distinguished between the Takings and Due Process Clauses.

CONCLUSION

Justice Stevens, in his Dolan dissent, stated: “There was nothing problematic about that interpretation in cases enforcing the Fourteenth Amendment against state action that involved the actual physical invasion of private property.”301 In other words, substantive due process against physical takings is okay, but against regulatory takings it is wrong because it risks a return to Lochnerism. Rather than as a muddle of substantive due process and the Takings Clause, we should think of land appropriations and regulatory takings as developing along separate tracks. The Supreme Court got everything right concerning appropriation of land by largely deferring to states and respecting their ability to regulate property. This accords with prevailing notions about state power that existed at the time the Fourteenth Amendment was adopted. In addition, the same framework would have existed had the Supreme Court not “incorporated” the Takings Clause in Chicago, B. & Q. or Penn Central. Substantive due process would have led to similar outcomes, and in fact it did until 1978. Things went awry in regulatory takings jurisprudence when the Supreme Court adopted an expansive notion of what a “taking” is. What would the Committee of Fifteen have made of this? The trouble was, there really was no such thing as a regulatory taking in the nineteenth century. Zoning and land use regulations were sparsely used. At that time, a “taking” was only the most fundamental exercise of eminent domain: the appropriation of land.

300. Id.
If a taking was still defined as such, then the Court has adhered to the Reconstruction idea that substantive due process provides minimal protection to property owners, and that state law is the primary source to limit eminent domain.

On the other hand, even in land appropriations, the Takings Clause must mean something. After all, “it would be ‘incongruous’ to apply different standards ‘depending on whether [a constitutional] claim was asserted in a state or federal court.’” In U.S. ex rel. Tennessee Valley Authority v. Welch, the Court gave legislative determinations of public use “near[ ] immunity from judicial review” when it held that determinations of Congress and legislatures are binding. If even “traditional” takings protections only extend to the limit of due process, why have a Takings Clause at all? Is this the fact that the Committee of Fifteen recognized when it voted against a takings clause analogue in the Fourteenth Amendment? It may simply be that the Takings Clause has always been redundant with substantive due process or “natural” rights. The truth is, we will never know. Studying the Fourteenth Amendment is much like a traditional reading of the Five Books of Moses that comprise the Torah. One can read the Five Books in so many different ways and discern so many different meanings that there is no “correct” interpretation found thus far. A reading of the Fourteenth Amendment, even through the perspective of those who were there at its drafting, does not resolve the uncertainty. The comments of individuals involved with the drafting of the Fourteenth Amendment, frequently unsupported by the written record, change our attitude about the intent and meaning of the Amendment. Reading the Fourteenth Amendment through the framers’ eyes helps to some extent, but it really does not alleviate the confusion. Was it simply to support and propagate the Republican party by granting blacks suffrage? Was it out of a genuine concern to protect freed slaves? Was it to protect scalawags and carpetbaggers who had seized power in the South? Did Congress simply want to destroy states’ rights and empower the federal government by overturning Barron v. Baltimore?

304. Id. at 557.
In the realm of eminent domain, it is unfortunate that a more clear meaning behind the Fourteenth Amendment cannot be discerned since it is central to protecting property rights. The fact is, natural law protection for individual property rights should form the basis of eminent domain, and protection should be much broader than what the Takings Clause itself would allow. It is likely that *Kelo* may be revisited in the future. Our society’s anger toward that decision, whether well-founded or not, is heard by the courts. This will lead to a very interesting decision in the future. Whatever the case, it is clear that the Fourteenth Amendment contains a natural law limitation that protects property rights to some degree.
This essay assesses the performance of Justice Sandra Day O'Connor with respect to the constitutional rights of property owners, and argues that her property jurisprudence was an assortment of different and contradictory elements. In short, the O'Connor legacy is more complex than her vigorous dissent in *Kelo v. City of New London* (2005)\(^1\) might suggest.

Curiously, Justice O'Connor's property rights decisions are a relatively underexplored dimension of her Supreme Court career. Even admiring studies of her work on the Court give scant attention to property-related issues.\(^2\) Certainly there is much to applaud in O'Connor's record on this topic. She often joined with the majority of the Rehnquist Court as it cautiously sought to strengthen the rights of property owners. Although O'Connor helped property rights make a modest comeback in constitutional law, her overall voting pattern was somewhat ambivalent and left ample room for the regulatory state. Moreover, O'Connor's interest in property seemed to wax and wane over her years on the bench.

I consider in Part I decisions by Justice O'Connor that point toward a strengthening of the rights of property owners. In Part II I examine judicial opinions by O'Connor which cut in the opposite direction, minimizing property rights. I probe in Part III her seemingly inconsistent thinking about the “public use” limitation on the exercise of the eminent domain power.

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I. DECISIONS SUPPORTIVE OF PROPERTY RIGHTS

A. Takings Jurisprudence

Over the course of American history both the contract clause and the due process clause have played important roles in protecting the rights of property owners. In the post–New Deal era, however, the takings clause of the Fifth Amendment has been the principal vehicle for the vindication of property rights. That Amendment provides in part: “nor shall private property be taken for public use, without just compensation.” Therefore, the bulk of Justice O’Connor’s property decisions turn upon interpretations of this language.

Many of the cases in which she participated focused on the question of what governmental actions, short of outright acquisition, amounted to a taking of property within the meaning of the Fifth Amendment ban on taking private property without just compensation. For example, early in her tenure on the Supreme Court, O’Connor was called upon to decide whether a minor but permanent physical occupation of an owner’s property under governmental authorization amounted to a taking. The Court had long viewed a physical invasion by government as a particularly serious matter.

In *Loretto v. Teleprompter Manhattan CATA Corp.* (1982), Justice O’Connor joined the majority opinion which affirmed “the traditional rule that a permanent physical occupation of property is a taking,” even if only a small portion of the owner’s property was occupied. In other words, O’Connor was prepared to endorse a categorical rule governing physical incursions on land.

O’Connor’s record with respect to regulatory takings was more complicated. She supported the decision in *Nollan v. California Coastal Commission* (1987). In that case the Supreme Court, for the first time since the 1920s, invalidated a land use regulation. At issue was the practice of local governments to condition the grant of building permits to developers upon exactions, such as the

5. 458 U.S. 419 (1982).
6. *Id.* at 441.
dedication of land to the public or the payment of impact fees. The *Nollan* case arose when a state agency conditioned a permit to rebuild a beach house upon the owners’ grant of a public easement across the beachfront. O’Connor joined with the majority to hold that the imposition of such a condition constituted a taking because the requirement was unrelated to any problem caused by the proposed development. The Court also indicated a willingness to scrutinize more carefully the connection between the purpose and the means of regulation. In *Dolan v. City of Tigard* (1994), with O’Connor’s support, the Court overturned another exaction scheme. A local zoning agency approved the building plans of a store owner conditioned on the owner’s dedication of part of her land to the city for a public greenbelt and a bicycle path. The Court insisted that there must be a “rough proportionality” between the imposed exactions and the burdens expected from the proposed building development. It also ruled that the local government had the burden of justifying the regulation. Because the city in *Dolan* failed to meet its burden, the Court held that the exactions amounted to a taking of private property without compensation.

Indeed, O’Connor made clear that she was prepared to place a broad reading on the *Dolan* test governing exactions. There was uncertainty among lower courts as to whether the *Dolan* test applied only to cases in which the exaction was imposed by administrative decision or also extended to legislative enactments. In *Parking Association of Georgia v. City of Atlanta* (1995), a case involving a municipal ordinance requiring parking lot owners to undertake extensive and costly landscaping, the Supreme Court declined to resolve the issue. However, O’Connor joined Justice Clarence Thomas in a dissent from the denial of certiorari. They cogently argued:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.10

10. Id. at 1117–18.
As Thomas and O’Connor correctly perceived, it is difficult to see why a different standard should apply depending upon the character of the state action. The takings inquiry should instead focus on the impact of the regulation upon the property owner.

In addition to scrutinizing exactions, the Rehnquist Court demonstrated concern about land use regulations that drastically reduce the value of property. At issue in *Lucas v. South Carolina Coastal Council* (1992) was a South Carolina total ban on beachfront development. Designed to prevent beach erosion and preserve a valuable public resource, the law prevented the owner of the last two residential lots from building any permanent structure on his land. O’Connor once again joined the majority opinion, which found that regulations denying an owner “all economically beneficial or productive use of land” amount to a per se taking, notwithstanding the public interest advanced to justify the limitation. The Court reasoned that the total deprivation of economic use is the practical equivalent of physical appropriation of land. It expressed concern that controls preventing economic use “carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.”

Most takings cases have involved land use regulations, but a number of governmental policies have been challenged as unconstitutional takings of property. One such challenge concerned a congressional statute imposing a retroactive financial obligation on a former mining employer to bolster the solvency of a coal industry retirement and health fund. Writing for a plurality of the Court in *Eastern Enterprises v. Apfel* (1994), O’Connor determined that the statute as applied constituted an unconstitutional taking. She noted generally that an economic regulation could effect a taking. Stressing that retroactive laws are disfavored, O’Connor pointed out that the statute divested Eastern Enterprises of property and imposed a severe financial liability long after the company had ceased coal mining operations. She concluded that when a legislative remedy “singles out certain employers to bear a burden that is substantial in amount, based on the employers’ conduct far in the past, and unrelated to any commitment that the employers made or to any injury

12. *Id.* at 1017.
they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.”  

**14.** Given the splintered opinion in *Eastern Enterprises*, the importance of the decision is unclear. Still, it is noteworthy that O’Connor invoked the regulatory takings doctrine in the context of a general regulatory measure.  

In several concurring or dissention opinions, O’Connor took positions that would strengthen the constitutional protection of property owners in takings cases. In *Keystone Bituminous Coal Ass’n v. DeBenedictis* (1987),  

**16.** the Supreme Court rejected a takings challenge to a Pennsylvania statute prohibiting certain coal mining to protect surface structures from subsidence. O’Connor joined, together with two other justices, in a dissenting opinion by Chief Justice William H. Rehnquist. The dissenters maintained that the act extinguished all rights in an identifiable segment of property—millions of tons of coal—and effected a taking for which compensation was required.  

A year later O’Connor evidenced a degree of skepticism about rent control schemes. In *Pennell v. City of San Jose* (1988),  

**18.** the Court brushed aside an attack on a municipal rent control ordinance that mandated consideration of a tenant’s “hardship” status in determining a reasonable rent. The Court concluded that a taking challenge was premature because there was no evidence that the hardship provision had ever been applied to reduce the amount of a rent. O’Connor, joining a dissenting opinion by Justice Antonin Scalia, insisted that the tenant hardship provision effected a taking of property. They stressed the purpose behind the takings clause was to prevent government from singling out particular individuals from bearing costs that should be placed on the public as a whole. Scalia and O’Connor charged that the city “is using the occasion of rent regulation . . . to establish a welfare program privately funded by those landlords who happen to have ‘hardship’ tenants.” They added that the prescription of the takings clause was grounded upon “the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation.”  

**19.**

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14. *Id.* at 537.  
17. *Id.* at 506–21.  
19. *Id.* at 23.
O’Connor also reflected property-conscious views in *Preseault v. Interstate Commerce Commission* (1990), a case arising under congressional legislation to promote the conversion of abandoned railroad rights-of-way to recreational trails. Such conversions were challenged as a taking of the property of servient landowners. Arguably the act enlarged the burden on landowners by indefinitely delaying the termination of the railroad easement by abandonment under state law. The Supreme Court determined that, even if a taking occurred by virtue of a trails conversion, the landowners could seek compensation in the Claims Court under the Tucker Act.

O’Connor authored a concurring opinion in which she emphasized that a takings claim could arise from the rails-to-trails legislation. She opined “that state law determines what property interest petitioners possess and that traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on any property interest they possess.” O’Connor maintained that regulatory oversight of railroad abandonments by Congress was a distinct question from whether the exercise of such power amounted to a taking. Indeed, she went further, declaring that “the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power.”

Of particular interest is the opinion by Scalia, in which O’Connor joined, dissenting from the denial of certiorari in *Stevens v. City of Cannon Beach* (1994). At issue were decisions of the Supreme Court of Oregon declaring that the doctrine of custom applied to all dry-sand beaches in the state, and that the public enjoyed a customary right to use such beaches for recreational purposes. When the owner of a beachfront lot was denied a building permit for construction of a seawall, the owner brought an inverse condemnation action against the city. The owner asserted that the doctrine of custom was a newfound fiction, and that in any event the facts did not support its application to the owner’s property. The Supreme Court declined

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23. *Id.* at 23.
to review the ruling of the Oregon court dismissing the complaint. Scalia and O’Connor, however, persuasively argued that the petition for certiorari should have been granted, and in so doing broke new ground in Fifth Amendment jurisprudence.

The two justices strongly intimated that the Supreme Court of Oregon was creating a novel doctrine rather than describing an already existing doctrine. They insisted:

As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law. . . . No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. . . . Since opening private property to public use constitutes a taking, . . . if it cannot be fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effectuated an uncompensated taking.25

This prescient opinion contemplated the possibility that a judicial decision could constitute a taking of property. Under this analysis, the invocation of novel doctrines, or the reversal of long-standing rules governing property, to defeat established rights of owners might well run afoul of the Fifth Amendment.26

In Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (2010),27 a case decided after O’Connor’s retirement, a plurality of the Supreme Court endorsed the concept of a judicial taking of property. Scalia, writing for the plurality, drew heavily upon his opinion with O’Connor in Cannon Beach. He asserted: “It would be absurd to allow a State to do by judicial

25. Id. at 1334.
27. 130 S. Ct. 2592 (2010).
Scalia amplified his reasoning:

In sum, the Takings Clause bars the State from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, 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. But the particular state actor is irrelevant. If a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.

Although the concept of a judicial taking has gained traction, the doctrine raises complex issues that are outside the scope of this essay. Suffice it to say that, on its face, the text of the Fifth Amendment draws no distinction between the branches of government in terms of legal change that affect property ownership. Therefore the basic notion seems sound, even though many issues remain to be resolved. For our purposes, it is important to recall O'Connor’s contribution to the formulation of judicial takings doctrine.

In addition, O'Connor addressed the contested role of transferable development rights in takings analysis. In *Suitum v. Tahoe Regional Planning Agency* (1997), the owner of an undeveloped lot near Lake Tahoe was not permitted to develop her land, but was entitled to receive allegedly valuable transferable development rights (“TDRs”) which she could sell to other owners. It was a matter of dispute whether the TDRs had any actual value in the market. The owner brought suit, claiming a regulatory taking of her property. The

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28. *Id.* at 2601.
29. *Id.* at 2602.
31. See, e.g., Ilya Somin, *Stop the Beach Renourishment and the Problem of Judicial Takings*, 6 DUKE J. CONST. L. & PUB. POL’Y 91, 106 (2011) (“Judicial takings are fundamentally similar to other takings. The fact that judges, rather than legislators or executive branch officials, enact them is irrelevant under the Constitution. No one doubts that judges are forbidden to violate other constitutional rights. Property rights protected by the Takings Clause are no different.”).
32. 520 U.S. 725 (1997).
Supreme Court found the case ripe for judicial review, and remanded the case without a decision on the merits. Scalia, joined by O’Connor and Thomas, concurred in an opinion treating TDRs. They stressed that the ability of the owner to sell TDRs was not related to the existence of a taking. The three justices declared that the availability of TDRs was relevant only to the question of compensation, and did not bear on the issue of whether there had been a taking. As they framed the question, “the relevant issue is the extent to which use or development of the land has been restricted.” The existence of TDRs simply did not pertain to this issue, but could be part of the full compensation for a taking.

O’Connor’s reluctance to fashion hard and fast rules in the context of regulatory takings was evident in her concurring opinion in Palazzolo v. Rhode Island (2001). She agreed with the Court that a takings claimant was not necessarily barred where the claimant acquired the regulated property after the state-imposed restrictions were enacted. In her view, the timing of the regulation’s enactment was simply one of a number of factors to be considered in a regulatory takings inquiry. O’Connor indicated a preference for ad hoc factual investigations. She tellingly observed: “The temptation to adopt what amounts to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context.” Such an approach, however, leads to highly subjective decision-making and unpredictable results.

B. Remedies for a Taking

Individuals pursuing a regulatory takings claim in federal court face a virtual stone wall. Not only must they bear legal fees and transaction costs, but procedural hurdles make it almost impossible to bring such claims in federal court. Under the ripeness doctrine set forth in Williamson County Regional Planning Commission v. Hamilton Bank (1984), an opinion which O’Connor joined, a claimant

33. Id. at 747–49.
34. Id. at 749.
36. Id. at 632–36.
37. Id. at 636.
must satisfy a two-prong test before instituting a federal court challenge to an alleged regulatory taking. Claimants must first obtain a “final decision” from the appropriate local government agency on a land use application, and must then seek and have been denied compensation in state court. As a practical matter, the Williamson County ripeness test has virtually shut the door on the ability of claimants to seek a remedy for a regulatory taking in federal court. In addition, the federal courts are barred by the federal full faith and credit statute from relitigating issues that have been resolved in state court actions. Consequently, regulatory takings claimants are commonly left with no access to a federal forum. The Williamson County rule has long been the subject of criticism. It clearly suggests the Supreme Court’s lack of interest in enforcing property rights. No other important right is treated in such a shabby manner.

In San Remo Hotel v. City and County of San Francisco (2005), the Supreme Court rejected the argument that courts should not apply the preclusion rules under the federal full faith and credit statute when a claimant was forced into state court first in order to meet the Williamson County ripeness test. Justice John Paul Stevens, speaking for the Court, was untroubled by the acknowledged fact that takings claimants could not present their federal claims under the Fifth Amendment in a federal forum.

Justice O’Connor, however, joined with three other justices in a concurring opinion by Chief Justice Rehnquist. He urged the Court to revisit the second prong of the Williamson County test, requiring takings claimants to seek state court review before bringing a federal court action. Rehnquist questioned the justification for the

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39. 28 U.S.C. § 1738 (providing that “judicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or custom in the courts of such State . . .”).


41. 545 U.S. 323 (2005).

42. Id. at 348–52.
state-litigation requirement, and pointedly commented that claimants challenging land use regulations on First Amendment grounds could come directly to federal court. Rehnquist was perplexed “why federal taking claims in particular should be singled out to be confined to state court, in the absence of any asserted justification or congressional directive.” By joining this concurring opinion, O’Connor signaled her unhappiness with the restrictive Williamson County test, and her willingness to enlarge the ability of takings claimants to have their cases heard in a federal forum.

II. DECISIONS DISMISSIVE OF PROPERTY RIGHTS CLAIMS

A. Takings Jurisprudence

Despite the above discussion, O’Connor was by no means supportive of all takings claims. We now turn to a consideration of those cases in which she found no property rights violation. Of course, even the most property-conscious judge would not necessarily decide every case in favor of property owners. Still, one should assess the total record in order to correctly gauge the extent of O’Connor’s defense of property rights.

At issue in Yee v. City of Escondido (1992) was the validity of a local rent control ordinance when joined with a state law severely limiting the power of property owners to terminate mobile home tenants. The ordinance prohibited any rent increase without the approval of the city council. Mobile park owners alleged that the rent control ordinance effectuated a physical occupation of their premises, and amounted to a per se taking of their property under Loretto. They argued that the effect of the ordinance, when coupled with the state law, was to confer a right on mobile home tenants to remain indefinitely on their property at below-market rents.

O’Connor, writing for the Court, ruled that the rent control ordinance, seen in conjunction with the state law, did not compel the landowners to submit to physical occupation. She pointed out that the owners voluntarily rented their property and retained the right to change the land use and evict the tenants with notice. Revealingly,

43. Id. at 351.
45. 458 U.S. 419 (1982).
O’Connor emphasized: “A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.” Finding no compelled physical occupation of property, she ruled that the ordinance was a regulation of use and did not amount to a per se taking. O’Connor declined to pass upon a regulatory taking claim as improperly presented, but noted that states have broad authority to regulate landlord–tenant relationships.

The outcome in *Yee* was problematic. O’Connor’s insistence that “no government has required any physical invasion of petitioners’ property” was misleading. The landowners initially invited the mobile home tenants to enter their premises for a limited time determined by a lease. But the state statute greatly limited the power of the landowners to terminate such leases, thereby in effect converting the lease term into one of indefinite duration. It is certainly arguable that the state government had indeed sanctioned a physical occupation of the landowners’ property. Moreover, *Yee* was the harbinger of a gradual shift in O’Connor’s thinking about property rights. By the early twenty-first century she was increasingly inclined to restrict application of the regulatory takings doctrine and to uphold governmental regulations of property.

In this regard, consider O’Connor’s curious role in the cases arising from the use of interest payable on lawyers’ trust accounts (“IOLTAs”). Starting in the 1980s, most states established IOLTA programs under which attorneys were required to deposit nominal client funds in special bank accounts. The interest earned on such pooled IOLTA accounts was paid to legal foundations that funded legal assistance for low-income individuals. The program was challenged as a taking of property—the interest on IOLTA accounts— that rightfully belonged to the clients. The threshold question was whether the interest on IOLTA accounts was private property. In

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46. *Yee*, 503 U.S. at 528.
47. *Id.*
48. Nonetheless, *Yee* has remained a barrier to finding a physical taking in the context of rent control. *See Harmon v. Markus*, 2011 WL 782233 (2d Cir. 2011) (finding that tenancy of indefinite duration under rent control laws does not amount to a physical taking of property).
Phillips v. Washington Legal Foundation (1998), a 5–4 majority of the Supreme Court, joined by O’Connor, declared that the existence of a property right was determined by reference to an independent source such as state law. Applying Texas law, the Court ruled that the interest earned on IOLTA accounts belonged to the lawyers’ clients. It adhered to the traditional rule that “interest follows principal.” The case was remanded for consideration of whether IOLTA interest has been taken by the state. The decision in Phillips raised doubts about the constitutionality of the IOLTA scheme.

In Brown v. Legal Foundation of Washington (2003), the Court unanimously found that IOLTA rules amounted to a physical taking of property but determined, by another 5–4 vote, that clients suffered no loss and were therefore not entitled to compensation. O’Connor now voted to reject the claim for compensation, thereby weakening Phillips and leaving the clients with no meaningful remedy for the conceded deprivation of their property. The decision turned upon question of how to measure just compensation. The majority’s curious reasoning can only be sketched here. The majority invoked the time-honored norm that the compensation should be “measured by the property owner’s loss rather than the government’s gain.” In other words, the government must pay the fair market value of the property taken, and not for whatever advantage the acquisition might bring to the government. Although IOLTAs generated substantial funds for the state, the Court remarkably concluded that the owners of the principal had suffered no loss. The salient point for our purpose is that O’Connor joined an opinion that seemed more concerned to sustain IOLTA programs than to vindicate the right of property owners. At the very least there is substantial tension between her positions in the two IOLTA cases. The owners of the principal were left with little more than lip service about their private property rights.

The same pattern—backing away from earlier actions in defense of property rights—was apparent when O’Connor joined the majority in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning
At issue was a thirty-two-month moratorium imposed on all land development in the Lake Tahoe basin while a regulatory agency fashioned a land use program. The moratorium was challenged as a deprivation of all economically viable use and thus a per se taking of property under *Lucas v. South Carolina Coastal Council*. The majority concluded that the categorical *Lucas* rule was inappropriate to resolve whether a temporary ban on development constituted a taking of property. Instead, the Court looked to the ad hoc balancing test of *Penn Central Transportation Co. v. City of New York* (1978) as the most suitable framework to determine the existence of a taking. It reasoned that regulations temporarily denying all use of property might not constitute a taking if the delay was part of a state plan to enact safety or zoning laws. Moreover, the Court insisted that property could not be divided into temporal segments when considering the impact of a temporary regulation. With a temporary regulation, the property would always have future value.

The dissenter in *Tahoe-Sierra* disputed whether there was a meaningful distinction between a temporary and permanent prohibition on development. They pointed out that the claimants were forced to leave their property economically idle for years. The dissenter maintained that the *Lucas* rule should govern, and that the moratorium was the practical equivalent of a forced lease to the government. Here again O’Connor joined in a decision that weakened the protection afforded property owners and underscored her growing preference for ad hoc examination of facts instead of clear rules. Her vote was also seemingly at odds with the *Lucas* opinion, which she had joined a decade earlier.

O’Connor further narrowed the regulatory takings doctrine in *Lingle v. Chevron, U.S.A., Inc.* (2005). Some background may be helpful in placing the *Lingle* litigation in context. In *Agins v. City of Tiburon* (1980), the Supreme Court ruled that a land use regulation “effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.” This language was repeated in a number of later cases.
takings decisions by the Court, and was invoked by lower federal courts to invalidate local rent control ordinances.\textsuperscript{60}

At issue in \textit{Lingle} was a Hawaii statute that imposed ceilings on the rent that gasoline companies could charge dealers who leased company-owned service stations. The expressed legislative purpose behind this measure was to reduce gasoline prices. Yet Chevron retained the right to raise wholesale gasoline prices to offset any loss arising from the rent regulation, and did not challenge the statute on grounds that the company could not earn a reasonable return on investment. Rather, the company argued that Hawaii’s law did not “substantially advance” its purpose of reducing gasoline prices and thus constituted a regulatory taking. Upholding this contention, lower federal courts held that the act would not lower gasoline prices for consumers and amounted to a taking.

Speaking for the Supreme Court in a troublesome opinion, Justice O’Connor reversed. Reasoning that the efficacy of a regulation had nothing to do with the burden that it placed on property owners, she jettisoned the “substantially advances” formula as not germane to a regulatory takings analysis. O’Connor maintained that a regulatory takings inquiry

\begin{quote}
aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.\textsuperscript{61}
\end{quote}

She added: “the notion that such a regulation nevertheless ‘takes’ private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.”\textsuperscript{62} In short, O’Connor restated and limited takings jurisprudence. While regulatory takings analysis should concentrate on the severity of the imposed burden, the irrationality of a regulation might be relevant to the degree of burden.\textsuperscript{63}

\textsuperscript{60.} See, e.g., Tahoe-Sierra, 535 U.S. at 334; \textit{Cashman v. City of Cotati}, 374 F.3d 892–93, 896 (9th Cir. 2004).
\textsuperscript{61.} \textit{Lingle}, 544 U.S. at 539.
\textsuperscript{62.} \textit{Id.} at 543.
Unfortunately, the *Lingle* opinion contained some dubious history and perpetuated the second class status of property rights in constitutional law. O’Connor repeated the erroneous proposition that until the landmark opinion in *Pennsylvania Coal v. Mahon* (1922), it was thought that the takings clause did not cover regulations at all. In fact, commentators and jurists had long considered whether regulations might be so severe as to have the practical effect of a physical taking. The modern regulatory takings began to take shape in the late nineteenth century. In 1888, for instance, John Lewis, the author of a treatise on eminent domain, stated that when a person was deprived of the possession, use, or disposition, “he is to that extent deprived of his property, and, hence . . . his property may be taken in the constitutional sense, though his title and possession remain undisturbed.” Clearly the regulatory takings doctrine did not originate in 1922.

Having rejected Chevron’s takings claim, O’Connor suggested that an attack on an arguably irrational statute should be heard under the due process clause of the Fourteenth Amendment. But this is almost certainly a dead end. The Supreme Court has not struck down an economic regulation as a violation of due process since 1937. Her notion that Chevron could secure meaningful consideration of a due process claim is fanciful as federal courts do not provide even cursory review of property rights claims under due process. Indeed, O’Connor emphasized judicial deference and maintained that courts “are not well suited” to scrutinize economic regulations. She added that “we have long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation.” She never explained why courts are suited to resolve a wide variety of other value-laded individual rights claims

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64. 260 U.S. 393 (1922) (Holmes, J.).
65. David J. Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER AND YALE REV. 97, 102–05 (1891). See also *Bent v. Emery*, 137 Mass. 495, 496, 53 N.E. 910, 911 (1899) (Holmes, J.) (“It would be open to argument at least that an owner might be stripped of his rights so far as to amount to a taking without any physical interference with his land.”); CARMAN F. RANDOLPH, *THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* 24–26 (1894).
69. Id. at 545.
under the heading of due process. O’Connor’s _Lingle_ opinion demonstrates the continuing impact of New Deal constitutionalism, which fashioned a dichotomy between the rights of property owners and other personal rights. Property rights were reduced to secondary status, and were thus entitled to little judicial solicitude.70 This development served the political needs of the New Deal by facilitating the extension of governmental controls. O’Connor even cited _Ferguson v. Skrupa_ (1963),71 a notorious expression of New Deal constitutionalism. In that case the Supreme Court upheld a blatant special interest law and virtually abdicated any judicial review of economic legislation under the due process norm. Absent a signal change in the law, O’Connor’s suggestion that Chevron seek due process review is simply not credible.

Finally, in _Lingle_, O’Connor made it plain that in most situations the standard for determining whether a taking has occurred continues to be the multifactor balancing test set forth in _Penn Central_. This is regrettable because the _Penn Central_ test is fraught with problems.72 Not only are the various factors—i.e., “economic impact of the regulation,” “interference with “distinct investment-backed expectations,” “the character of the governmental action”—vague, but there is no indication of how each factor is to be weighed or how they related to each other. Much depends on the weight one subjectively assigns to the different factors to be balanced.73 As O’Connor herself has pointed out, the _Penn Central_ factors have “given rise to vexing subsidiary questions.”74 Yet she made no attempt to clarify the confusion. Consequently, we are left with a uncertain and malleable test that can be manipulated to justify almost any outcome but is most commonly utilized to favor the government over individual

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70. United States v. Caroene Products Co., 304 U.S. 144 (1938); Ely, supra note 3, at 139–41.

71. 372 U.S. 726 (1963). At issue in _Williamson_ was a state law barring an optician from fitting or duplicating eyeglass lenses into new frames without a prescription from an optometrist. It was a classic example of a law enacted to serve the interests of a narrow group at the expense of the general public.


73. Anthony B. Sanders, _Of All Things Made in America Why Are We Exporting the Penn Central Test?_, 30 Nw. J. INT’L L. & BUS. 339, 354 (2010) (observing that under the _Penn Central_ approach “courts are free to range just about as widely as they please in determining whether the government has taken property without providing just compensation”).

74. _Lingle_, 544 U.S. at 539.
owners. Speaking of Penn Central, Stuart Banner has correctly noted: “The only clear implication was that victories for property owners adversely affected by regulation would be very rare indeed.”\(^75\) The Lingle opinion demonstrates O’Connor’s preference for ad hoc decision-making on a case by case basis, rather than the articulation of a general norm.

B. Remedies for a Taking

Just as her analysis in takings cases was uneven, so O’Connor sometimes took a crabbed view of the remedies available for individuals whose property was taken. She dissented in two cases where the Court majority enhanced the means of enforcing property rights. In neither case did O’Connor manifest a robust commitment to property rights.

In First English Evangelical Lutheran Church v. County of Los Angeles (1987),\(^76\) the Court majority ruled that property owners may be entitled to compensation for the temporary loss of land use when the governmental controls are later invalidated. The mere invalidation of the restriction was not deemed a sufficient remedy for the period during which the temporary taking was in effect. O’Connor joined the three dissenters in an opinion that questioned whether the temporary deprivation of all use amounted to a taking, and which stressed deference to state interest in controlling land development.\(^77\)

Similarly, O’Connor dissented in City of Monterey v. Del Monte Dunes at Monterey, Ltd. (1999),\(^78\) the first case in which the Supreme Court sustained an award of monetary damages for a regulatory taking. Of greater significance, the Court majority found that the question of liability on a regulatory claim under section 1983 was properly submitted to a jury. It ruled that a landowner had a constitutional right for a jury trial to determine whether he or she had been deprived of all economically viable use of property. O’Connor, however, joined a dissenting opinion which insisted that there was no right to a jury trial in an inverse condemnation action.\(^79\)

\(^76\) 482 U.S. 304 (1987).
\(^77\) Id. at 322–41.
\(^78\) 526 U.S. 687 (1999).
\(^79\) Id. at 733–55.
C. Contract Clause

Article 1, section 10 of the Constitution provides in part: “no state shall . . . pass any . . . Law impairing the Obligation of Contracts.” During the nineteenth century, the contract clause was among the most litigated provisions in the Constitution, and was the principal limitation on state authority.\(^{80}\) The clause, for example, was central to the jurisprudence of the Marshall Court.\(^{81}\) The contract clause, however, steadily declined in importance in the twentieth century. This process cannot be traced in detail here.\(^{82}\) The provision received a near-fatal blow in *Home Building & Loan Association v. Blaisdell* (1934),\(^{83}\) which became the basis for modern understanding of the contract clause. This highly controversial decision upheld a two-year moratorium, enacted during the Great Depression, on the foreclosure of mortgages. Although susceptible of a narrow reading that restricted valid impairments of contracts to emergency situations, the Court opinion also suggested that, under its police power, a state’s interest in economic regulations could justify interference with contractual arrangements. The triumph of New Deal constitutionalism, with its stress on judicial deference to legislative judgments about economic matters, virtually eviscerated the once-mighty contract clause.

In the 1970s, the Supreme Court showed a fleeting interest in reinvigorating the contract clause, sparking speculation that the provision might regain some of its former importance.\(^{84}\) In practice, however, the contract clause is usually subordinated to the Court’s deference to legislative policy. In *United States Trust v. New Jersey* (1977),\(^{85}\) a case in which the Court actually found a contract clause violation,

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\(^{80}\) *Benjamin Fletcher Wright, Jr.*, *The Contract Clause of the Constitution* xiii (1938).


\(^{85}\) 431 U.S. 1 (1977).
the justices nonetheless declared that usually “[s]tates must possess broad powers to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result.”86 Thereafter, the Court has adhered to a sort of balancing approach which defers heavily to a state’s determination of when legislation impairing contracts is reasonable. Such a minimal test is at odds with the language and purpose of the contract clause, but goes far to explain the emaciated nature of the provision in current constitutional law.

In fairness, then, it is apparent that the contract clause had been drained of much vitality before O’Connor joined the bench in 1981. Nonetheless, she never demonstrated much interest in the provision, and even joined opinions that made contract clause doctrine still worse. For example, O’Connor voted in Exxon Corp. v. Eagerton (1983)87 to reject an attack on an Alabama statute that prohibited the pass-through of a severance tax to consumers, notwithstanding contractual provisions permitting producers to do so. The Eagerton Court adopted an understanding of the police power so broad as to uphold any type of state economic regulation affecting contracts. Similarly, in Energy Reserves Group v. Kansas Power & Light Company (1983),88 O’Connor and her colleagues upheld a state law that imposed a ceiling on the contractual right of natural gas suppliers to increase prices.

O’Connor’s one contract clause opinion for the Court added little to the virtual collapse of the clause as a meaningful restraint on state authority to rearrange contractual obligations. At issue in General Motors Corp. v. Romein (1992)89 was a change in state law requiring employers to refund workers’ compensation benefits previously withheld. The company challenged the statute mandating retroactive payments on contract clause grounds. It argued that the workers’ compensation law was an implied term of a collective bargaining agreement, and that a retroactive requirement to pay the benefits impaired the obligation of contract. O’Connor began her opinion by affirming the long-standing rule that the existence of a contract was a question for the independent judgment of federal courts and was

86. Id. at 22.
not determined by state law. She then found that there was no contractual arrangement regarding workers’ compensation benefits, and hence no violation of the contract clause. O’Connor maintained that state laws were implied into private contracts only when such measures affect the enforcement of agreements. A change in state law affecting the remedies that make contracts enforceable, she noted, is subject to contract clause analysis because a change in remedies may weaken the binding force of agreements. But the clause does not bar all changes in law, O’Connor observed, because such a construction “would severely limit the ability of state legislatures to amend their regulatory legislation.”

III. THE “PUBLIC USE” IMBROGLIO

Eminent domain is among the most intrusive powers of government because it compels owners to transfer their property to the government or government-sponsored enterprises. The framers of the Fifth Amendment curtailed the exercise of eminent domain by imposing conditions that private property could be acquired for “public use” and upon payment of “just compensation.” Yet in the twentieth century the Supreme Court has largely deferred to legislative determinations of “public use,” and has been unwilling to reign in the increasingly aggressive exercise of eminent domain by state and local governments. The prevailing interpretation of the “public use” requirement has been guided by the leading case of Berman v. Parker (1954). Property owners challenged the taking of their land under a comprehensive urban renewal project in the District of Columbia for redevelopment by a private agency. They argued that property could not be taken from one owner and transferred to another for private use. Dismissing this contention, the Supreme Court declared that “[t]he role of the judiciary in determining whether [eminent domain] power is being exercised for a public purpose is an extremely narrow one.” The Court not only equated the concept of “public use” with the broader notion of “public purpose,”

90. Id. at 190.
93. Id. at 32.
but likened eminent domain to the very different police power to protect public health, safety, and morals. Finding that the “concept of the public welfare is broad and inclusive,” it stressed judicial deference to legislative judgments about the need for eminent domain. Berman signaled the almost complete abandonment by the federal courts of the public use clause as a meaningful constraint on governmental authority to acquire private property.

In the first of her two Court opinions addressing the “public use” requirement, O’Connor followed in the footsteps of Berman, and upheld the far-reaching exercise of eminent domain in sweeping terms. At issue in Hawaii Housing Authority v. Midkiff (1984) was a land redistribution scheme that entailed the transfer of the fee simple title of family residences from landowners to tenants under long-term leases in order to overcome the perceived problem of concentrated land ownership. The legislature entertained the fanciful hope that conversion of leaseholds into freeholds would somehow decrease housing costs. This program was assailed as an illegitimate use of eminent domain to take land from one private party and immediately turn it over to other private hands. Writing for the Court, O’Connor reaffirmed the policy of judicial deference to legislative determinations regarding “public use.” She did not mention that the targeted landowners were charitable trusts who operated to assist native Hawaiians. Brushing aside the objection that the land redistribution scheme essentially employed eminent domain to serve private interests, O’Connor repeated the dubious proposition that the “public use” requirement was “coterminous” with the police power.

In an attempt to demonstrate some historical support for the Hawaii land redistribution program, O’Connor made an inapposite reference

94. *Id.* at 33.
96. The plan was fatally flawed from the outset. See Debra Pogrund Stark, *How Do You Solve a Problem Like in Kelo?*, 40 J. MARSHALL L. REV. 609, 624–30 (2007) (stressing that the beneficiaries of the takings in *Midkiff* were wealthy tenants and speculators, and that the land redistribution scheme at issue did not reduce the cost of buying homes); Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to “Fulfill Their Unique Role”? A Response to Professor Dyal-Chand*, 31 U. HAW. L. REV. 423, 429–33, 456 (2009) (pointing out that *Midkiff* “resulted in a dramatic escalation of home prices in Hawai‘i, contrary to its stated goal of housing cost reduction”). An astute jurist early realized that the likely effect of the statute was to aggravate the shortage of fee simple residential land and inflate land prices. *Midkiff v. Tom*, 702 F.2d 788, 805–06 (9th Cir. 1983) (Poole, J., concurring).
to Revolutionary-era statutes abolishing quitrents. These measures are of questionable value in sustaining her opinion. Quitrents were paid to the crown or a colonial proprietor and are best understood as a form of taxation. O’Connor’s invocation of statutes eliminating quitrents was in the nature of an historical fig leaf.

O’Connor concluded that the Court would sustain any exercise of eminent domain “rationally related to a conceivable public purpose.” What exercise of the condemnation power would not meet such as relaxed standard? This needlessly expansive language would come back to haunt O’Connor a few years later. In the wake of Berman and Midkiff, many observers felt that, as a practical matter, the Supreme Court had eliminated “public use” as a check on when government can take property.

Justice O’Connor’s next opinion addressing “public use” suggested a dramatic change of heart on her part. In the highly controversial case of Kelo v. City of New London (2005), a 5 to 4 majority of the Court upheld the exercise of eminent domain for purposes of economic development by private enterprise. Not surprisingly, in reaching this result the majority relied heavily on Berman and Midkiff.

O’Connor would have none of it, authoring a blistering dissent. She now sought to carve out some room for judicial review of “public use.” “Under the banner of economic development,” O’Connor insisted, “all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded. . . .” She argued that if incidental public benefits arising from economic development amounted to “public use,” then the majority had in effect removed “the words ‘for public use’

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98. Id. at 241, n. 5.
99. See Alvin Rabushka, Taxation in Colonial America 24–25 (2008). The colonists greatly resisted the payment of quitrents, and they were collected only with difficulty. Hence, the abolition of the quitrent system may well have been of more symbolic than practical significance. See Lawrence M. Friedman, A History of American Law 24–25 (3d ed. 2005). In any event, the elimination of quitrents did not entail a massive transfer of title to land, but actually strengthened the legal position of the current owners.
100. Midkiff, 467 U.S. at 241. O’Connor further asserted: “Redistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligarchy is a rational exercise of the eminent domain power.” Id. at 243.
101. Kelo, 545 U.S. at 469.
103. Kelo, 545 U.S. at 494.
from the Takings Clause of the Fifth Amendment.” According to
O’Connor, the “public use” and “just compensation” requirements put distinct limits on the taking of property in order to “ensure
stable property ownership by providing safeguards against exces-
sive, unpredictable, or unfair use of the government’s eminent
domain power—particularly by those owners who, for whatever
reason, may be unable to protect themselves in the political process
against the majority’s will.” She expressed concern that the ma-
ajority opinion “significantly expands the meaning of public use” and
imposes no restraint on eminent domain. Of particular interest
was O’Connor’s sharp critique of the “errant language” both in
Berman and her own Midkiff opinion that equated “public use”
with the scope of the police power. In much-quoted language, she asserted: “The specter of condemnation hangs over all property.
Nothing is to prevent the State from replacing any Motel 6 with a
Ritz-Carlton, any home with a shopping mall, or any farm with a
factory.” O’Connor concluded by noting that the majority opinion
would likely benefit the powerful at the expense of the weak. “The
beneficiaries,” she noted, “are likely to be those citizens with dispro-
portionate influence and power in the political process, including
large corporations and development firms.”

O’Connor’s powerful dissent in Kelo cheered property rights ad-
vocates and surely helped to spark the negative public reaction to the
decision. The outpouring of state laws to curb the taking of property
for economic development purposes, coupled with state court rulings
that reject the majority’s reasoning, strongly suggest that O’Connor
was closer to prevailing public opinion than was the majority. But

104. Id.
105. Id. at 496.
106. Id. at 501.
107. Id. There is room to question, however, whether the sweeping language to which
O’Connor belatedly objected was included in her Midkiff opinion by mistake. See D. Benjamin
Barros, Nothing ‘Errant’ About It: The Berman and Midkiff Conference Notes and How the
Supreme Court Got to Kelo with Its Eyes Wide Open, in PRIVATE PROPERTY, COMMUNITY
DEVELOPMENT, AND EMINENT DOMAIN 57–74 (Robin Paul Malloy ed. 2008) (arguing that the
justices in Midkiff, including O’Connor, were “aware of the risks of a broadly-written de-
cision”). This evidence supports the view that O’Connor in fact changed her mind about the
appropriateness of such language.
108. Kelo, 545 U.S. at 503.
109. Id. at 505.
110. See Thomas W. Merrill & Henry E. Smith, The Morality of Property, 48 WM. & MARY
L. REV. 1849, 1880 (2007) (noting “unprecedented public opposition to the idea of taking of
the question remains: can the *Kelo* dissent be squared with the *Midkiff* opinion?

O’Connor sought to distinguish *Midkiff* by identifying three categories of takings that satisfied the “public use” norm: transfers of private property to public ownership, as for roads or military bases; transfers of private property to private parties, such as common carriers or public utilities, which have special duties to serve the public; transfers to private parties in unusual circumstances where “the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society.” 111 In her mind, *Berman* upheld eminent domain to eliminate urban blight, and *Midkiff* sustained the taking of property to eliminate an oligopoly in land ownership. Thus, both fit into her third category.

Yet O’Connor’s efforts to distinguish *Midkiff* are unconvincing. First, there is no clear line between the elimination of blight and commercial development. Given the open-ended understanding of what constitutes blight in many jurisdictions, blight takings could be utilized to achieve economic development purposes. 112 Indeed, blight condemnations are often part of a redevelopment program. The difference that O’Connor saw between blight takings and economic development takings is elusive and likely untenable. She might more profitably have revisited the question of whether the elimination of blight constitutes “public use.” 113 Second, one could argue that the land redistribution scheme in *Midkiff* was a greater threat to the security of private property than the economic development taking in *Kelo*. It contemplated an overhaul of landownership in the entire state, a move without precedent in American history.

On the other hand, the facts of the two cases are distinguishable. The outcome in *Kelo* clearly moved beyond the factual basis for

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112. *Ely, Post-Kelo Reform, supra* note 110, at 134–36 (discussing elusive definitions of “blight,” and noting that the distinction between “blight” and economic development is fuzzy).
Midkiff because the condemned homes in New London were not blighted and did not, by any stretch of the imagination, constitute an oligopoly. Moreover, the taking in Kelo obviously conferred immediate benefits on powerful private interests, while any gains for the public were indirect and speculative.

Perhaps O’Connor reconsidered the impact of free-wheeling eminent domain and at least partially changed her mind. She may well have been influenced by the trend among state supreme courts to tighten the definition of “public use” even before the Kelo decision. In particular, the decision by the Supreme Court of Michigan in County of Wayne v. Hathcock (2004) overruling a prior decision and emphatically rejecting the economic development rationale for the condemnation of land received widespread publicity. O’Connor cited Hathcock in her dissent, and quite likely the increasing judicial skepticism about an open-ended understanding of “public use” caused her to rethink the question. She may also have become more attentive to the actual impact of eminent domain upon communities. Her comment about eminent domain serving the interests of the powerful and politically connected point in this direction. Or perhaps, given her penchant for ad hoc inquiry in takings cases, O’Connor was simply more sympathetic to the middle class homeowners in New London than she was to the large landlords in Hawaii. She backed away from some aspects of Midkiff, expressly repudiating her previous linking of “public use” and the police power. But she also insisted that Midkiff was “true to the principles underlying the Public Use Clause.” The result is a high degree of intellectual confusion flowing from her tendency to eschew legal doctrine in favor of ad hoc decisions. A takings jurisprudence that rests upon personal preference in particular cases is unlikely to produce either consistent or workable rules. Ultimately O’Connor’s thinking remains a puzzle.


116. Kelo, 545 U.S. at 500.

117. For an insightful comparison of O’Connor’s opinions in Midkiff and Kelo, see Gideon
CONCLUSION

For decades following the political triumph of the New Deal, the Supreme Court generally ignored issues pertaining to the rights of property owners. Critics charged that the Court had virtually deleted property rights from the Constitution. As the political and intellectual ascendancy of the New Deal disintegrated, however, the Court gradually expressed renewed interest in the subject.\footnote{E. L.Y., supra note 3, at 142–43.} In the 1980s, and especially after Rehnquist became chief justice in 1986, the Supreme Court became more solicitous of the rights of property owners than at any time since the pre–New Deal Court of the 1930s.

O’Connor contributed significantly to this development. Certainly she did much to help restore property rights to the constitutional agenda. But her achievements were mixed, and fell short of what her early opinions portended or what property rights advocates hoped. O’Connor never formulated a consistent or muscular property rights approach, and often sustained governmental power. Her pragmatic jurisprudence—as in other areas of constitutional law—did not lend itself to the fashioning of clear rules or providing guidance for the future. In this regard, her abiding support for the mushy Penn Central test for regulatory takings is revealing.

Still, a comparative look might be helpful to gain a perspective on O’Connor’s property jurisprudence. For example, contrast Justice O’Connor’s property decisions with those of Justice John Paul Stevens, the author of the majority opinions in\footnote{Stevens compiled a very consistent record of hostility to meaningful protection of property rights. Reflecting the continuing influence of statist liberalism emanating from the New Deal, Stevens almost invariably rejected or minimized claims advanced by property owners. He made clear his skepticism about the doctrine of regulatory takings.\footnote{Kanner, The Public Use Clause: Constitutional Mandate or “Hortatory Fluff?”, 33 PEPP. L. REV. 335, 356–57 (2006) (“Justice O’Connor’s intellectual misadventure thus demonstrates that she who lived by ad hocery dies by it.”).} He repeatedly expressed great—some might say...
naïve—confidence in local land use regulators. Indeed, in his *Kelo* opinion Stevens seemed virtually mesmerized by the City of New London’s supposedly comprehensive development plan, which, in spite of his enthusiasm, turned out to be a failure. Thus, he was prepared to allow local officials wide discretion over the rights of owners. Fortunately, O’Connor did not always follow this supine path.

In 1994, in an opinion joined by O’Connor, Chief Justice Rehnquist proclaimed: “We see no reason why the Takings Clause, as much a part of the Bill of Rights as the First Amendment, should be relegated to the status of a poor relation.” By this measure both the Rehnquist Court and O’Connor fell short. Despite its conservative reputation, the Rehnquist Court never had a firm majority prepared to uphold the rights of property owners in the face of governmental regulations. The justices, including O’Connor, were unable to break free of statist thinking about property. This is not to deny that there were some positive steps to strengthen property as a constitutional right. By O’Connor’s retirement, property owners enjoyed somewhat more protection from government than they had in prior decades. How much more protection, however, was a subject for debate. But thanks to O’Connor and her colleagues both scholars and the general public were talking more about property rights than they had done in a generation. The full implications of this are yet to unfold, and so a final assessment of O’Connor’s checkered property jurisprudence is premature.

120. See Nicole Stelle Garnett, *Planning as Public Use?,* 34 Ecology L.Q. 443, 444 (2007) (noting the frequency with which the Stevens opinion in *Kelo* invoked the terms “plan” or “planning”).

121. It is revealing that in his reminiscences about his tenure on the Court Justice Stevens did not even comment on cases dealing with property and contractual rights. See John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (2011).


THE PROPERTY RIGHTS DECISIONS OF JUSTICE SANDRA DAY O’CONNOR: WHEN PRAGMATIC BALANCING IS NOT ENOUGH

RICHARD A. EPSTEIN*

INTRODUCTION: O’CONNOR’S FIDELITY TO TRADITION

Any search for two words to characterize Justice Sandra Day O’Connor’s judicial work over her distinguished twenty-five-year Supreme Court career would quickly hone in on “pragmatism” and “balancing.” Justice O’Connor is “pragmatic” not because she displays any trace of personal opportunism, but because of her deep institutional commitment to do what she can to promote the long-term stability of American political institutions under law. She believes in “balancing” because of her strong conviction that constant attention to the particular facts and circumstances of each individual case help restrain a Justice from pushing legal doctrine too far in one direction or another—again, in ways that might destabilize the legal system. So constrained, Justice O’Connor does not give pride of place to overarching theories in working out her particular decisions. It would, however, be a serious mistake to treat her as a constitutional “minimalist” who wants to situate every case on its own bottom, for she does have a consistent philosophy. Instead, her primary concern is to preserve continuity with existing legal doctrinal structures, which requires more fidelity to the past than any strong minimalist view of constitutional law would require. The best way to think of her work is as an effort to nudge the received judicial wisdom in her preferred direction, without attacking the intellectual foundations

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1. For a discussion of this view, see, for example, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (2001).
of the system as a whole. Put otherwise, she is comfortable—too comfortable, in my view—with the United States’ modern social democratic state that relies on a firm public/private alliance that simultaneously works for both sustained economic growth and a fair distribution of wealth. Her frame of mind represents an updated judicial version of Pax Eisenhower, with its winning campaign slogan of “Peace, Prosperity, and Progress.”

There is much to be said for adopting this model. Its key trade-off is to write off any large gains from major judicial intervention in order to prevent major institutional shipwrecks borne of hasty and irresponsible judicial intervention on matters in which courts have, at most, imperfect knowledge. A former legislator, Justice O’Connor is generally sympathetic to legislative schemes that memorialize compromise settlements to complex problems. Her affection for balancing tests is like a gyroscope that prevents the ship of state from lurching too far in one direction or the other. Put otherwise, Justice O’Connor worked comfortably within the dominant tradition, without seeking to overturn it. That view carries over to her work in property law, which for these purposes, I construe to cover the law of takings and the collateral doctrines dealing with deprivations of due process and impairment of contracts. The question is how to evaluate her performance.

The inquiry merits a split decision. Armed with this general approach, she has produced, without question, some of the strongest and most thoughtful Supreme Court decisions in the past decade. Her decision in *FDA v. Brown & Williamson Tobacco Corp.* offers as careful a demolition of aggressive administrative action as one could hope to read. Her decision in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue* offers one of the best defenses of the flat tax in the context of the First Amendment, which easily could be generalized to cover all systems of taxation on all forms of property. And her analysis of federalism in *Gregory

2. See Dwight Eisenhower, Mandate for Change: 1953–1956, 484–85 (Doubleday, 1963) (“The slogan ‘Peace, Prosperity, and Progress,’ which was applied to the first-term years, and was used in the campaign of 1956 . . . .”).
v. Ashcroft 6 offers perhaps the most thoughtful judicial commentary on matters of federalism. Her thoughtful opinion in New York v. United States 7 breathed some much needed rigor into the vexed relationship between the national and state sovereignty. That decision followed her powerful dissent in South Dakota v. Dole, 8 which turned on the distinction between encouragement and coercion in the law of unconstitutional conditions and is a beacon of sense relative to the opinion for the Court prepared by Chief Justice Rehnquist. 9

There are two common threads that link all these diverse opinions together. At first look, they may seem to be unrelated, but in fact they are closely connected The first point is that in her strongest opinions Justice O’Connor was prepared to strike something down. That simple task sharpens the intellect and allows her to use her thinking cap. The reason these decisions work so well is that the basic tradition in which she wrote calls for some higher level of scrutiny which allows her to turn her analytical powers to the hard questions put before her, without having to rock the Supreme Court’s constitutional boat.

The second point is that she tends to use that power on those issues for which she cares about as a constitutional matter. That point seems more or less true with respect to her First Amendment decisions, where she cares about the role of political speech in society, and it is equally true in her administrative law opinions, where she has some concern with the excess aggrandizement of administrative power. It is also evident in her federalism opinion, where her history as a state legislator (who rose to be speaker of the Arizona assembly) made her acutely aware of the dangers of the federal overreach with respect to matters that she thought rightly lay within the control of the state, and which inspired some of her most incisive and influential writing.

Yet exactly the opposite predilections are at work in the property cases, where she tended (at least until Kelo) to give a large berth to state and local government officials to regulate all aspects of local land use law. Here the desire to respect these decisions of state and

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local government officials leads her to embrace a world view in which balancing is done in accordance with the rational basis test, where the slightest state interest can resist the strongest private claims. In this regard, Justice O'Connor's fidelity to tradition often does more harm than good. In making this statement, I am well aware that on some key issues, she has aligned herself with what might be called the conservative majority on the court. She has sided with Justice Antonin Scalia and Chief Justice William H. Rehnquist in their joint effort to put some constitutional limitations on the common practice of state local governments to demand exactions as the price for permitting new projects. For example, she concurred in Justice Scalia's decision in *Nollan v. California Coastal Commission*, which introduced the doctrine of unconstitutional conditions into the law of takings, and joined Chief Justice Rehnquist's effort in *Dolan v. City of Tigard* to place proportionality limitations on these exactions in such a way as to limit their insidious scope.

Yet in the end, both of these efforts to constrain the machinations of state and local governments proved to be failures as lower courts have deployed a variety of devices to water down *Nollan* and *Dolan*, so that today state and local governments routinely impose exactions with little fear of judicial invalidation. The same is true with respect to her decision to join Chief Justice Rehnquist in *First English Evangelical Lutheran Church v. County of Los Angeles*, where his efforts to limit the scope of permanent partial takings did little or nothing to tie the hands of local governments that sought to impose strong delays on the development of property rights. Indeed, the rule was largely eviscerated in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*. There, it seems likely that


Justice O'Connor joined the majority because the claimants raised the bar so high as to say that any moratorium—no matter how short—constituted a temporal taking for which compensation was required.16 The simple truth is that unless and until the Supreme Court revisits and reaffirms these decisions, lower courts will remain highly deferential to state and local governments on all land use issues. And that level of commitment on these issues is just not there.

This capsule summary helps identify the two systematic weaknesses of Justice O'Connor's pragmatic balancing. First, that approach guarantees that she has no fire in the belly. Until her flawed-but-inspired valedictory in Kelo v. City of New London,17 no property rights case attracted her passion at the same level brought by the Supreme Court in cases of racial segregation and police brutality between, say, the New Deal Supreme Court and the early years of the Burger Court, which are best understood as an extension of the Warren Court.18

The second weakness of her position is ultimately more important. Constitutional pragmatism and balancing all presuppose that the correct way to address both legal doctrine and institutional practices is incrementally. But for that approach to make sense, the doctrine and practices have to be at or near the right place to begin with. There are doubtless many areas of Supreme Court jurisprudence that can regarded as more or less on the mark. I take that view on the dormant commerce clause, which has done a world of good even though it has somewhat porous textual foundations.19 I think that the same can be said of First Amendment's protection of public

16. Id. at 320 ("For petitioners, it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a per se rule that a taking has occurred."). Indeed, there is no need to go that far. Another sensible reading allows for "normal delays" that are commonly experienced, so long as these are cabined to a relatively short time. See id. at 343 (Rehnquist, C.J., dissenting). For a defense of that line, see Gary Lawson & Guy Seidman, Taking Notes: Subpoenas and Just Compensation, 66 U. CHI. L. REV. 1081 (1999).


19. For a discussion, see, for example, Richard A. Epstein, Waste & the Dormant Commerce Clause, 3 GREEN BAG 2d 29 (1999).
dissenting voices. But takings law is not in any shape to command a level of judicial respect that it has not earned.

Five major decisions shaped this field prior to Justice O’Connor’s appearance on the Supreme Court. Block v. Hirsh bestowed extensive power on the state to impose rent control systems on real estate leases. Euclid v. Ambler Realty Co. immunized virtually all zoning schemes from constitutional attack, except on some small-bore issues. Home Mortgage Co. v. Blaisdell used an expansive reading of the police power to cope with emergencies to truncate the constitutional protection from state regulation afforded to mortgagees, chiefly banks and other financial institutions. Berman v. Parker gave local governments a wide berth to institute comprehensive planning schemes without running afoul of the public use limitation found in the Takings Clause. Penn Central Trans. Corp. v. City of New York relied on a famous three-part balancing test that softened the protection that private property received against land use ordinances—in this instance, a landmark preservation statute. The last two loom very large in Justice O’Connor’s pantheon of decided cases.

There is one common element in all these decisions, which is their willingness to show strong deference to the decisions of a government regulator—even when it trenches strongly on the rights of private property and voluntary contract. The great vice of Justice O’Connor’s incrementalism is that she begins her deliberation, not with a sound appreciation of how wrong these cases are as a matter of first principle, but from her insistence on asking just how far she can deviate from the current legal position without toppling the apple cart. The justices writing in the earlier cases were, of course, not bound by any particular decision. Even if they were, they would have been quite happy to move the yardstick in their preferred direction without undue concern with stare decisis, constitutional text, or constitutional theory. All these vices are evident in Justice Brennan’s facile opinion in Penn Central. The effect, therefore, of

Justice O’Connor’s position is to entrench the worst in the Supreme Court precedent, which thereby makes it more difficult to undo a bad status quo in the next iteration. This tendency is, of course, not confined to the property cases broadly conceived. It is also exemplified in Chief Justice Rehnquist’s commerce clause opinion in United States v. Lopez27 which further insulated the gigantic over-reading of the commerce power in Wickard v. Filburn28 from much-needed further scrutiny.29

The intellectual root of our current judicial disarray starts with the wretched status quo ante when Justice O’Connor took her seat on the Court in 1981. The dominant approach toward takings issues is summed up by two words that appear nowhere in the Constitution, but which dictate its across-the-board application: rational basis. That test represents one of three flavors of constitutional review. The most exacting form involves strict scrutiny, where the key assumption is that the error cost of letting bad legislation through is far greater than the error cost of keeping good legislation off the books.

There are two types of error: the first can be termed Type I Error, and the second is Type II Error. If Type I error is far more costly, the law should opt for more Type II errors than Type I errors. We, therefore, are trying to minimize the weighted sum of both types of error, each with a distinctive weight $n$ or $m$. The task is to minimize $n$ (Type I) + $m$ (Type II) where both $n$ and $m$ can be less than or greater than one. Divide both sides through by $m$, so that the task is to minimize the sum of $(n/m)$Type I + Type II. In a strict scrutiny system, it is plausible, and perhaps even generous, by way of numerical illustration, to set $n/m = 10$. In intermediate scrutiny, that ratio is surely lower. I think that it would not be a fair representation to assume that $n/m = 1$ in these cases, but is in fact greater than 1, which reflects the common perception that intermediate scrutiny is closer to strict scrutiny than it is to the rational basis test, where $n/m < 1$, which is to say, the error of keeping legislation off the books is far greater than the error of letting it in. If that ratio equals 0.1, strict scrutiny cashes out to be 100 times (10/0.1) as serious as rational basis. No wonder it is a rare occasion when legislation is

upheld under strict scrutiny or struck down under rational basis. A judicial chasm lies between the two approaches.

The Constitution is not explicitly equipped with any calipers that indicate which standard of review should be used in which particular context. Those critical choices are left to the vagaries of constitutional interpretation. The questions involved in this circumstance, therefore, are as follows. The first is whether or not the Supreme Court (which is the only court whose view truly matters on this issue) should utilize a uniform standard of review across each class of constitutional claims. If the answer to that question is yes, what standard ought to be applied? If the answer is no, which is manifestly the choice today, the next question is which constitutional provisions receive what level of scrutiny, and why. Thus, in the takings area, it seems quite clear that courts give greater scrutiny to the question of what compensation is “just” than they give to the question of whether a taking is for a particular matter of public use. This contrast is made explicitly in the following passage:

There can, in view of the combination of those two words [just and compensation], be no doubt that the compensation must be a full and perfect equivalent for the property taken, and this just compensation, it will be noticed, is for the property, and not to the owner. . . . This [verbal formulation] excludes the taking into account as an element in the compensation any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it to stand as a declaration that no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner. . . .

By this legislation, Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial, and not a legislative, question. The legislature may determine what private property is needed for public purposes; that is a question of a political and legislative character. But when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just
compensation shall be paid, and the ascertainment of that is a judicial inquiry.\textsuperscript{30}

That persistent distinction, moreover, cannot be derived by any textual inspection of the entire Takings Clause—“nor shall private property be taken for public use, without just compensation”—which reads, across the board, as a strict constraint on all government officials.

So which particular constitutional provisions should receive what level of scrutiny? In the end, I can envision only one sound approach to that challenge. The underlying principle runs in its simplest form as follows: the higher the level of legislative or administrative malfunction, the greater the level of judicial scrutiny.\textsuperscript{31} That view was articulated most forcefully in the late John Hart Ely’s 1980 book, Democracy and Distrust, whose title reveals its thesis.\textsuperscript{32} As stated, this proposition does not take into account the abilities of the Supreme Court to discharge its ultimate function. Surely if the Court were universally regarded as a corrupt institution, say, incorrigible as an Argentinean or Russian court, no one would pay fealty to it. But no one remotely thinks that this is the case, so the question of its competence goes into the balance in the form of question of whether the disputed issue falls within the Supreme Court’s institutional competence. At this point, the relative insulation of the judiciary from political forces means that there are few systematic

\textsuperscript{30} Monongahela Navigation Co. v. United States, 148 U.S. 312, 326–27 (1893). Several points are worthy of note here. First, in Monongahela, there was never any real question of whether the locks involved in that case were for public use, so that the sentence in question only refers to the fact that the legislature has the power to decide which public works project to initiate. The taking for private use issue is just not raised. Second, the reference that the compensation is “for the property, and not to the owner” is used here to indicate that there is no setoff to the amount paid a given owner for the return benefits received from the project that are shared with the public at large. The point here is to preserve parity, which in turn reduces the level of political machinations. On these risks, see Richard A. Epstein, Bargaining with the State 98–103 (1993) on the preservation of the surplus. Note that Justice Brewer is also correct when he observes that some setoffs may well be appropriate for any increased value that goes uniquely to the party whose property is taken. That proposition in turn raises the question of additional recovery for severance damages, an issue to which he alludes, but does not resolve. See Monongahela, 148 U.S. at 326 (“We do not in this refer to the case where only a portion of a tract is taken, or express any opinion on the vexed question as to the extent to which the benefits or injuries to the portion not taken may be brought into consideration.”).


\textsuperscript{32} Id.
fluctuations in its competence level. So the dominant inquiry remains how well the Supreme Court can expect the legislature to reform across different areas.

Historically, that legislative failure was immense on questions of race in the period, between, say, 1890 and 1960,\textsuperscript{33} where disenfranchisement and marginalization of minority groups rested on a fashionable form of racial bigotry that all too often permeated legislative and administrative action. Similarly, political dissent calls for a high level of judicial scrutiny, given the inveterate danger that incumbents will stack the deck in their favor. Moving on, there are also high levels of scrutiny in dealing with state restrictions on the flow of interstate commerce, precisely because of the well-known tendency of states to favor their voters at the expense of out-of-state parties who need not only the protection of diversity jurisdiction, but also protection of a nondiscrimination provision so that they are not treated more harshly than their local competitors.\textsuperscript{34}

In dealing with these areas, one theme dominates the interpretation of the case law: every juncture follows in rough contour the principles not of the strong libertarian, but of the classical liberal. It is important to state briefly both the similarities and differences between these two positions.\textsuperscript{35} Both libertarian and classical liberal theories start with the view that individual autonomy, or self-ownership, is the indisputable starting place for the analysis of any system of individual rights. This includes those enshrined in the Constitution, with its explicit guarantees, good against both the state and the federal government, that no person should be deprived of life, liberty of property, without due process of law.\textsuperscript{36} Clearly, these items are placed on the list because they are the dominant interests that are worth protecting; a proposition that follows easily from the general Lockean proposition that speaks about the protection of “lives, liberties, and estates”\textsuperscript{37} which compromise the only interests that are protected under the name “property,” which clearly let the

33. For a discussion, see C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d ed. 1974).
35. I develop this theme in RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD (1995).
36. U.S. Const. amends. V & XIV.
state afford police power protections against theft, rape and murder in order to protect the autonomy of the person.

For the purposes of this paper, however, the key element is the protection of property, which covers land and much else besides, including water rights, air rights, chattels, and intellectual property. To some libertarians, these rights are conceived of as “absolute” so that they can be forfeited or otherwise lost only for two reasons: first, to satisfy the losses attributable to aggression against others, and second, to honor a prior contractual obligation made to others but not discharged. In contrast, taxation in any form and eminent domain find no secure place under an uncompromising libertarian approach because both involve the state initiation of forced exchanges where the state determines both whether the exchange shall take place and the amount of compensation supplied for that property loss.38

The classical liberal position understands both the necessity for, and the dangers of, the twin practices of taxation and eminent domain. As to need, without the insertion of state power, there is simply no way overcome the massive holdout and coordination problems that stand in the path of organizing key social institutions. In this context, I shall not rehearse the well-understood reasons for requiring the collective provision of public goods.39 But it is important to note that authorization of both the taxing and eminent domain powers is explicit in the Constitution.40 Accordingly, no credible case can be made for reading the document as a hard-line libertarian tract. But by the same token, the careful calibration of the rules that govern both taxation and condemnation make it equally clear that the Framers of the Constitution were painfully aware of the abuses that often cropped up in the operation of these powers. Thus, where the commitment to the right is firm, as with speech and free trade, the explicit limitations against exploitation are found in a narrow definition of the police power, such that the use of government force without the payment of compensation is concentrated on activities that involve the use or threat of force or fraud.41 The state can

38. For a powerful statement of this point of view, see Ellen Frankel Paul, Property Rights and Eminent Domain (1987).
39. For the classic exposition, see Mancur Olson, The Logic of Collective Action (1965).
impose restrictions against firms that threaten the use of force against potential customers that choose to do business with their rivals. But it cannot introduce protectionist legislation that prohibits fair competition—no force and fraud—in the marketplace for goods any more than it can do so in the marketplace for ideas, which was the point of the so-called labor exception to the police power in *Lochner v. New York*. It is, in a word, no accident that the concern for misleading statements marks the limits of state control in dealing with advertisement and other forms of commercial speech. It is equally the case that the ability to prevent the shipment of goods into another state depends on a clear showing that they pose a peril to the animal and plant life located there. When there are no such justifications, the restrictions on outsiders must be matched by similar restrictions on insiders, so that regulation does not create a home court advantage to domestic firms.

All those protections remain in place under any regime of strict scrutiny because the Justices have understood the social gains that come from protection of the underlying interests. But it is just that conviction that fails when the discussion switches to the protection of property rights under the Takings Clause. In modern times, property is no longer regarded as the guardian of every other right. It is often treated as though it were the bastion of privilege or that it protects holdings that have some vague, dubious pedigree. Or that there are a dizzying array of supposed externalities—visual and aesthetic ones easily come to mind—that justify its regulation without compensation. If that capacious definition of the police power were applied to speech, it would allow anyone to plead their own adverse reaction to deny the rights of others to burn the American flag, or, to push the claim even further, to resist saying the Pledge of Allegiance. The point here is that there is no alternative to the classical liberal theory on the limited scope of the police power, if the central task of constitutionalism is to design a government that

is strong enough to protect its catalog of individual rights without letting an abuse of government power snuff out those same rights. The adoption of the rational basis test therefore represents a key surrender on this central point, by adopting a course of action that literally offers the state vastly more running room than the classical liberal position—by a factor of one hundred, as it were. It is this willingness to let down the guard that marks in so many ways Justice O'Connor's jurisprudence in this area. It is instructive to go through her major opinions on this area with this point in mind. In so doing it is instructive to see how they build on all the earlier decisions that were set out above. In Part I I look at the dramatic turn around in her two public use decisions, *Midkiff* and *Kelo*. In Part II, I extend the analysis to her two decisions that deal with the issue of regulatory takings, *Yee v. Village of Escondido* 49 and *Lingle v. Chevron U.S.A. Inc.* 50 Part III looks at her opinions in *Connolly* and *Eastern Enterprise* in the context of retroactive legislation. The last Part concludes.

I. PUBLIC USE AND THE TAKINGS CLAUSE: OF *MIDKIFF* AND *KELO*

*Hawaiian Housing Authority v. Midkiff* 51 marked Justice O'Connor's first major opinion on property law. Writing for a unanimous 8–0 majority, she upheld the constitutionality of Hawaii's Land Reform Act of 1967, 52 which created a scheme for the transfer of a landlord's interest in leased premises to the sitting tenant by use of the state's eminent domain power. The first salient feature of this scheme is that the condemnation was not initiated by the state for some public purpose. Instead, under the Act's provision, any group of sitting tenants could petition the local government for the condemnation. Once the petition is made, the matter was referred to the Hawaiian Housing Authority for a determination of whether

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51. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); see Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986) (arguing that *Midkiff* illustrates that "courts have no theory or conceptual foundation from which meaningful standards for judicial review of public use issues might originate"); see also H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (arguing that *Midkiff* was decided in accordance with originalist principles because of "the difficulty of tying the hostility to redistribution directly to the 'public use' language of the fifth amendment").
the condemnation is consistent with the provision of the Act. Thereafter, the state was authorized to lend money to individual tenants to help them finance the condemnation in question but could only proceed with the particular condemnation once the financing was arranged so that the state took no independent financial risk. In dealing with this case, the Ninth Circuit held that this elaborate scheme ran afoul of the Constitution because at root, it was nothing more than “a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B’s private use and benefit.”

When the case reached the Supreme Court therefore, the public use question was regarded as a live one by the lower courts. Affirming that decision on the ground stated by the Ninth Circuit would have done no obvious violence to the constitutional text or, as I shall show, to the prior decisions of the Supreme Court. But Justice O’Connor did not take that course. Instead she took her cue from the one earlier decision, *Berman v. Parker*, which in good incremental fashion she treated as the “starting point of our analysis.” That 1954 decision reflected a strong academic consensus that the demands for intelligent urban planning required a virtual nullification of the public use requirement, such that the protection afforded individual property owners was solely through the payment of just compensation. Those two factors put her immediately in her comfort zone. Her challenge was how to reach that result, where the outcome depended on the choice of the constitutional standard of review. On that question, she opted emphatically for the rational basis test by uttering one sentence, with one key word, that largely charted the course of government takings (as opposed to regulations) in the United States for the next 20 years or more. The key word is, of course, “conceivable.” The larger passage in which it is embedded reads as follows:

To be sure, the Court’s cases have repeatedly stated that “one person’s property may not be taken for the benefit of another

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55. *Midkiff*, 467 U.S. at 239.
private person without a justifying public purpose, even though compensation be paid." Thus, in Missouri Pacific R. Co. v. Nebraska, where the "order in question was not, and was not claimed to be, . . . a taking of private property for a public use under the right of eminent domain," the Court invalidated a compensated taking of property for lack of a justifying public purpose. But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

On this basis, we have no trouble concluding that the Hawaii Act is constitutional.57

The passage is highly suspect on a large number of grounds. The first of these is textual. The Constitution does not say "nor shall private property be taken for uses that the legislature find serve a conceivable public purpose without just compensation." The words "public use" are narrower than the words "public purpose," for there are many government takings that might serve a public purpose where the public makes no use of the land. Indeed, Midkiff is just one of those cases, for once the process runs its course the tenant–turned–fee owner has the outright fee interest indistinguishable from that of any other property owner. The elastic nature of the clause is made more palpable by the insertion of the word "conceivable" in the passage, even though that term does not appear in any of the cases that she cites in support of her new general proposition. And with the insertion of that word, it looks as though the public use clause does receive its final burial. It is without question the case that virtually any comprehensive government program serves multiple ends, some of which count as good public policy and others of which count as bad ends. Adding the word "conceivable" makes it highly likely that one of those other purposes, taken alone and out of context, becomes sufficient to support the result. What started out as a limitation on the power of government to take property has now been eviscerated to allow the scheme in question.

So the issue then turns to the question of whether any such conceivable purpose can be identified. On this score, Justice O'Connor does not break stride. Spurred on by an ingenious argument by two constitutional heavyweights, Laurence Tribe and Kathleen Sullivan, Justice O'Connor concluded that the high concentration of land

57. Midkiff, 467 U.S. at 241 (internal citations removed).
ownership in Hawaii creates a “land oligopoly,” which the Hawaii legislature could, and did, create as an evil by imposing artificial increases in rents. Arguments of this sort pass muster only because they are not meant to be subject to scrutiny, let alone refutation. The observation that land is concentrated in the hands of 72 or 22 landowners is consistent with intense competition in the rental market, for these concentrations are far below the three or four firms that attract attention under the antitrust law.

At no point does she ask, however, a theoretical question of whether state intervention is needed to cure any market failure. On this point, moreover, theory lines up squarely against her. The key insight in this area is that the eminent domain power is primarily needed to secure the assembly of many different parcels of land that are needed to achieve a single integrated purpose, such as a railroad that has to cut through the land of many owners. In a world without eminent domain, there is a material risk that individual landowners could hold out for large sums of money, such that the combined demands could easily upend a project that it is in the interest of all to go forward. The just compensation requirement insures that no individual is necessarily made worse off by the state action, at least if the compensation is correctly calculated, which often today it is not. The decision to go forward in the face of that cost thus allows the state to achieve through coercion a positive collective that no set of private contracts could hope to match.

In contrast, the situation presented in Midkiff is the antithesis of the standard setting for invoking the eminent domain power. All that is at stake in Midkiff is a large collection of individual bilateral contracts, each of which could be renegotiated independent of the others. Here is a case where private buyouts are simpler, cheaper,

59. U.S. Dep’t of Justice & FTC, Horizontal Merger Guidelines, § 5.3 (2010). “The HHI [the Herfindahl-Hirschman Index] is calculated by summing the squares of the individual firms’ market shares, and thus gives proportionately greater weight to the larger market shares.” An HHI below 1500 normally attracts no attention. The HHI for a market with 22 equal size firms is effectively zero. Any market in which the largest firm has only 10 percent of the market will usually have a HHI of under 200. Note that at best the HHI is only a minimum condition for intervention. In some cases a merger between a strong and a weak firm could be justified even if it increases concentration, by adding to the efficiency of the combined firm.
and more accurate than the clumsy state administrative apparatus. The individual difficulties in lease renegotiation cannot count as a reason to justify forced condemnation under the aegis of the state, for if they do so, then any lease, or indeed any other contract, could be overridden on the ground that contract modification is a complex process, which indeed it is. The simple truth is that the case for eminent domain could not be at a lower ebb than it is in this setting, especially since the Bishop Estate (which was the state’s largest landlord) was seeking at the time to work out deals with tenants, in the face of an all-too-evident sovereign risk, which is best combated by diversifying assets across several different jurisdictions.

This theoretical explanation points as well to a strong cleavage between *Midkiff* and *Berman v. Parker* on which Justice O’Connor heavily relied. 61 *Berman* was a land use case in which the question was whether to condemn a perfectly viable department store in a blighted neighborhood. On this score, Justice Douglas pointed to the kinds of physical, aesthetic and monetary judgments that had to be made, and claimed that none of these should be second-guessed by the courts. 62 That proposition is doubtful in *Berman*, 63 but even if his point were 100 percent correct, none of those considerations were raised in *Midkiff*, where no change in land use of any type was contemplated. *Midkiff* presents no issue of potential nuisances, no issue of aesthetic compatibility. *Berman* and *Midkiff* could have

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62. We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation’s Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way. Berman, 348 U.S. at 33. Note that this particular passage was not quoted in *Midkiff*.

63. For my critique, see Richard A. Epstein, Public Use in a Post-Kelo World, 17 SUP. CT. ECON. REV. 151 (2009); see also Ilya Somin, The Limits of Backlash: Assessing the Political Response to Kelo, 93 MINN. L. REV. 2100 (2009) (arguing that *Kelo* has resulted in “a more extensive legislative reaction than any other single court decision in American history”). But see Richard A. Posner, Foreword: A Political Court, 119 HARV. L. REV. 31, 90–99 (2005) (arguing that neither the majority nor dissent in *Kelo* represent pragmatic decision-making, because they do not consider the reason for eminent domain and New London’s reasons for invoking eminent domain, and its consequences).
been distinguished on perfectly sensible grounds if Justice O’Connor had only been prepared to look closely at the different factual patterns in the two cases.

Once again, the rational basis test is an open invitation for sloppy analysis, where the acontextual use of language trumps any critical examination of the underlying differences, even though Justice O’Connor well knew that the earlier cases did not line up well with Berman. Why else would she begin the quoted passage with an apologetic, “[t]o be sure”? Indeed, any close examination of the other cases that she cites reveals that none of them are remotely similar to the outright private transfer in Midkiff. To give but one example, in Rindge v. County of Los Angeles, the landowner alleged that the state had made a sham taking of his ranchland for use as a public highway near Malibu, California. The challenge admitted that the road would be open to the public, but insisted that that public roadway would not be connected to other public roads. What this has to do with the situation in Midkiff is anyone’s guess. But the bottom line is that the desire not to rock a political consensus dominated over all three defensible grounds on which the case could be examined: text, theory, and precedent.

The many mistakes and confusions in Midkiff proved a perfect foil for the second of Justice O’Connor’s public use opinions, her notable Kelo dissent. That opinion gave her some measure of redemption by casting the rational basis test to the winds. Her most famous line will have enduring appeal to both populists and defenders of property alike. “Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.” The clear implication is that all sorts of high-handed activities are possible without some explicit invocation of the eminent domain power. At this point, she pounces on the risk of government abuse that eluded her in Midkiff. Rindge, for example, re-enters the picture, only now it stands not for the ability of government to spread its tentacles broadly, but as a representative of “straightforward and constitutional” cases in which “the sovereign may transfer private property to public ownership—such as for a road, hospital or military base.”

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64. Rindge v. County of Los Angeles, 262 U.S. 700 (1923).
65. Kelo, 545 U.S. at 494–505.
66. Id. at 503.
67. Id. at 497.
than it did in *Midkiff*, for now she has no patience with the general proposition that the state enjoys carte blanche in dealing with land development decisions. Thus in *Kelo* she describes in painful detail the lack of adequate street and alleys, light and air, that prompted the DC land use decision. At this point, she can show the powerful difference between *Berman* and the plight of Wilhelmina Dery, who is dragged from the “well-maintained house” where she had lived with her husband since 1946. The term “conceivable” also gets a complete makeover, which leaves rational basis in tatters. “Yet for all the emphasis on deference, *Berman* and *Midkiff* hewed to a bedrock principle without which our public use jurisprudence would collapse.” To drive that point home, she opens her opinion by quoting the well-rehearsed language in *Calder v. Bull* with its natural law overtones:

> An Act of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority . . . . A few instances will suffice to explain what I mean. . . . [A] law that takes property from A. and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with such powers; and, therefore, it cannot be presumed that they have done it.

It was of course just this trope that motivated the Ninth Circuit in *Midkiff v. Tom*, which Justice O’Connor peremptorily tossed aside in *Midkiff*. The wholesale (and welcome) retreat from her earlier decision becomes clear when she notes that the seeds of the *Kelo* debacle are found in the “errant language” found in *Berman* and *Midkiff*. *Midkiff*’s devastating word “conceivable” does not appear in her *Kelo* dissent, but it does appear in Justice Thomas’s dissent, when he states that the Takings Clause authorizes “the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.” Note the great leap backwards from rational basis to near-strict scrutiny in a single

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68. Id. at 498.
69. Id. at 500.
70. *Kelo*, 545 U.S. at 494 (quoting *Calder v. Bull*, 3 U.S. 386, 388 (1798)) (emphasis deleted in *Kelo*).
71. See discussion, supra.
73. Id. at 510.
sentence! Nonetheless, Justice O’Connor remains at a loss to distinguish *Kelo* from *Midkiff*, so she invokes a tired terminological ploy in speaking about *Berman* and *Midkiff*: “Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use.”\(^74\) The difficulty is that the statement is false. All the benefits from *Berman* were indirect because the department store had to be sacrificed for collateral goals. All the long-term alleged benefits in *Midkiff* came from how fee ownership could promote economic development. If those cases are direct benefits, then so too the result in *Kelo*, whether those benefits pan out or not.

The real sociological challenge does not lie in spinning fine tales to distinguish *Kelo* from its predecessors. Rather, the challenge is to find out why *Kelo* provoked a political uproar of the first magnitude, while *Midkiff* passed by under the radar to large public silence. The explanation cannot lie on the nature of the public use that was advanced. *Kelo*, like *Berman*, was a land use case, while *Midkiff* was a title-shifting affair, which is surely the weaker ground. Rather, the big difference comes from the other side of the market, which in no way enters into the formal eminent domain equation on public use. *Midkiff* did not involve a change of possession of the subject once the scheme was put into effect. Instead, it let sitting tenants take out landlords whose only interest in the property was in future cash flows. Subjective value was of no concern in *Midkiff* because the properties were always for sale at a price. But with *Kelo*, there was a forcible dispossession of people who had lived their entire lives on the premises, with no desire to sell and no desire to hold out for a higher price. They just wanted to be left alone. Yet they were swept aside in an inexhaustible search for tax revenue, which is what prompted Justice O’Connor’s telling Motel 6 to Ritz-Carlton example. Mind you, this should be a powerful theme even if the houses were taken for a road. But at that point, there is no obvious textual hook to block the transaction by invoking the “for public use,” because in admitted public use cases, the political processes alone decide whether to go ahead, once the just compensation requirement is satisfied.

None of that mattered in this case, where the toxic combination of unprincipled constitutional interpretation and illicit public purpose gave rise to the backlash of the new millennium against *Kelo*.

\(^{74}\) *Id.* at 500 (italics in original).
Justice O'Connor deserves abundant credit for raising the issue in *Kelo*. But Justice Stevens’s thoughtless majority decision came out in the wrong way, in part because Justice O’Connor never offered in *Midkiff* the interpretation of *Berman* that she hit on in *Kelo*. Take on that task early on, and it becomes possible to outline the major factual differences between a plausible land use plan in *Berman* and New London’s want of any coherent plan—where the city had all the vacant land it needed for structures it never would build on anyhow. Justice O’Connor’s personal redemption for her errors in *Midkiff* brings too little and comes too late. Indeed it is clear that the use of that dangerous term “conceivable” has guided the Court’s deliberation in areas outside the narrow public use connection, leading it to uphold dubious real estate taxation schemes in a number of other contexts.\(^75\)

II. PHYSICAL AND REGULATORY TAKINGS: OF YEE AND LINGLE

Justice O’Connor’s next two major takings decisions deal not with public use, but with the distinction between regulatory and physical takings. The problem here is a genuine one because the Takings Clause has its clearest application in those cases where the government swoops down in tyrannical fashion to seize private property for itself. Everyone recognizes that this outright expropriation is caught by the Takings Clause. But the issues become far more complex when the government acts more gingerly in approaching property which is subject to divided ownership, often by the creation of a landlord/tenant relationship. These common arrangements obviously produce gains from trade for the two parties, and a sound law of takings would do little to jeopardize these arrangements by stripping away some

\(^75\) The latest manifestation of this regrettable world view is found in Justice Breyer’s opinion in *Armour v. City of Indianapolis, Indiana*, in which Breyer thought that the applicable standard was that “the burden is on the one attacking the [classification] to negative every conceivable basis which might support it.” 132 S. Ct. 2073 (2012). In that case, Indianapolis gave its residents two ways to pay for special assessments, one by a lump sum and the other by periodic payments. When it changed the assessment system, it was prepared to waive future payments from those who had only paid the initial installments, but not to refund the unused portion of the prepaid expenses. The administrative burdens here are trivial, and the distinction made thus penalizes one group that took one of two equivalent economic offers. For critique, see Richard A. Epstein, *Intellectual Laziness on the Supreme Court: It’s Time to Scrap the Irrational “Rational Basis Test,“* DEFINING IDEAS: A HOOVER INSTITUTION JOURNAL, http://www.hoover.org/publications/defining-ideas/article/119811.
of the protection given to owners when they divide their property interest. Nonetheless, in many of these cases, the level of protection to partial interests in real property is given far less protection than is afforded to the unified fee simple interest.

Two of Justice O’Connor’s opinions, *Yee v. City of Escondido*[^76] and *Lingle v. Chevron U.S.A. Inc.*[^77], raise variations on this theme, in connection with one of the central distinctions in the law of takings: what, if any, is the line between physical and regulatory takings. Today’s by-the-book Supreme Court doctrine rests on a bedrock distinction between what are termed “physical” takings and “regulatory” takings. The first and more important of these decisions is *Yee*. At stake was a mobile home ordinance that the City passed pursuant to a California authorization statute that allowed tenants who occupied mobile homes to remain on the property of their landlords after the expiration of their leases, at rents determined by the local government to be “just, fair and reasonable,” in light of a variety of factors. All of the factors related to the cost of providing the space and none of them related to the increase in value attributable to a shift in market demand.[^78] Justice O’Connor approached this case within the general framework. She understood full well that if this scheme were struck down, the traditional systems of rent control for ordinary apartments would come under increased scrutiny. Her decision dutifully applied a near syllogism. There is a strong distinction between physical and regulatory takings, which is binding on the Court, and which subjected the


[^78]: See *Yee*, 503 U.S. at 524–25. The ordinance allows the rentals to be set: after considering the following nonexclusive list of factors: (1) changes in the Consumer Price Index; (2) the rent charged for comparable mobile home pads in Escondido; (3) the length of time since the last rent increase; (4) the cost of any capital improvements related to the pad or pads at issue; (5) changes in property taxes; (6) changes in any rent paid by the park owner for the land; (7) changes in utility charges; (8) changes in operating and maintenance expenses; (9) the need for repairs other than for ordinary wear and tear; (10) the amount and quality of services provided to the affected tenant; and (11) any lawful existing lease.
government to only minimal scrutiny. This ordinance constituted a regulatory not a physical taking so that the public utility model on rate of return worked. The opinion is just flatly wrong on both points. I shall take them up separately.

A. Physical Versus Regulatory Takings

The genesis of this distinction lies in two key Supreme Court cases, *Loretto v. Teleprompter Manhattan CATV Corp.*\(^79\) and *Penn Central Transportation Co. v. City of New York.*\(^80\) *Loretto* establishes a near–per se compensation rule in physical takings cases, and *Penn Central* authorizes a rational basis-like standard (though the phrase “rational basis” is never used) in regulatory takings. In *Loretto*, the Court required compensation (which turned out to be very little indeed)\(^81\) when the government occupied private property or when it authorized private parties to do so pursuant to its own legislative powers. In *Loretto*, the application of that rule required compensation when a private cable operator was allowed to install a cable box on the roof of the landowner’s apartment building. On the other side of the line fall those cases in which the government does not either enter or authorize entry but instead imposes regulations that restrict the uses that a landowner can make of his or her property. The paradigmatic case on that issue in our law is *Penn Central*, which famously held that in regulatory takings cases, the per se rule gave away to “ad hoc” standards, such that the landowner could not recover the diminution in land values without a clear showing that the government actions had exceeded their proper scope.\(^82\) The case relies famously on a balancing test of the sort that Justice O’Connor gravitates toward, and which she relied on in *Yee*.\(^83\) The ultimate question is whether this hundred-or-so-fold difference in levels of scrutiny is justified in *Yee*.

Justice O’Connor wrote again for a unanimous Court, which was subject to only two short concurrences by Justices Blackmun and Souter on points of no matter. As with *Midkiff*, Justice O’Connor

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83. *Yee*, 503 U.S. at 523 & 531.
was at her worst in dealing with this challenge, because she was always within her comfort zone, and never felt obliged to grapple with any of the tough conceptual issues that are raised by the physical/regulatory taking distinction that has gained such a stranglehold over the judicial imagination. There are, of course, important differences between takings by way of occupation that are concentrated on one person and general regulations that bind large groups. But these are polar opposites that have to be explained as part of a general theory that also encompasses the many intermediate cases. On the one side, regulation can start to focus down until the restrictions bind only one or very few properties. On the other, an aggressive government program could result in the condemnation of small holdings from a large number of people. An ideal theory does not just deal with the polar opposites, but also has to deal with the many intermediate cases. In these cases, the hard-edged line has to be justified as a matter of first principle, and workable in fact.

The decisions in both *Penn Central* and *Loretto* fail to offer the requisite conceptual foundation for this ostensible hard-edged distinction. At issue in *Penn Central* was whether a landmark designation for Grand Central Station allowed the City of New York to block construction of a new office tower over the old station without compensation. The first challenge asks why this should be treated as though it is a mere regulatory taking, when in fact the decision meant that the landowner was prevented from using his air rights which were a fully protected interest under state law, capable of being sold, mortgaged, leased and the like. For this inquiry, Justice Brennan did not even seek to offer an answer, but only insisted that the proper approach required “this Court [to focus] rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’” That approach marks an enormous departure from the law of private property more generally, whose signal achievement has been to develop a regime that allows for the creation, transfer and protection of divided interests in property in order to permit maximum gain from the use of a particular resource. The process takes place in two steps. First, the transfer allocates the rights between the two parties, where we are confident of a joint

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85. *Id.* at 130–31.
gain that exceeds the transaction costs of putting the deal together, for otherwise that deal would never have occurred in the first place. The second is that the transaction between the two parties does not increase their rights over that which the original landowner had before the division. The creation of air rights squarely meets both those tests, so the challenge is why the takings law does not follow suit and apply to both interests in that private property at the same time. That result would increase private wealth without blocking the ability of state to acquire the air rights if it decided that the public gain from open space exceeded the private gain from development. The case thus falls exactly under a sensible account of public use so sorely missing in Berman and Midkiff.

The avenue for that development was presented by the 1960 decision of the Court in Armstrong v. United States with its oft and justly quoted passage that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”86 In Penn Central, Justice Brennan pays lip service to the passage, but then engages in the kind of dangerous deconstruction of rules that dismisses the categorical command of Armstrong with the general observation that “this Court, quite simply, has been unable to develop any ‘set formula’ for determining when ‘justice and fairness’ require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.”87 Justice Brennan couldn’t because he didn’t try. Instead, he retreated to “ad hoc inquiries” tests, where the key trade-off asks whether the:

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\text{... 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. A “taking” may more readily be found when the interference with property can be characterized as a physical invasion by government, ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.}^{88}
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87. Penn Cent., 438 U.S. at 124.
88. Id. (internal citations removed).
But this passage does not contain a whiff of an explanation why the loss of air rights does not count as a physical taking or why the designation of a few buildings for special treatment counts as an adjustment of benefits and burdens instead of a disproportionate exaction on one side. The mystery, moreover, only deepens with Loretto, where Justice Marshall affirms the weak holding of Penn Central, but then concludes, along with Professor Frank Michelman (also in attendance at our Conference), that the invariable rule for physical takings, or more precisely, those that involve a “permanent occupation,” is one that necessarily calls for just compensation. But a reader can look in vain throughout Loretto to find anything more than a recitation of cases that applied this distinction for an explanation of how it fits into a comprehensive theory. At no point does Loretto give a theoretical reason why a clause that on its face appears to apply to all forms of private property, including air rights, should lead to such disjoint outcomes. At no point does it explain why the political risks of faction are greater with occupations than with regulations, given that political groups are all too eager to impose regulations that give them enormous benefits while creating social losses at the same time.

One reason why the physical/regulatory takings line is so vexed is that it grew up long after the first rent control cases, which justified these statutes as a wartime effort to combat monopoly rents in cases where there was a rapid increase in the demand for land.89 That regulation allowed tenants to stay on after the expiration of their leases, but did not authorize them to stay on in perpetuity. But as these statutes were renewed on a regular basis, their rationale had to change, such that they became a form of tenant protection against ostensible exploitation in real estate markets that are in most locations intensely competitive. Once the physical/regulatory distinction gained traction, it was no simple matter to fit the earlier rental cases in it, given that the holdover tenant remained in possession after the expiration of the lease. The common law view on this question was that the holdover tenant remained in possession only at the sufferance of the landlord.90 The landlord was entitled to immediate eviction, or could hold the tenant to the fair market value of the leased premises if that figure were greater than the

90. For discussion, see, for example, Crechale & Polles, Inc. v. Smith, 295 So.2d 275 (1974).
stipulated rent in the lease, which was often in the case. In some jurisdictions, the holdover tenant was liable for double rent. The simple logic here was that the tenant was in the wrong, so that all doubtful questions had to be resolved in favor of the landlord, which is the best way to avoid difficulties when the tenant over stays his or her welcome. The common law cases do not contain the slightest hint that the holdover tenant could remain in possession at his own option for a rent set by the state.

It follows, therefore, that *Loretto*’s per se rule of just compensation should apply to all holdover tenants. Since the rent control statutes provided for a rent that was kept systematically below the appropriate levels, the statutes were necessarily confiscatory unless the state picked up the difference between statutory rent and market value. Indeed, in strict logic, the just compensation issue needed not be addressed at all if *Midkiff* comes out the other way. The only difference between the two cases is that under the Hawaiian statute at issue in *Midkiff*, the reversionary interest was transferred to the tenant in one closed transaction, while in the rent control cases, the transfer takes place month by month, without a definite end. But the differences between a perpetual lease and outright transfer of property have no bearing on either the just compensation or the public use question. In both cases, the statute should fail. Any return to first principles of takings law, therefore, condemns all rent control statutes on *Loretto*’s per se basis.

That condemnation is correct not only as a formal doctrinal matter. It also is critical from a social point of view, where the holdover tenants at low rents lead to systematic and pervasive resource misallocations. Tenants that should leave rent control premises stay on for long periods of time, such that outsiders who could make better use of the property are shut out by the system. The landlord, who is constantly short-changed on revenues, now has little incentive to improve the property. Social resources are wasted in the endless rate-making proceedings that take place at city hall. Communities are hurt by the mismatch of the tenants to the neighbor, as graying communities have little use for the ball fields and other facilities that are far more suitable to younger tenants. Nonetheless, the ability of entrenched tenants to vote their preferences shows a difficult public

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91. See, e.g., *Fla. Stat. Ann.* § 83.06 (2011) (providing double rent to the landlord when the tenant refuses “to give up possession of the premises at the end of the tenant’s lease”).
choice problem that makes it all too difficult to undo the damage by legislation.

B. The Escondido Ordinance

The state of the general law at the time of Yee was so fixed that only a Supreme Court decision that undid cases like Block v. Hirsh could change the landscape. Indeed, a challenge to San Jose’s rent control statute had just gone down in flames in Pennell v. City of San Jose,92 notwithstanding the strong opinion of Justice Antonin Scalia (both concurring and dissenting, joined only by Justice O’Connor), which noted that the government could avoid expropriation of landlords by renting the property at market rates and reletting it at subsidized rates, making up the difference out of general revenues.93

Faced with strong Supreme Court precedent, determined lower court judges sought to escape the clutches of the rent control law by engaging in what could only be described as an ingenious, but dubious, end run. In the typical rent control case, the tenant remained in possession of the premises after the expiration of the lease. With the typical mobile home, the vehicle remained on someone else’s land after the expiration of the lease. In Hall v. City of Santa Barbara,94 Judge Alex Kozinski seized on that difference to move the Santa Barbara ordinance to the physical takings side of the line. That result was supported by William Fischel,95 who claimed that the differences in local politics were such that the concentrated force of these mobile home tenants could dictate outcomes in small communities, but that rent control in larger cities required a solid measure of larger community support.96 But the political economy point should run in the opposite direction. As Madison’s definition of faction in Federalist Number 10 makes clear, any constitutional order has to attend to two different risks: majority expropriation of the minority, and minority expropriation of the majority. The question of which

93. Id. at 21–22.
96. See Fischel, supra note 95, at 894–98.
risk is greater cannot be answered in the abstract. Much depends on the salience of the issue in general politics. But there is with the Takings Clause no reason to predict the outcome in advance, for once the politicians have done their work it should be clear in which direction the expropriation goes. That level of wealth transfer is apparent in both settings, so in both the proper result is to invalidate the taking for the want of any serious effort to protect landlord interests.

The novelty of the situation, however, presents a problem for Justice O’Connor because here the intrusion into space took a form that made the physical invasion inescapable. But rather than dealing with the issue head on, she resorted to a set of dubious judicial techniques to avoid a serious analysis of the question. Her first ploy was to insist that this was not really a physical takings case at all: what was at stake in her view “. . . is a regulation of petitioners’ use of their property, and thus does not amount to a per se taking.”97

The italicization of the term “use” does not do anything to save the argument. There is no case in which someone enters land without an intention to make use of it. To say that all entries are use cases leaves the class of physical takings empty. The key issue here is that the original entry under the lease was permissible only until the expiration of the lease, so that the rules on physical takings have to be adjusted to deal with future interests,98 which is what the law of holdover tenants tries to do. Her astonishing proposition means that it is now respectable to claim that a party who is admitted to land for a year is entitled to stay forever because there is no need for a fresh entry after the expiration of a term. That doctrine would be the end of real estate law as we know it, because it would put in jeopardy all standard commercial leases. But in this instance, the point of this facile argument was to insist that the taking therefore had to be treated under the more lenient balancing test of *Penn Central*, which she then declined to do because that count had not been raised below.99 Yet, true to form, when Judge Bybee tried to revive that regulatory takings argument in *Guggenheim v. Goleta*,100 he was reversed en banc a year later.101 *Yee* had sealed its doom.

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97. *Yee*, 503 U.S. at 532 (italics in the original).
98. See, e.g., Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996).
99. See *Yee*, 503 U.S. at 522–23.
100. *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009).
The second part of Justice O'Connor's argument was no more persuasive than the first. She argued that there was really no taking in this situation because the landlord is entitled to regain possession of the land so long as he was prepared to turn it to some alternative use. She writes:

At least on the face of the regulatory scheme, neither the City nor the State compels petitioners, once they have rented their property to tenants, to continue doing so. To the contrary, the Mobilehome Residency Law provides that a park owner who wishes to change the use of his land may evict his tenants, albeit with six or twelve months notice. Put bluntly, no government has required any physical invasion of petitioner's property.102

Put bluntly, this passage offers a classic illustration of how a local government, with Supreme Court blessing, can protect its ordinance by leaving the landowner with one useless stick in the bundle of rights. The point here is made clear by running any valuation of the landlord's interest before and after the passage of the local ordinance. Before, the value of the land for its use as a rental site remains intact after the expiration of the lease. During the period of that lease, the landlord's interest is equal to the sum of the discounted lease payments coupled with the discounted present value of the reversionary interest when it falls into possession. For short-term leases that are close to market value, the second term dominates the first. Under the new arrangement, the landlord receives a sum equal to the present discounted value of future payments under the government lease, which are far less than those payments when the property could be leased out again at market value.

To that, Justice O'Connor adds the value of the right to turn the property to other use. But that right is close to worthless for two reasons. First, in most cases the highest and best use of property lies in its current use patterns. Thus the right to regain the premises only applies to what is at best a small set of cases where major changes in land use are contemplated. Second, that supposed right is hemmed in by other land use regulations in the City of Goleta, for any change in land use patterns requires the landowner to go through

102. Yee, 503 U.S. at 527–28 (internal citations removed).
extensive administrative hearings that, given the local opposition, are likely to block any projects for life, as it were. In these cases, the correct measure is whether the compensation in question is a full and perfect equivalent of the rights surrendered. Zero does not meet that standard.

There is a close connection between the Justice O'Connor of *Midkiff* and the Justice O'Connor of *Yee*. Both of these cases deal with the transfer of the landlord's reversion to the tenant in possession at below market prices. In both these cases, there is no need at all for government intervention because there is no holdout problem to be dealt with, which could not be countered by a term in the lease that provides, for example, that if the tenant vacates the premises and leaves the mobile home in place, the landlord must pay him the fair market value for the (depreciated) property in question. There is, moreover, no serious monopoly problem in either place, at least if there were more than one mobile home site in the immediate environment, even though that point was raised at the time by Joseph Sax.¹⁰³ And even if there were, the remedy is to make sure that the rents in question are adjusted to competitive levels, which would reflect the increase in the underlying value of the real estate. Those rents would surely be recoverable if the landowner sold the property to a new person for its fair market value, and they should be captured by the incumbent landlord without the interposition of an unnecessary sale. To be sure, someone would have to take some measure of the monopoly power, but if one takes a region that extends beyond Goleta, the HHI index, of relevance in *Midkiff* would be very low, so that the radical restrictions on rates count much more as confiscation of appreciation than the suppression of monopoly behavior. Once again, Justice O'Connor's effort to walk the fine line has ended in shipwreck. Balancing does not work when the relevant precedents are way off line.

The second of Justice O’Connor’s regulatory takings case is *Lingle v. Chevron U.S.A. Inc.* Lingle offers yet another window into the vexed interaction between the law of leases and the law of takings. Lingle involved a constitutional challenge to Hawaii Act 257, which was fortunately repealed shortly after the Supreme Court’s decision came down. The Hawaii statute, which sustained an attack by local gasoline station operators against Chevron and other out-of-state oil companies, represented the worst in local protectionism. The carefully crafted ordinance imposed restrictions on the rent increases that the Chevron could demand from its tenants; it removed the ability to terminate a lessee at the expiration of a term, and it blocked Chevron from putting in new gas stations near to those of an incumbent dealer. First the District Court and then the Ninth Circuit struck down the statute on the ground that it did not advance its stated purpose of lowering the price of gasoline to Hawaiian consumers—this, on the sensible conclusion that dealers who seek to entrench themselves are not likely to pass along savings to consumers.

The basis for these lower court decisions is found in a single sentence in *Agins v. City of Tiburon*, which states that a government regulation of private property should be treated as though it “effects a taking if [that regulation] does not substantially advance legitimate state interests.” That proposition is clearly useless in the form that it is provided, for at a minimum it does not distinguish between cases that raise police power versus those that raise public use issues. In *Agins*, moreover, the test was put to the worst possible purpose by validating an ordinance that set the minimum lot size in Tiburon at five acres, thereby stripping from its owner the substantial value that could be derived from subdividing the property. In *Lingle*, however, the internal inconsistencies of the formula were of little consequence because both courts below did the sensible thing in striking down a statute that, in effect, stripped Chevron of many of its negotiated rights under the lease, which constitutes a clear taking of private property.

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107. 2006 HAW. SESS. LAWS 78 (signed by the Governor on May 5, 2006).
109. *Id.* at 260.
In writing her opinion for a unanimous Supreme Court, Justice O’Connor reversed and remanded the decision below for reconsideration under the tripartite balancing test that Justice Brennan had earlier developed in *Penn Central*. In her view, the central task was to explain why asking only whether an ordinance substantially advances legitimate state interests does not capture the full range of relevant considerations, including most critically the comparison of benefits and burdens of the regulation that *Penn Central* requires. Unfortunately, what is missing from her opinion is any willingness to ask whether the *Penn Central* formula actually makes sense in a case of this sort, where it decidedly does not.

As with *Midkiff* and *Yee*, the first question to ask is whether the ordinance in question stripped the lessor of rights under the lease, which of course it did. At this point, it hardly matters whether we think of this case as a physical taking of the property or a mere regulation of its operation, for in neither case is there any sensible public-regarding justification for imposing these regulations. The regulation is a straight wealth transfer between the two parties, with negative consequences on consumers. It thus falls outside any sensible account of the police power. What is totally unclear in this instance is how the *Penn Central* formula would even apply to this situation, with its elusive invocation of “investment-backed expectations” that only deflects the inquiry for the constitutional question of whether the government has taken private property. In the end, therefore, this decision shows Justice O’Connor’s strengths and weaknesses. Working within the established tradition, she is able to demolish one useless strand of takings jurisprudence. But once that is done, she refuses to make waves. Instead, she does not critique the *Penn Central* formula; nor does she indicate how it might apply to the question at hand. The law of takings faces its greatest challenges in dealing with the state reconfiguration of divided interests in property—recall that *Pennsylvania Coal v. Mahon*\(^\text{110}\) dealt with the creation of an easement of subjacent support. A comprehensive law of takings has to be able to treat these cases by something other than the “ad hoc” *Penn Central* rules. But those larger theoretical questions are, regrettably, passed by in silence.

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\(^{110}\) *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922) (“while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).
The influence of the *Penn Central* decision has been felt not only in leases and land use regulation, but also with the general area of retroactive legislation. As a matter of general legal theory, retroactive legislation has always been a keen concern because it imposes obligations on individuals for which they were given no opportunity to conform.\(^{111}\) The protection of individuals against that kind of legislation imposes major limitations on what a government can do to its citizens. Yet at the same time, the proposition limits the way in which government can act in order to deal with what it regards as its past mistakes. It should therefore come as no surprise that the post–New Deal tendency has been to relax constraints on retroactive applications.\(^{112}\) That issue first reached the Supreme Court in *Usery v. Turner Elkhorn*,\(^{113}\) which dealt with new burdens imposed on employers to fund a black lung disease program. Justice Marshall said, “[I]t may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.”\(^{114}\) That “solely” carries a lot of weight. That same logic came to the fore in *Connolly v. Pension Benefit Guaranty Corp.*, where the Supreme Court faced a challenge to the Multiemployer Pension Plan Amendments Act of 1980 (“MPPAA”)\(^{115}\) and unanimously held that neither the due process nor the Takings Clause prevented a bait and switch.\(^{116}\) Individual firms were lured into membership in the PBGC with the promise that they could withdraw at any time, no strings attached. Then when the financial

\[^{111}\text{For discussion, see, for example, Lon Fuller, The Morality of Law (1966).}\]

\[^{112}\text{See, e.g., Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935).}\]

\[^{113}\text{Usery v. Turner Elkhorn, 428 U.S. 1 (1976) (effectively overruling Alton).}\]

\[^{114}\text{Id. at 16.}\]


\[^{116}\text{Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986). See also Andrea L. Peterson, The Takings Clause: In Search of Underlying Principles Part II: Takings as Intentional Deprivations of Property Without Moral Justification, 78 Cal. L. Rev. 53 (1990) (arguing that Justice O'Connor's view in Connolly stands for the proposition that in takings cases "A not only must establish that the generalization of wrongdoing was unreasonable, but she also must establish that the lawmakers' judgment of wrongdoing was unreasonable as applied to her particular case . . . .").}\]
obligations incurred by the Board ballooned, Congress amended the original statute so as to allow withdrawal only upon payment of a fee designed to reflect their “unfunded vested benefits” share of the liabilities for the program. The Supreme Court gave great weight to *Turner Elkhorn*, rejected the categorical test for compensation outlined in *Armstrong v. United States*,\(^1\) and applied the usual balancing test of *Penn Central* to the case.\(^2\) It then dismissed these challenges on the ground that “[p]rudent employers then had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations.”\(^3\) To be forewarned is, therefore, to be forearmed.

Viewed as of the time of the new legislation, Congress only sought to insulate the public at large from having to pay money to support the worker claims to these pension benefits. But the decision not to put this cost on the public at large rests on the view that they were not accountable for the losses in question. Neither, of course, were the companies who wanted to get out of the plan. The difficulty here with the “notice” variation is that each round of legislation makes it easier for the next to similarly renege on earlier promises. In the end, this cycle demeans the credibility of the United States. Therefore, in the future, it will become harder to get people to join government programs. In addition, the operation of all these government programs will become just that much less careful in light of the ability to go back to the industry to fund the excesses of the program’s public administration.

To her credit, in her concurrence Justice O’Connor asked whether, after *Connolly*, there were any limits that the arbitrary and capricious standard imposed on the ability of Congress to so legislate. Her discussion, however, starts with the odd concession that “the mere fact that legislation requires one person to use his or her assets for the benefit of another will not establish either a violation of the Taking Clause or the Due Process Clause,”\(^4\) without explaining why this

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2. Id. at 225.
3. Id. at 227 (“We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble.”). The source of the trouble came from the highly dubious administration of the program.
4. Id. at 228 (O’Connor, J., concurring) (internal quotations removed).
amounts to anything other than the once-forbidden taking from A to B. She also noted that the “readjustments” that Justice Marshall spoke of in *Turner Elkhorn* could justify the imposition of any fine or obligation on any party who is on notice that governments misbehave. In theory, the notice argument should cut in exactly the opposite direction. The foreseeability of government misbehavior explains why strong constitutional protections are needed against government chicanery because everyone is on notice that, left unchecked, legislatures will make easy promises at one time, and then change the rules midstream.

In her view, however, the major doubts about retroactive liability did not suffice to raise a facial challenge of the withdrawal provisions; that led her to voice doubts about plans that “impose substantial retroactive burdens on employers in a manner that may drastically disrupt longstanding expectations, and do so on the basis of a questionable rationale that remains open to review in appropriate cases.” All of this is sensible enough within Justice O’Connor’s balanced approach to these questions. But what is lacking is any plausible theoretical explanation as to why she resists the facial challenges to statutes. There was no question that the legislation challenged in *Connolly* did transfer wealth from mining companies to the pensioners beyond what they agreed to assume. The question then is why the *amount* or *timing* of those transfers goes to anything other than the amount and timing of the compensation that federal government should have to provide the companies for the additional burdens that they have, without question, been forced to bear. Justice White had insisted that it was not fair to impose these obligations on the public, who were not part of the dispute. But nowhere does he explain why it makes sense to empower the public to use legislation to transfer wealth from one private party to another. A strong theory of limited government would find that the tough-mined approach to pension modification has the great virtue of stopping the regime of false promises before it begins, precisely by making the public pay when it wants to take from A and turn it over to B.

Justice O’Connor was true to her word, however, in *Eastern Enterprises v. Apfel* where she was able secure the concurrences only

121. *Id.*

of Chief Justice Rehnquist and Justices Scalia and Thomas. Writing for that plurality, she struck down under the Takings Clause yet another decision by Congress, this time in the Coal Industry Retiree Health Benefit Act of 1992, to intervene yet again in the employer union disputes that had been before Congress on a more or less continuous basis since 1947. The act sought to impose additional financial obligations on coal companies long after they left the coal mining industry. In Eastern’s case, the 1992 Act sought to impose additional liabilities for the company’s actions between 1946 and 1965. That statute was obviously retroactive, but it is by no means crystal clear that it cuts back on legitimate expectations in some distinctive way that the earlier statutes approved by Justice Marshall did not. Justice O’Connor therefore held that this statute so dashed legitimate “investment-backed expectations” that Eastern was able to overcome the presumption of validity that was set out in *Turner Elkhorn*. But the distinction between the two cases was only with respect to timing and extent of the obligations, so that all the intellectual difficulties of drawing the line between different retroactive schemes remained.

It is here where the differences in approaches matter. Under the categorical approach that I defended above, the 1992 CIRHBA is just a more egregious illustration of an unconstitutional practice. If the state were intent on going through with the plan, its budgetary allocation would have to be greater. But since the only question was whether it could impose these burdens, an injunction should issue in both cases, precisely because the federal government is not willing to pony up the money from general revenues. Clearly the public choice issues here are identical to those in *Pennell*. The compensation requirement attaches a price to government action and thus induces more responsible deliberation. It is instructive to note that Justice O’Connor could not carry the needed fifth vote, as Justice Kennedy wrote his own due process analysis, which fractured the Court and thus rendered its precedential value nugatory in future years. There is a clear object lesson: balancing tests work well if

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people are in fundamental agreement. But in these pension cases dealing with black lung disease, no such agreement was around. The liberal justices are quite comfortable in taking money from A and giving it to B, and they have little difficulty and less guilt in sticking with the original decision of Justice Marshall in *Turner Elkhorn*. Eastern Enterprises is a case where Justice O’Connor’s diligent and conscientious effort to get half a loaf was able to do that and no more. The Coal Act was struck down, but the ability to impose principled limitations in future cases became a notable failure, as the lower courts, which have little or no patience with property rights protection seized on the fact that O’Connor’s opinion commanded only three other votes, and so was not a binding precedent.125

**CONCLUSION**

It is important to read these criticisms of Justice O’Connor’s takings jurisprudence in light of the general trajectory of takings decisions in the Supreme Court. During her term of office, she usually, but not always, took a more property protective decision, the one major exception being her decision to join a Stevens majority in *Tahoe-Sierra Preservation Council*.126 Yet at the same time, her two worst decisions, *Midkiff* and *Yee*, were written on behalf of unanimous courts, which gives ample testimony to the low level of protection that property interests receive from the Court. In the one case in which she struck out boldly against the majority—*Kelo*—the greatest obstacle that lay in her path was her own *Midkiff* decision.

125. See, e.g., Swisher Int’l, Inc. v. Schafer, 550 F.3d 1046, 1056 (2008) (“[T]he takings analysis is not an appropriate vehicle to challenge the power of Congress to impose a mere monetary obligation without regard to an identifiable property interest.”). *Swisher* involved the imposition of taxes on manufacturers of tobacco goods to ease the costs of transition, but its point surely does seem odd. Money must count as property, and the failure to pay the obligation will surely result in the imposition of a judgment lien that can be levied against specific property. The situation is not different from one in which the state says that the private property owner need surrender only one of three parcels of property, or pay cash equal to its amount. Note too that if there is no property interest here, how then can the due process clause be implicated when it too applies only to the interest that any person has in “life, liberty or property”? *Swisher* itself involved a set of transition payments for farmers who were being stripped of their massive agricultural subsidies. Why anyone should receive any subsidy for being forced to give up an undeserved benefit previously obtained is not made clear in the opinion.

My disappointment with Justice O’Connor thus applies to the entire Supreme Court. The objections are both doctrinal and practical. At the doctrinal level, there is simply no sustained effort to reconcile three pairs of opposites that work their way through all the cases.

First, in some cases the Supreme Court follows the *Armstrong* test so that disproportionate burdens are the measure of compensation. The “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” In other cases, it follows the “ad hoc” exception to it found in *Penn Central*. Invoke the first sentence, and compensation follows. Invoke the second, and the compensation disappears.

Second, in some cases, the Supreme Court speaks of the wrong of government taking from A and giving to B announced in *Calder v. Bull*. In other cases, the key line is that of *Usery* stating “our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations.” The only way to readjust burdens, of course, is to take from A and give to B, a risk of which everyone is on notice.

Third, in *Midkiff*, any “conceivable” public purpose allows a taking to go forward, a proposition that she and the dissenters explicitly rejected in *Kelo*.

Take the more restrictive of each of these three propositions, and the law of takings will be in pretty good shape. Take the more deferential half, and it is not. Unfortunately, the more an issue appears to matter, the more likely it is that the Supreme Court will take the wrong path unaware of the social dislocations that its decisions create. Quite simply, its decisions have introduced a vast gulf between the system of private property that operates in private disputes and the odd jumble of property rights that is fashioned to ease the path to state domination in all manner of land use issues. Once property is divided, the individual pieces consistently receive less protection than does the whole. That weakened level of protection allows courts to make the claim that a mere diminution in value from the partial restriction on property rights does not give rise to a compensable event.

128. *Calder*, 3 U.S. 386. See *supra* Part I.
At this point, the Court supplies an instructional manual for legislatures to destroy valuable interests in property without having to own up to the financial consequences for their decisions. It is not as though the protection of private property from all forms of regulation is contrary to some larger social interest. Quite the contrary, the only way to protect that social interest in prosperity is to protect the private building blocks that make this possible. The many artifices that are used to defend rent control laws freeze property in its current use, without taking into account the losses that are imposed on those who are not allowed to rent or buy property when it is subject to what amounts to a perpetual lease in favor of the sitting tenant. Those social losses reduce the wealth of the community, the opportunities for advancement, and the size of the tax base. Yet notwithstanding these serious allocative losses, the Supreme Court, Justice O'Connor included, shows too much deference to political institutions whose capacity for misbehavior is all too apparent. It is not that one asks the Justices to invent property protections where none exist. It would be quite sufficient for them to enforce the protections that do, or at least, did exist, instead of whittling them away with a set of distinctions that lack any intellectual coherence. In the end, we are all losers from this sorry overall performance in the area of the constitutional protection of property rights.
A country’s constitution, its body of “constitutional” or “higher” law, may contain a “bill” or “charter” of “rights”—a compilation of special guarantees respecting named aspects of personal and associational freedom, authority, and social standing. Lists typically include guarantees respecting faith and conscience, communication and expression, political franchise, security and privacy, equality, due process, and so on. By special guarantees respecting such matters, we mean assurances beyond the general ban a constitution may also contain against interference into personal and social life by legislation that is utterly and incontestably void of any credible, public justification. We do not, however, necessarily mean absolute and unconditional assurances. We may rather mean assurances against non-trivial infringements by the state (or by others with the state’s allowance) for which (or for the state’s allowance of which by others) the state does not provide a sufficiently convincing justification, in terms of some overriding moral or other social purpose that is served by the infringement or by the law that authorizes or allows it.

Our topic of interest here is the inclusion of property rights among those aspects of personal and associational freedom, authority (and so on) that are covered by special constitutional guarantees. But what, then, are “property” rights—as distinguished, say, from freedom, dignity, privacy, equality, and due process rights? In answer: I use the term “property right” roughly to mean a legally supported power and privilege of control over assets external to the embodied self. Accordingly, when I speak of constitutional protection for property rights, I mean supreme-law protection for (i) defensive claims against (ii) disturbances of proprietary positions and prerogatives that (iii) have been lawfully established under (iv) an extant legal regime that supports private ownership.

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1. Externality to a self more expansively construed would be another question. See Margaret Jane Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982).
We deal here, then, with negative (or “possessive”) as opposed to positive (or “distributive”) rights respecting property. Our concern is with constitutional guarantees respecting retention and control of assets (and their values) currently recognized as yours, as opposed to guarantees respecting what you will not be suffered at any time, or for long, to go without. By “constitutional protection for property rights,” I mean a trumping right of every person to be protected—perhaps not absolutely and unconditionally, but not negligibly, either—against state-engineered losses in lawfully acquired asset-holdings or asset-values.

The question of constitutional protection for property rights is obviously not identical to the question of support in a country’s legal system for property rights and private ownership. Constitutional law aside, a society or its leadership may be quite firmly and reliably committed to private property and market-based institutions, and therefore to providing and upholding the sorts of civil and regulatory laws and transactional facilities required to support such institutions: laws prohibiting theft and trespass, for example, in forms gross and subtle; laws bestowing proprietary dignity on non-corporeal claims, or on holdings divided by time or by use; facilities such as deeds registries, land courts, and probate tribunals; and so on.

Consider, now, the case of New Zealand, which offers no higher law protection at all for any personal rights; or of Canada, whose Charter of Rights and Freedoms makes no mention of property rights. Or, for that matter, of the United States, where nominal constitutional protection for property rights becomes, in the view of many, a paper tiger under prevailing judicial constructions. Constitutional law aside, no one doubts that the legal systems of these countries all

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3. Of course, a constitution may also contain guarantees of the latter sort—see, e.g., South Africa Const. §§ 25(5), 25(7), 26–28—but they are not the concern of this essay.

4. See U.S. Const. amend. V, XIV (providing guarantees against deprivations of property without due process of law and against takings of property except for public use and with just compensation).

notably support private property and market-based institutions and will continue to do so into an indefinite future.

Our question here is not about “reasons why” for a first-order legislative policy (as we might call it) of cushioning owners against a wide range of redistributive effects of state legislative and other actions. So doing looks like a normal form of respect for private property (the institution), and a legislative policy of respect for private property can draw support from a well-known mix of reasons of political morality and prudence. Our question, though, is about “reasons why” for a second-order policy of embedding in supreme law a trumping right of every individual to due respect, from first-order (“ordinary”) lawmakers and officials, for the first-order policy of respect and regard for private property. In response to that question, one’s initial thought might be that the plainer and more compelling are the reasons for the first-order policy, the less obvious—in a democracy, anyway—will be reasons for the second-order policy of constitutional-legal backup.

Parallel questions can be raised, of course, about any bill-of-rights protection you might care to mention—be it for life or liberty or dignity or expression or privacy or whatever—and parallel rejoinders anticipated. The precise contents of the doubts and rejoinders will vary from protection to protection and from country to country. My undertaking here will be to provide a highly general typology of rejoinders focused on property-rights protection. By calling the typology “general,” I mean that each rejoinder-type it mentions could potentially be relevant for any country, although (as will become obvious) the actual force of any one or any combination of the rejoinders will vary sharply from country to country, depending on historical, economic, and legal-cultural situation.

All the rejoinders I will suggest to the constitutional protection question for property rights can be brought together under one highly abstract, unifying reason. It seems that any answer will have to draw from the highly general idea that a specific entrenchment in constitutional law, of everyone’s individual right against state-engineered asset-value impairments, is a functional prerequisite (or is at any rate a highly useful device) for securing the moral aims and social benefits that private property and market-based institutions

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6. The possible parallelism of rejoinders will become evident in Part III, below.
are meant to capture. Relevant circumstances vary radically from country to country, but—as we shall see—it may always be urged that such is the case, more or less credibly in varying historical conditions.

As a closing introductory word, I note that a typology of “reasons why” for constitutional protection of property rights may bear relevance not only (and maybe not chiefly) for the work of those engaged in the fashioning of constitutional texts, but also (and maybe sometimes mainly) for the work of judges and whoever else is called upon from time to time to construe and apply what appear to be pertinent constitutional texts. I proceed next to a tiny case study designed to illustrate that point and thereby to lay some groundwork for the typology to follow—and designed, as well, to give some attention to the judicial work of Justice Sandra Day O’Connor, the honoree at our conference in Beijing.

I. THE **LINGLE** DECISION

The decision by Justice O’Connor that I want to highlight is the judgment she wrote for a unanimous Supreme Court in 2005, in the case of *Lingle v. Chevron*.7 That was a case in which a trial-level court of the United States had decided, first, that a certain scheme of price regulation imposed by the state was economically unsound, and, second, that because of this economic error the state would be required to pay cash compensation to those suffering private economic losses as a result of the price regulations.8 The U.S. Supreme Court disagreed. It held that the question of a state’s obligation to compensate private parties for losses resulting to them from a scheme of state regulation of the economy is not to be commingled in that way with the question of the scheme’s economic wisdom. Rather, these are to be approached by courts as entirely separate questions, each subject to a different type of judicial oversight (and the latter to very little of it). To my mind, this opinion for the Court by Justice O’Connor stands as her single most telling contribution to the field of constitutional protection for property rights.

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Whenever the state introduces a new scheme of economic regulation, imposing special legal controls over trade in some economic market, it is likely that some people’s private property holdings will suffer a resulting loss in economic value. Let us call this kind of loss to a property owner a “regulatory loss.” Our Constitution prohibits the state from taking away anyone’s private property for public use, without paying the owner for the property taken.9 So the question arises: Does a regulatory loss count as a “taking” of property by the state for which our Constitution requires the state to pay? Our courts have said, in effect, that usually it does not, but in some special cases it does.10 But then, of course, the question is: Which sorts of cases are those special ones? By the light of what guiding values or principles do we pick those special cases out? That is where the Lingle decision comes in.

Over the years, our Supreme Court has explained our Constitution’s requirement of compensation to owners for property taken by the state as concerned, at its core, with ensuring that costs occasioned by the state’s activities will be spread fairly across the whole society of citizens—thus as driven not by a value of economic efficiency but by a value of civic fairness.11 In line with that idea, the decisive factor for picking out those regulatory losses for which the Constitution demands compensation would always have to be something about the loss itself, whether measured absolutely or relatively to the situations of others12: How heavy (acute, debilitating, degrading) is the burdensome effect sustained by the complaining owner? How disproportionate is it to what others bear, or

9. See U.S. CONST. amend. V. This same guarantee has been held applicable to state governments in the United States by force of U.S. CONST. amend XIV, see Chicago B. & Q. R. Co. v. Chicago, 126 U.S. 226 (1897).


11. The routine citation is Armstrong v. United States, 364 U.S. 40, 49 (1960) (affirming the purpose of the taking clause to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”). See Lingle, 544 U.S. at 537. Compare text accompanying note 11 with Richard A. Epstein, Beyond the Rule of Law: Civic Virtue and Constitutional Structure, 56 GEO. WASH. L. REV. 149, 169–70 (1987) (endorsing the civic rationale for the taking clause, but without suggesting that it is the sole and exclusive, or even the dominant rationale).

12. See Lingle, 544 U.S. at 539 (remarking that the Court’s tests for treating a regulatory loss as constitutionally demanding of compensation have converged on a focus on “the severity of the burden that government imposes upon private property rights”).
may normally expect to bear over a complete lifetime in a market- regulatory political-economic environment?

The message seemed clear, but some confusion nevertheless arose in our courts, owing to some incautiously worded dicta from our Supreme Court, mainly in the year 1980 in a case called *Agins v. Tiburon*, but also in a few other, earlier cases. Following the *Agins* decision, some of our judges had clothed themselves with a responsibility to treat as a taking of property, for which the state must pay, any loss to an asset-holder resulting from a scheme of regulation found by that judge to reflect a mistake (or perhaps it would be a “clear” mistake) of economic policy in the ordinary sense that the scheme (as the judge concludes from the evidence presented in court) will not work out to any net public economic advantage. According to this view, a judge so finding must treat any resulting regulatory losses to property owners as “takings” of their property for which they have a constitutional right to a monetary compensation from the state, and so must require the state to choose between paying full compensation to all adversely affected property owners or else withdrawing the new regulations from going into effect against those owners.

Justice O’Connor’s judgment for the Supreme Court in the *Lingle* case has put a stop to that idea. The *Lingle* ruling sends clear directions to our courts, as follows: The Constitution assigns questions of economic policy for decision by the government and the legislature, not by the judiciary. Therefore, when courts of law are weighing a Constitution-based claim from property owners to compensation for regulatory losses suffered by them, those courts must set aside completely any question about the economic wisdom of the regulation. The courts must focus strictly on the question of whether the losses

13. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Court wrote that “the application of a [regulatory law] to particular property effects a taking if the [law] does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.” *Id.* at 260 (citations omitted).

14. See *Lingle*, 544 U.S. at 541–42 (recalling these earlier cases and dicta).

15. See, e.g., the lower-court decisions in the *Lingle* case, cited in note 8, supra.

16. The *Lingle* decision allows for the possibility of regulatory legislation that is shown to be so plainly and totally devoid of a credible, public justification that it fails the test of “due process of law” and is on that ground to be held unconstitutional. In such a case, however, the sole remedy obtainable from a court would be nullification of the offending legislation. No claim for compensation would arise. *See Lingle*, 544 U.S., at 542–43.
or burdens to the complaining property owners are so large, acute, and disproportionate that those owners cannot in all fairness and justice be denied compensation for those losses.\footnote{See id. at 542 (calling the two inquiries “logically distinct” from one another).}

The \textit{Lingle} ruling has obvious importance on a practical level. It steers judges away from using the Constitution’s protections for the rights of persons and associations as a basis for overruling the government’s judgments regarding economic policy.\footnote{The \textit{Lingle} Court made plain its rejection of (and indeed its revulsion toward) any such general policy-oversight role for the United States judiciary. See id. at 544–45.} Additionally, it gets in the way of litigants who might aim to use “takings” litigation as a broad-gauged political strategy of opposition to state regulatory activism.\footnote{Compare \textit{Lingle}, supra at 537 (quoting from a prior decision the point that the taking clause is “designed not to limit the governmental interference with property rights \textit{per se}, but rather to secure \textit{compensation} in the event of an otherwise proper interference amounting to a taking”).} But the \textit{Lingle} ruling also contains some deeper messages from the Supreme Court about the general shape of our constitutional law, and I want to mention two of those.

The first message is, again, about the Constitution’s reason for laying down its safeguard against uncompensated takings of property by the state. The reason, as the \textit{Lingle} ruling teaches, does not lie in the pursuit of a technical economic conception of welfare maximization. It rather lies in a concern for fairness, equity, and mutual regard among citizens in their democratic political relations, that is, in their relations as lawmakers to each other. Clarification of this point—that our Constitution protects against privately held asset-value losses (insofar as it does) for the sake of equitable relations among citizens, not for the sake of social welfare maximization (an echo, one might say, of the famous dissenting declaration by Justice Holmes in the \textit{Lochner} case that the Constitution “is not intended to embody [an] economic theory”\footnote{Lochner v. New York, 198 U.S. 45, 74, 75 (Holmes, J., dissenting).} is an important recent marker in the discourse of American constitutional law.

A second, larger message from the \textit{Lingle} decision requires a bit more in the way of explanation. The American Constitution’s bill of rights is obviously concerned with protecting certain interests of citizens against dangers of impairment by acts of the state. Now, we can distinguish the general interest every person always has (whether or not making use of privately owned assets) in the freedom to choose...
and pursue his or her activities and projects without heavy-handed interference from the state, from the interest, special to an owner of property, in the security of the value of that ownership to her. Over the past history of American constitutional law, the idea has sometimes arisen that our Constitution treats the latter sort of interest—of an owner in the security of her ownership and its value—as exceptionally sacrosanct, especially strongly protected, beyond the level of consideration accorded to the more generalized interest each person has in freedom to choose and pursue her own projects and activities in life.\textsuperscript{21} The \textit{Lingle} decision is significant because it cuts strongly against this idea of super-special protection for property and property values. The decision puts the Constitution’s protection for a person’s asset values back on the same level with protection for a person’s general freedoms when this exercise is not directly connected to property ownership.

The point is implicit, not explicit, in Justice O’Connor’s \textit{Lingle} opinion, and it may not be immediately self-evident. Therefore, I offer illustration.

Suppose there is some kind of plant crop from which you can manufacture a substance that produces a mild state of pleasurable intoxication when eaten or smoked, and which also can serve as a useful medication against certain human disease conditions. Call this crop cannabis. Suppose this stuff—cannabis—is being widely grown by farmers and sold on the market for a profit, and also is being widely and profitably processed into consumable products by manufacturers. Now suppose the state steps in and totally prohibits any and all production or use of cannabis for any purpose, including medicinal purposes. As a result, some owners of land that had been used for growing crops of cannabis, and some owners of factories where the material was processed for consumption, suffer substantial losses in the economic values of their holdings of land and industrial hardware and software. Some other citizens, who have no external assets or investments at stake but only their bodies and

minds (that is, they had been using cannabis medicinally and recreationally) will have to seek out replacement products. Assume that any discoverable replacements turn out to be more expensive and less effective or benign than the products of cannabis.

Now suppose both groups want to claim that the new law is unconstitutional. The reason both groups give is that the state has not shown—and has not, in all truth, got—any genuine public justification for making the law. The demonstrable fact (so both groups maintain) is that neither unrestricted cultivation of cannabis nor unrestricted production and distribution of marketable manufactures from cannabis causes any more in the way of social harm than do cultivation, processing, and marketing of any of countless other agricultural products (including but by no means limited to grapes and grains grown as raw material for the production of alcoholic beverages). Both groups stand ready with proof in the form of impressive data studies and analyses, which they will present if allowed into court with their claims. Indeed, each group plans to tender in court the exact same studies and expert witnesses.

Now here is one, further fact about American constitutional law. The chances of succeeding with such an evidentiary showing of the regulation’s uselessness, when the only constitutionally protected interest you can assert is the simple freedom to obtain products you desire on the market (whether for recreational, medicinal, or any other kind of use) are virtually zero. Any merely, barely, remotely plausible claim by the state to have a genuinely public, regulatory purpose will prevail.22 By contrast, under the doctrine stemming from the Agins case (which the Supreme Court finally did away with in Lingle), the very same evidence of the uselessness of the regulation would stand a good chance of succeeding when presented by a property owner demanding compensation for a resulting regulatory loss to asset values.23

22. The point appears to hold quite generally, regardless of whether the use for which the regulated or forbidden product is sought is one, such as the practice of one’s religion, that enjoys special constitutional recognition. See Employment Div. v. Smith, 484 U.S. 872 (1990). There is an apparently quite narrow exception when the use for which the product is required is constitutionally protected expression and the regulation in question specially targets products required and acquired in the course of a publication activity. See Minnesota Star & Tribune Co. v. Comm’r of Revenue, 460 U.S. 575 (1983).

23. That is how some American courts had been reading the remark from Agins (447 U.S. 255) that the Constitution requires compensation for regulatory losses whenever the causative regulation has not been shown to “substantially advance” a legitimate state interest. See Lingle, 544 U.S. at 542 (“The ’substantially advances’ formula suggests a means-ends test: It
Thus, constitutional protection against losses to asset values would be preferred to constitutional protection against losses to general recreational and (so to speak) medicinal freedom.

Can you see any reason why a constitutional bill of rights should be written or read to produce such an outcome? Any reason why the state should be held to a stricter standard of justification for its regulatory laws when defending them against the claims of asset owners who have suffered a loss in the market values of their assets, than when defending them against the claims of sick people denied access to a cheap and effective medicine, or healthy people denied access to an irreplaceable recreational asset? Justice O’Connor’s judgment in the *Lingle* case carries a strong suggestion that our Constitution is not to be understood to have any such effect. And that is indeed a significant development in the long history of American constitutional law.

II. A TYPOLOGY OF REASONS TO PROTECT DEFENSIVE PROPERTY RIGHTS CONSTITUTIONALLY

Before starting on a typology of reasons to protect property rights constitutionally, let us recall more or less exactly what the constitutional protection is for which we want to lay out the possible reasons. Here are the points to bear in mind:

- **By “defensive property rights” we mean rights against state-authorized impairments of the reach, security, and value of rights, powers, and privileges attached to legal private ownership of identifiable assets, lawfully obtained.**
- **By “constitutional protection” for such rights we mean protection commanded by a country’s entrenched, “higher” or “supra-legislative” (“constitutional”) laws, but furthermore we mean protection that is *special* in the same sense in which we would say that religious-freedom rights or free-expression rights are specially protected by constitutional law: meaning that the protection exceeds in force and rigor whatever protection the constitution prescribes generally and residually (as a matter, say, of “legality” or “rationality” or “due process”) against any and all regulatory lawmaking that is found to lack even a shred of a plausible pretense to genuine public motivation or justification.**
We do not, however, necessarily mean that the protection must be the absolute or “hard” protection of a highly formal and largely exceptionless rule against infringement (so that all covered impairments are ipso facto unconstitutional), as opposed to the “softer” form of protection suggested by a “balancing” or “proportionality” regime (so that a showing of a covered impairment puts the state to a burden of showing a sufficiently convincing justification).

I place into three main categories the possible “reasons why” for constitutional protection of property rights as thus defined. I call these categories by the names of fundamental personal right, collective good, and necessity. I have fashioned this threefold categorization specifically with regard to the “reasons why” question for property right protection. It turns out, though—as we shall soon start seeing—to bear a noticeable companionship to the “reasons why” that American jurists have typically produced for our second-order policy of constitutional protection for free-expression rights (as opposed, that is, to the “reasons why” for a strong first-order legislative (and common-law) policy of respecting freedom of expression).

Fundamental personal right. For a number of reasons (which we do not have to sort out meticulously here), one might want to insist that if a Constitution is going to name any specified aspects of personal or associational freedom or authority for special protection, that list ought to include whatever such aspects count as the fundamental rights (or interests, as some might prefer to say) of persons. Thus, one reason that we regularly give for the U.S. Constitution’s protection of expressive liberty is that the freedom to speak one’s mind and thoughts to others counts for a great deal in putting together a worthy, fruitful, or respect-worthy human life. Something similar might be proposed for the interest of a person in the retention, as against organized social invasion or impairment, of proprietary prerogatives, benefits, and values that compose one’s lawfully acquired asset portfolio at any given time. (It is not my purpose here to say whether such a proposition is philosophically or anthropologically supportable. For now, just suppose that it is.)

Collective good. In standard American constitutional legal discourse, free-expression rights are highly valued and protected not
only by reason of their widely perceived centrality to individual personal dignity and flourishing, but also because they enable and structure the collective good of the free flow and exchange of information and ideas. Needless to say, private property rights may be similarly valued and protected, on a widely shared understanding that private property is constitutive of the collective good of a market-based economic system, whose superiority to alternatives, in terms of both productivity and freedom, is expected to work to everyone’s advantage.

**Necessity.** By a reason of “necessity” for some level of constitutional protection against asset-portfolio impairments, I mean a perceived risk, found unacceptable by a country’s constitutional policymakers, that some group of actors will respond to a failure to adopt that level of protection in ways damaging to the country’s interests. The actors might be investors or lenders without whose capital inputs the country’s economy will founder, or they might be other governments or international organizations whose friendship or cooperation will be imperiled by such a failure. (“Necessity” may look like a subset of “collective good,” but we will notice below a difference between them perhaps worth having in mind.)

I believe these three reason-types—“fundamental right,” “collective good,” “necessity”—are sufficiently spacious to take in every rejoinder we might expect to hear to the question of reasons for constitutional protection for defensive property rights (as opposed, that is, to reasons for a first-order policy of legislative respect and regard for private-property and market institutions and their supportive legal software). And yet, despite the spaciousness and generality (or you might call it the vagueness) of each of these three reason-types, a typology dividing the “reasons why” space into those three sectors can provide some guidance—as I now undertake to show—to those charged with the making and implementation of constitutional law.

**III. NON-CONFIDENCE IN ORDINARY POLITICS: VARIATIONS ON THE THEME OF “DISTRUST”**

How much (if any) and what forms of special constitutional protection, for which selected rights and interests, will make the overall best of whatever we regard as the relevant values—including, I

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mean, whatever values we may (or may not) attach to popular self-government, to social justice, to political legitimacy or identity—along with, of course, the more technically amenable values of productive efficiency? (To be clear: I do not mean to exclude the possibility that our conception of “overall best” will require the assignment to some values of a preemptive or “lexical” priority over others.) The question seems complex to the point of non-tractability—perhaps for any given society at any given time, let alone for societies and times in general. Even so, we can go some distance toward a generalizable mapping of conceivable responses to it. Against constitutional protection for one or another right or interest, it seems the objection must always reduce either to a denial that political regard for that alleged right or interest can ever carry any positive value at all (say, a zealot’s take on religious freedom), or else to a concern about legal formality: a worry that overall good service to our full array of values (including, remember, whatever values we attach to political identity, legitimacy, and democracy) demands a kind and degree of political responsiveness to ever-changing social, economic, and cultural conditions, not excluding resort to regulatory or redistributive state activities that the presence in the picture of the protective constitutional rules will sometimes inevitably block or distort. In favor of constitutional protection, it seems the reasons will usually if not always boil down to deficits of confidence and trust in ordinary politics, for which constitutional protection is perceived to provide a cure that is worth whatever losses to whatever values are expected to result.

My rumination here thus follows in the track of Professor Richard Epstein’s designation twenty years ago of distrust of government as the “universal solvent” and “fundamental postulate” of constitutional design. Just as with the case of the constitutional defense of speech, Epstein wrote, “[T]he constitutional defense of property . . . rest[s] on the sense that government . . . officials are . . . persons . . . subject to a . . . presumption of distrust,” owing to the inevitable ravages on judgment of self-interest and imperfection of knowledge. The universal constitutional solvency of distrust or non-confidence may come

26. See JOHN RAWLS, A THEORY OF JUSTICE 43 (1971) (defining a “lexical order” as “an order which requires us to satisfy [fully] the first principle in the ordering before we can move on to the second . . . and so on”).
28. Id. at 47.
to seem a truth inescapable, once you pause to think about it. Present purposes do not require any final verification of this thought, but it is worth a moment’s reflection.

Here before us is a proposition (say) of the unique serviceability to sovereign moral and other social ends of legislative due regard for private property (or for free speech or free exercise of religion). You either do or you do not hold that proposition to be self-evident, true beyond fair and reasonable dispute. Only if you do hold it thus can you possibly be excused for writing it into a law that inevitably must interfere with—is designed to interfere with—forms of collective decision you regard as ordinarily respect-worthy and maybe even as ordinarily morally required. But if you do hold it thus, then you ought not to invite the hampering, by rigid constitutional law, of the state’s pursuit of those supposedly sovereign moral and social ends by such regulatory and redistributive means as it from time to time judges best—unless you think the likelihood is substantial that political decision-making in the ordinarily accepted modalities will deviate from a competent pursuit of values that (by hypothesis) reign in your country as public values whose sovereignty as such cannot reasonably be contested. Note that the force of this proposition does not depend on any particular account of the causes of expected deviation. They might be corruption, haste, excitement, distraction, general incompetence, random unavoidable oversight or mistake. The question in respect of each suspected cause will be whether you see the problem as usefully correctable by the device of constitutional protection for this or that named category of rights or interests.29

The point seems general and supple enough to cover conceptions of the aims and functions of constitutions that are not facially straight-line instrumentalist or calculative. Constitutions are often said to serve expressive and identitarian aims: identifying ourselves to ourselves and to others as a people who hold value V in the highest regard. But why do it that way, with the attendant risks to the daily pursuit of the very values we cherish, if we have perfect confidence in our doing it simply by setting to the world and to ourselves a vivid example of a people who do, in fact—and not under the lash of a judicial guardianship—steadfastly maintain in their politics the highest regard for V?

29. For an extended survey of possible reasons not to be too sure about this, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).
Well, we might believe that the general interest is best served by getting some matters settled once and for all for the long term, so that people can plan and proceed with their lives accordingly.\textsuperscript{30} Or constitutional protections may be conceived to serve the function of “gag rules,” of taking off the table for political consideration issues that we fear will be dangerously socially and politically divisive.\textsuperscript{31} But the sovereignty of the values of social-normative stability and of avoidance of excessive political division, as well as the proposition (say) of the unique serviceability to those ends of an assurance of the state’s non-involvement with religion, either are or not among propositions you think any reasonable fellow citizen must share; and then the general dilemma follows as sketched above.

But if distrust or non-confidence is thus the universal solvent, then what boots it to sort out the general reasons for constitutional protection for property into that other series I have suggested: fundamental right, collective good, necessity? The answer is that the dialectics of non-confidence play out differently, with different players, for the three reason-types, and those variations have implications for the forms and degrees of constitutional protection that we may judge most apt for the case of defensive property rights.

Start with collective good. As widely perceived by American constitutional policymakers, a socially beneficial free market of ideas depends on the willingness of people who have things to say to say them, and thus also on people’s sense of safety against state-organized retribution, overt or subtle, for saying the things they do (thus our constitutional-legal doctrines of “overbreadth”\textsuperscript{32} and “chilling effect”\textsuperscript{33}). And so of course it is with property rights and their perceived essential service to market structuring and to general prosperity and freedom: Without adequate assurance of the safety of lawful acquisitions against state-organized or authorized invasions, effort and investment will flag and fail. At the point of constitutional policy-making, the question (posed in terms of collective good) will be how much of—or, better, how crucial—a contribution toward a requisite level of assurance is to be expected from one or

\textsuperscript{31} See Stephen Holmes, Gag Rules or the Politics of Omission, in Constitutions and Democracy 19–21 (Jon Elster & Rune Slagstad eds., 1988).
another sort of constitutional protection for property. The answer will depend as much on local political-cultural variables—which the constitutional choices might themselves affect, in one direction or the other, in the shorter and longer runs—as on anything like a culture-independent real truth about the actual difference that constitutional law and judicial review will make to on-the-ground governmental performance. (Thus, constitutional protection might be judged necessary in the early years of a post-colonial state-formation, but not later on, after a property-supportive political culture and track record have become firmly established.)

Move now to “necessity.” The difference between a “necessity” reason and a “collective good” reason for constitutional protection is the difference between the force of an internal judgment of reason by constitutional policymakers and the force of a judgment imposed on them (they think unreasonably or exploitatively) by external powers. We right here might judge that productive economic energy should in all reason be sufficiently forthcoming here, given our historical and political-cultural situation, without strong constitutional protection for portfolio values; but they out there might nevertheless construct a credible threat of boycott if we do not meet their demands for protection that would be excessive from some ideal, values-optimizing standpoint. (Might the market for constitutional protection of property thus be open, so to speak, for rent-seeking? Compare the market for state-subsidized industrial relocations between cities, regions, and countries.) Of course, that would not make the necessity any less of a necessity. So while the analysis for “collective good” might be complex and subtle beyond any hope of determinacy, the analysis for “necessity” might in practice be quite simple: We are between a rock and a place that is even harder, so give them what they demand.

The analysis for “fundamental rights” involves its own sort of complication. We have to distinguish between the view that a due regard for other rights or interests deemed fundamental—liberty, dignity, privacy, due process, equality of political respect and regard—entails some robust measure of legally backed security against ownership disturbances, and the view that state authorship or tolerance of disturbances of asset-holdings or asset-values counts as a fundamental right-violation just in and of itself, regardless of any further
ramification to freedom, dignity, privacy, equality, or due process. The former view, I have argued elsewhere, is no less comfortably ensconced than the latter in liberal political thought.\footnote{34. See Frank I. Michelman, \textit{Liberal Constitutionalism, Property Rights, and the Assault on Poverty}, 22 \textit{Stellenbosch L. Rev.} 706 (2011).}

On the latter view, the move to constitutional protection for property reflects a failure of confidence in the ability of ordinary politics to resist temptation to violate directly a recognized fundamental right. On the former view, the situation is more complex. Inclusion of “property” in the list of specially protected aspects of individual freedom, authority, and so on—when, say, “liberty,” “dignity,” “privacy,” “equality,” and “due process” have all already been included by reason of the universal solvent of distrust—that seems to reflect a failure of confidence not just in ordinary politics but in the extraordinary forums and processes of constitutional-legal enforcement, typically supreme or constitutional courts. “Property,” then (in the sense of defensive rights against impairments or diminutions of current holdings or their values) will have been added to the specially protected list not because it is deemed in itself to be a “dominant interest worth protecting,”\footnote{35. Compare Richard A. Epstein, \textit{The Property Rights Decisions of Justice Sandra Day O’Connor: When Pragmatic Balancing Is Not Enough}, 1 \textit{Brigham-Kanner Property Rights Conf. J.} 177, 186 (2012).} but because we mistrust the readiness of even those extraordinarily trusted forums and processes to remember and give due weight to the dependencies of the truly dominant interests—freedom, dignity, and so forth—on private property in the background. (But then upon whom do we rely to “enforce” the corrective reminder against \textit{them}?)

\section*{IV. “Hard” and “Soft” Constitutional Protection}

By way of suggesting what sort of payoff I would look for from our foregoing breezy (or you might call it arm-waving) consideration of the differing plays of the dialectics of distrust over our three broad reason-types for constitutional protection of property, I now introduce a distinction between “hard” and “soft” constitutional protection. A fairly dramatic hypothetical example—inspired by the recent legislative and constitutional property law of South Africa\footnote{36. See generally André van der Walt, \textit{Constitutional Property Law} (3d ed. 2011).}—will make clear the distinction I have in mind.
The case involves a law on eviction control. The law bars an owner from evicting anyone from quarters occupied by that person as his home, unless and until a court has determined that replacement housing is available to that person, within his means and also within practicable reach of that person's established place of work, if he has one, or of locations where work will be available for him if he is capable of working. This statutory barrier to eviction is plainly written to apply to any and all cases of attempted evictions of people from their current homes, regardless of any conceded entitlement of the applicant to immediate possession under basic and simple property and contract law—say, the applicant is the owner and the lease term has expired, or perhaps the occupation has been nakedly illegal from the start.

Now suppose an owner of residential property, blocked by this law from recovering possession following expiration of an express contractual lease term, argues in response approximately as follows:

My owner's title to this land is an asset, an item of property. The law in question, as applied to this case, has created in the current occupant a new asset, consisting of his legally protected, indefinitely continuing privilege to occupy the space in question. The law's bestowal of that asset on him perpetrates a redistribution from me to him—thus, a withdrawal from my asset portfolio, a contraction of its boundaries. The constitutional property clause flatly prohibits withdrawals of assets from owners by the state without just and equitable compensation, and no compensation has been provided.

Where that line of argument would normally be expected to succeed, no further questions asked, constitutional protection is of the kind I mean by "hard." Owners stand assured of high prospects of success from a strongly rule-formalist style of adjudication (no "consequences" or "balancing" questions here), where "conceptual

37. Such laws and their constitutionality in South Africa are discussed in id. at 296–99.
38. Compare Epstein, supra note 35, at 202–03:

The common law view . . . was that . . . the landlord was entitled to immediate eviction [of a holdover tenant], or could hold the tenant [either] to the fair market value of the leased premises [or] the stipulated rent in the lease. . . . It follows . . . that [a statute barring eviction and holding the rent to something less] [is] confiscatory unless the state pick[s] up the difference between statutory rent and market value.
severance” (as we have learned to call it under tutelage from Professor Radin39) is rampant.

By contrast, the constitutional protection would be “soft” where—as in South Africa—the court would be expected to agree that a constitutionally cognizable limitation (or “deprivation”) of property rights has occurred, but then immediately proceed to weigh the adequacy of the state’s justifications for the eviction-control law in terms of its overall service to the achievement of universal freedom, dignity, and equality, considering what might be the relatively modest infringement (as the state would argue) on the owner’s freedom, dignity, and so on.40 Owners might win some cases, but they would lose a lot of them, too. Protection would also be “soft” where the predictable judicial response is denial that any “taking” of property has occurred, considering that, after all, the owner has not been totally stripped of either the asset’s economic value (she still gets the same rent as before) or of her right to exclude the world once the current occupant takes leave. (I leave nameless, for the moment, the country where such would be the anticipated result.)

Let us now consider how the choice between hard and soft protection, or among forms and degrees of relative hardness and softness of protection, plays out against our tripartite division of reasons for constitutional protection for property. Under “collective good,” the level of hardness will be set—and no doubt adjusted from time to time by the appliers—pragmatically, in response to the considerations roughly described in the first paragraph of Part III, above. Under “necessity,” protection will be as hard as the makers and appliers of the country’s constitutional law think is required to meet the demands of the necessitating forces—but also presumably no higher than that, except as independently supported by their own internal considerations of collective good or fundamental rights.

Under “fundamental right,” the case is more interesting. Hard formalistic protection seems relatively more congenial to the view that security of asset holdings is a free-standing fundamental right on its own, while soft-protection-only seems more congenial to the

view that property security is only—at most—secondary and supportive of other rights such as liberty, dignity, equality, and so on. On a secondary understanding of the place of “property” in the list of constitutionally protected rights, a court would experience a stronger push toward looking and seeing how the challenged law fits into an overall program for securing to everyone what John Rawls calls a “full and adequate scheme of equal basic liberties”\(^\text{41}\)—pointing, then, towards a test of proportional justification. Of course, that comparison is not ironclad. On the one hand, in today’s world of constitutional-legal discourses, we cannot claim to find any bald contradiction between an affirmation of the fundamental status of an interest or right, and a subjection of constitutional protection for that right to a universal principle of proportionally justified limitation;\(^\text{42}\) distrust (of both ordinary lawmakers and constitutional reviewers) does not necessarily stretch so far. But, on the other hand, it might. Distrust might stretch far enough to dictate, to a given set of makers and appliers of constitutional law, that defensive property rights need strong and formalistic protection here and now, even allowing for antiformalist objections and even believing that defensive property rights lack a self-standing fundamental status of their own—just because they are, after all, secondarily and crucially supportive of rights and interests that are indeed fundamental, in ways that we don’t trust either ordinary politics or judicial-balancing politics to recognize or properly weigh.

Once again, we seemingly are left without much in the way of solid ground to stand on. But this much, at least, we can confidently say—recalling, now, my exemplary case of the eviction-control law: If you happened upon a regime of nominal constitutional protection for property rights, and found that it would not treat that law as highly constitutionally suspect and calling for some beyond-cursory measure of justification, you would have to doubt that the authors of that regime looked upon defensive property interests as first-line fundamental. And that finally returns us to Justice O’Connor and the \textit{Lingle} case.

Because, of course, the regime I have in mind is that of the United States of America. Extrapolating as any competent lawyer would


from our Supreme Court’s decisions in the cases of *Yee v. City of Escondido*,43 *Fresh Pond Shopping Center v. Callahan*,44 and *Pennell v. City of San José*,45 there seems no chance at all that a landowner here could prevail in our exemplary case. Can we catch a glimpse of why not from Justice O'Connor’s opinion in *Lingle*?

Maybe not at first glance. O’Connor’s opinion establishes two points about the American rationale for constitutional protection for defensive property rights: focus on a concern for civic fairness and of its rejection of a concern for economic theory. So far, that is non-committal on the question of American recognition of a free-standing, fundamental defensive right, against state-engineered asset impairments or redistributions. But, as I have tried to suggest, an answer to that question—and here Professor Epstein and I come again together—seems detectible not far beneath the surface of the opinion.46

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46. Between Professor Epstein and me there are normative disagreements but none, I think, about the correct description of the current state of American constitutional-legal doctrine.
OPTIONS FOR OWNERS AND OUTLAWS

LEE ANNE FENNELL*

Property rights delegate control to owners and other possessors within a compass that is specified spatially, temporally, and functionally. Within these confines, owners have choices. They can decide where and how to engage in a particular use, and which of the permissible uses to pursue at a given time. Within legal limits, they may hold onto or dispose of the property interest, or a portion of it. Drawing on analogies from finance, scholars have characterized these choices (and many others) as “real options.” An option gives its holder the right, but not the obligation, to do a particular thing, such as to sell or buy an entitlement at a given price. Real options in land are not explicit—no financial instrument changes hands—but rather are embedded in the structure of the entitlement.

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1. See Henry E. Smith, Exclusion and Property Rules in the Law of Nuisance, 90 VA. L. REV. 965, 974–85 (2004) (explaining how exclusion-based property rules delegate decisions about uses to owners). In this essay, I will use the term “owner” very broadly as a shorthand term for legally recognized possessory rights in real property, regardless of the labels they are given or the form that they take.

2. See Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 216 F. 3d 764, 774 (9th Cir. 2000) (“the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest”), quoted in Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 318 (2002).


4. A call option gives its holder the right, but not the obligation, to purchase the entitlement at the strike price, while a put option gives its holder the right, but not the obligation, to sell the entitlement at the strike price. See, e.g., Richard A. Brealey & Stewart C. Myers, Principles of Corporate Finance 503–05 (10th ed. 2011).

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itself.\textsuperscript{5} I will refer to them here as “embedded real property options” (“ERPOs”) to distinguish them from formal options to buy and sell interests in land, which parties may also transact over.

ERPOs have four notable characteristics. First, they do not typically feature fixed exercise prices or well-defined exercise periods. For example, an owner of a fee simple absolute may hold an option to develop the land for an indefinite period of time, but the price of exercising that option will fluctuate with the prices of inputs to development.

Second, and closely related, ERPOs held by landowners and other possessors are subject to a set of trumping options held by the government and by other parties. For example, zoning laws may change in ways that eliminate particular options, or a neighbor may move next door and engage in a use that falls short of an actionable nuisance but that nonetheless precludes certain sensitive land uses.

Third, the value of the option is tightly (if implicitly) tied to the underlying rules about who shall receive gains and losses associated with activity on the land. For example, a leaseholder may have the option to modify her premises by, say, installing built-in bookcases, but will not typically be entitled to any of the gains that come from those changes.

Finally, possessors are often in a position to exercise what I will here term “outlawed options”—the option to do something with the land that falls outside of the legally prescribed compass. To exercise an outlawed option, the actor pays the (implicit) strike price representing the expected repercussions from violating a prohibition or otherwise moving outside of the law’s protection.

ERPOs interact with law and policy and with the options held by other parties to dynamically construct the on-the-ground experience of property. In this essay, I explore these interactions in three steps. First, I lay out the basics of ERPOs and show how they operate in the shadow of trumping options held by the government and other parties. Second, I examine the special case of “outlawed options,” using “small title” residential holdings in urbanizing areas of China

\textsuperscript{5} Legal scholars have explored embedded options in a variety of doctrinal areas. See, e.g., Ian Ayres, Optional Law: The Structure of Legal Entitlements (2005); Robert E. Scott & George G. Triantis, Embedded Options and the Case Against Compensation in Contract Law, 104 COLUM. L. REV. 1428 (2004); George S. Geis, An Embedded Options Theory of Indefinite Contracts, 90 MINN. L. REV. 1664, 1686 n.114 (2006).
as a motivating example. Finally, I consider what an option-centered view means for property as an instrument of social policy. Because an option-based approach can translate diverse mixes of legal entitlements and extralegal moves into a common currency, it offers a useful vehicle for drawing connections and lessons across legal regimes.

I. LEGAL OPTIONS FOR OWNERS

Owners and other entitlement holders derive value from a variety of real options embedded in their property interests. The value of these embedded real property options ("ERPOs") depends on the extent of the entitlement in time, space, and function, the operative rules about who shall bear gains and losses, and the interaction of these ERPOs with trumping governmental options and with the ERPOs of other entitlement holders. The sections below examine a non-exhaustive set of ERPOs often associated with ownership: the option to develop, to remain on, and to dispose of the property.6 The next Part will take up outlawed options.

A. The Option to Develop

The ownership of vacant land embeds an option to develop it, as the real options literature has recognized.7 To take a simple example, an owner of an empty parcel can decide whether to develop the parcel immediately, or to wait and develop it later. If developing now for use A destroys or makes prohibitively expensive any possibility of developing the property for use B, then there is an option value associated with leaving the land undeveloped: the owner retains the right to develop for either use A or use B at their respective prices. In this context, the development prices for the uses are not preset as they are in the case of financial options; instead, these development

options are “floating options” whose exercise or strike price is set by the market conditions prevailing at the time the option is exercised.\(^8\)

The option to develop is not unlimited. Property rights are creatures of a political process. As such, they embody already-enacted constraints and are subject to further change through governmental action. Thus, any real options an owner or possessor of land holds are themselves subject to a trumping set of governmental options.\(^9\)

While these trumping options vary among jurisdictions, they generally include the right, but not the obligation, to take for public use upon the provision of compensation.\(^10\) In addition, the government retains the right, but not the obligation, to make many sorts of regulatory changes that diminish the value of property rights without providing compensation.\(^11\) This latter set of options may extinguish some of the owner’s options, including options to develop the property at certain times, for certain uses, or along certain physical dimensions. To put it another way, the exercise period for the owner’s option to develop can end without much warning.

Because of these conditions on the owner’s option set, the real options held by owners might be regarded as “soft options” that exist only at the government’s pleasure. However, owners who undertake certain acts can vest their rights and thereby solidify the option to continue along a planned development path.\(^12\) Moreover, once owners

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11. The line between compensable takings and non-compensable regulatory actions is notoriously unclear and governed by a mix of per se rules and balancing factors. I will not attempt to detail this complex area of law here, but these famous words of Justice Holmes suggest the difficulty of the line-drawing challenge: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

actually develop property for a given use, the government is significantly constrained both as a matter of law and politics from making uncompensated inroads into the stream of benefits secured by that option exercise. In this respect, some of the government’s options (those to engage in uncompensated changes in use rights) are themselves “soft options” that can be eliminated through the prior exercise of options by owners. But the government’s right to engage in compensated takings remains a “hard option” that trumps all others, as long as doctrinal requirements as to compensation and the purpose of the taking are met.

To see the interaction of these options, consider the following example. Suppose an owner has a parcel of land that can be used for either of two economically viable uses: use $A$, the development of a single family home on a large lot; or use $B$, the development of a 30-family dwelling unit on that same lot. On any plausible projection, developing the property for a single-family use will require changes to the land and investments in durable structures significant enough to rule out redeveloping for the 30-family dwelling anytime within the next 10 years, and, likewise, developing for the 30-family dwelling will rule out for at least a decade redeveloping for single-family use. At Time 1, the owner is not sure which alternative will turn out to be more profitable. There is a 50% chance that use $A$ (single-family) will be twice as profitable as use $B$ (30-family), and a 50% chance that use $B$ (30-family) will be four times as profitable as use $A$ (single-family).

If the owner were forced to make a decision now, the expected value calculation is clear; use $B$ dominates. But suppose the owner is not forced to make a decision now and can instead delay the decision by one year (to Time 2), when population trends will make clear which of the two uses would be more profitable. There is a 50% chance that use $A$ (single-family) will be twice as profitable as use $B$ (30-family), and a 50% chance that use $B$ (30-family) will be four times as profitable as use $A$ (single-family).

13. But see id. at 1242–61 (questioning the basis of this well-accepted legal principle and concluding that “current constitutional doctrine does not compel categorical protection for existing uses”).
law, a governmental entity might be able to eliminate either the owner’s option to develop for use A or her option to develop for use B without triggering a compensation requirement—although eliminating both would almost certainly amount to a taking if use A and use B together represent the entire universe of economically viable uses for the land.14

Finally, either before or after any development activity is undertaken, the government could engage in a compensated taking. After the land has been developed, however, the cost to the government of exercising this option will be higher than before, to the extent that compensation applies to the costs of the improvements on the land as well as the land itself.15 Thus, one effect of developing more quickly is to raise the government’s exercise price for a compensated taking and hence render it less likely.16 Whether or not this will actually have a pro-development effect depends on many factors, such as whether compensation is inadequate, adequate, or excessive, and how sensitive the government’s demand for property is to compensation requirements.17

B. The Option to Remain (or Not)

The fact that property interests extend forward in time—indefinitely, in the case of the fee simple—offers owners the option to stay on the land long enough to collect on investments they have


16. See Thomas J. Miceli, The Economic Theory of Eminent Domain: Private Property, Public Use 90–96 (2011) (noting that landowners may be able to influence the probability of a taking through their investment decisions, and examining the resulting incentives under different compensation rules and assumptions about government).

17. For example, undercompensation might be expected to reduce development, because a landowner would fear multiplying the base to which the undercompensation would apply. But enough development might ward off a price-sensitive but undercompensating condemning authority. See id.; see also Thomas J. Miceli, Compensation for the Taking of Land Under Eminent Domain, 147 J. INST. & THEORETICAL ECON. 354 (1991) (modeling the incentives for landowners to overinvest or underinvest where their investment decisions can influence the probability of a taking). The extent to which governmental entities respond to monetary incentives is unclear. See generally Daryl J. Levinson, Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs, 67 U. CHI. L. REV. 345 (2000).
made. An important subspecies of this option is the residential property occupant’s right to remain in place. A residential ERPO holds special significance because of the often idiosyncratic value placed on possession, and the potential for periods of possession to add value in nonlinear ways. Residents often make site-specific investments in the community and find themselves unable to replicate certain aspects of the residential experience, such as thick community ties, in a new location. Yet the option to remain holds value precisely because future payoffs are presently unknown; one is under no obligation to stay if the community disappoints, or if better opportunities become available elsewhere.

As with the option to develop, the occupant’s option to remain is a “soft option” that may be trumped in any number of ways, including through condemnation, foreclosure, or, in the case of rental property, the landlord’s decision to withdraw the unit from the market. The trumping options held by governmental entities, mortgagees, and landlords are not costless to exercise, however, and the law can do a variety of things to influence their strike prices.

Exercising one’s residential possessory option also generally requires making monetary payments at regular intervals—rent, mortgage, or property taxes. These amounts can fluctuate. In-kind expenditures may also be required, such as keeping the property up to code and monitoring for interlopers. The larger these expenditures

18. As such, we might think of owners as possessing a kind of rolling option, in which exercising the option to remain in any given period may (depending on the tenure form at issue) generate an option to remain in a subsequent period.


21. For example, mortgagees must go through specified foreclosure procedures, while landlords must comply with applicable legal provisions when converting property from rental units to condominiums.

22. Where formal title is unavailable, squatters may devote significant resources to guarding the property. See Erica Field, Property Rights, Community Public Goods, and Household Time Allocation in Urban Squatter Communities: Evidence from Peru, 45 WM & MARY L. REV. 837, 858 (2004); see also infra note 75 and accompanying text. Even with secure property rights, land may be lost to adverse possession if interlopers are allowed to enjoy a lengthy
become relative to the stream of expected benefits generated by staying, the less likely it is that one’s option will be “in the money” or worth exercising. Implicit limits on the applicable strike price for exercising the possessory option are embedded in many contractual and institutional arrangements, from fixed-rate 30-year mortgages to rent control to property tax caps. But long-lasting possessory options with low strike prices and limited trumping options do not come cheap. Mandating strong residential ERPOs may thus curtail households’ access to housing in the first place.23

The option to stay implies the option to leave, yet doing so is not always costless. Households with mortgages are often said to hold embedded put options that give them the right, but not the obligation, to force a sale of the property back to the mortgagee at the price of the outstanding loan balance, even when the property is currently worth far less.24 In some states, this option is the explicit product of laws that forbid lenders to take recourse against a defaulting mortgagor’s other assets, while in others it exists in de facto form whenever borrowers have too few other assets to be worth pursuing for the shortfall.25 The exercise of such options has raised serious concerns in the present U.S. housing market, given the significant proportion of homes that are worth less than their outstanding loan balances.26 In one sense, the defaulting borrowers are simply exercising a bargained-for option. But the potential for such exercises to generate externalities, especially if conducted on a broad scale,

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23. This charge is frequently leveled at rent control and other regulations designed to protect tenants. Although the empirical picture is often complex, the core intuition is not: making landlordism significantly less profitable could be expected to result in less of it, other things being equal.


25. See id. at 30.

26. Nationwide, between a fifth and a quarter of homes with mortgages are “underwater,” or worth less than what is owed on the mortgage, with significant regional variation. See CoreLogic, Corelogic Reports Negative Equity Increase in Q4 2011 (Mar. 1, 2012), available at http://www.corelogic.com/about-us/researchtrends/asset_upload_file360_14435.pdf (reporting a national figure of 22.8% for underwater residential mortgages at the end of the fourth quarter of 2011; in five states the combined average negative equity rate is 44.3%, while the remaining states’ combined average is 15.3%).
complicates the picture considerably—the lender is not the only one who stands to lose.27

C. The Option to Dispose

As the preceding discussion of strategic default already illustrated, landowners may hold ERPOs to end their involvement with the property and its improvements.28 Most ways of legally getting rid of property require the cooperation of a buyer or other recipient and hence are not options in the usual sense. However, in a legal regime with free alienability, there is an option to offer the property for sale—an act which can be accomplished unilaterally, and which, like the option to develop, carries a calculable strike price and expected return under specified market conditions. Implicit in the right to alienate the property is the option to hold onto the property as long as desired before exercising that option, whether in expectation of price appreciation or in the hope of receiving returns on a site-specific investment. Of course, the option to sell at a time of one’s own choosing may be trumped by involuntary transfers (as through eminent domain) or curtailed by governmental limits on alienability.

Alienability limits can take many forms and can be used to achieve a variety of ends.29 Of particular relevance to the discussion above is the way in which alienability restrictions (including limits on the ability to alienate security interests) can be used to advance the option to remain. A paternalistic rationale for restricting alienability is to prevent ill-considered transfers that leave the transferor worse off. Some alienability limits take the form of an enforced delay or “cool off” period to keep individuals from making a rash judgment

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that they will later regret. In some cases the limit may be a product of presumed information asymmetries. Paternalistic rationales may also fade into pure externality-based rationales when transactions would threaten a society’s normative commitments. The characterization of rural land in China as a “social safety net” for peasant households seems to draw on at least some of these considerations.

An even more interesting rationale for alienability limits relates to self-selection. If one wishes to attract buyers who will use the property themselves, there is perhaps no more direct way to do so than to forbid resale. Even when resale is not forbidden outright, restrictions on how, when, and by whom interests can be sliced and reaggregated will have the effect of shaping the market in particular ways, attracting certain market participants and repelling others.

II. OUTLAWED OPTIONS

Legal restrictions on property may be disregarded where the net gain from doing so is great enough, given the expected sanctions. This Part examines options to move outside of legal parameters.

A. Pricing Unapproved Alternatives

Occupiers of land are often in an excellent position to use property in legally unapproved ways or to transact over it outside of legally recognized “transaction structures.” In the context of housing,


32. See, e.g., Rose-Ackerman, supra note 29, at 960–61.

the potential for informal, extralegal, or just plain illegal arrangements is relatively great. The ways in which people use residential spaces are heterogeneous and hard to monitor, and privacy interests may limit the extent to which intrusion into the specifics of living arrangements will be pursued. Thus, the fact that certain choices are not available through recognized legal channels does not necessarily make them completely unavailable; it may instead merely alter their prices.

The law and economics literature is replete with discussions of certain kinds of sanctions as “liability rules” that permit entitlements to change hands on the unilateral initiative of one party, upon the payment of a fee. Liability rules are often explicitly described as call options because they give one party the right but not the obligation to do something upon paying what amounts to a strike price. While there is controversy surrounding this way of thinking about legal violations, the fact remains that often what appear on the surface to be prohibitions end up operating like prices. As informal work-arounds shade into non-recognized or even legally prohibited arrangements, the strike price of exercising a given option will incorporate the uncertainty and risk associated with moving outside the law’s formal protection.

Questions arise not only with respect to formal legal sanctions, but also as to whether particular interests will be protected against exploitation by other private parties or against uncompensated appropriation by the government. The government clearly has choices in this regard, and can adjust the level of legal protection afforded to informal or unapproved arrangements to suit its ends. For example, it might leave informal settlers exposed to governmental appropriation, but protect them from private expropriation. Depending

37. An interesting example of this approach is provided by the British Colonial Office’s (“BCO’s”) licensing system for squatters on the Australian frontier during the nineteenth century. See Lee J. Alston, Edwyna Harris, & Bernardo Mueller, *Property Rights, Land Settlement and Land Conflict on Frontiers: Evidence from Australia, Brazil and the US*, in
on the stream of consumption benefits produced by the informal arrangement and the costs and risks of the outside options available to the residents, something less than full-blooded title may be enough to spur transactions and investments in residential property. In the balance of this Part, I will use the “small title” sales of rural land to urban buyers in China as a springboard for thinking about these issues.

B. The Case of Small Title

In China, all urban land is state owned; private parties occupy it under long-term leases. The only legal method to transform collectively owned rural land into urban land is through eminent domain. Yet the expansion of urban areas and the demand for urban housing make the prospect of simply turning land designated as rural into urban residential developments very attractive. Doing

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38. See, e.g., id. at 16 (noting that despite the ability of the Crown to “evict squatters at any time without compensation” on the Australian frontier under the BCO’s licensing system, there remained “an active market for squatters’ runs”); see generally Michael Trebilcock & Paul-Erik Veel, Property Rights and Development: The Contingent Case for Formalization, 30 U. PA. J. INT’L L. 397 (2008).

39. Terminology varies, with the terms “small title,” “minor title,” and “petit title” appearing in the literature.


41. See, e.g., Deng, supra note 31, at 1 (describing eminent domain as “the only legal way to convert rural land into urban land that is owned by the government”). In China, rural land that is owned by local collectives cannot be legally alienated for urban development outside of the eminent domain process. See id. at 2; see also Ruoying Chen, Divided World: China’s Land Tenure System and Implication to Foreign Investment in China, DONG-A J. INT’L BUS. TRANSACTION L. (Spring 2010), available at http://ssrn.com/abstract=1665175; Eva Pils, Waste No Land, 11 ASIAN-PAC. L. & POLY J. 2, 18 (2010) (detailing the strict alienability restrictions on rural land).
so allows the parties to the transaction to capture the surplus associated with moving land from a low-valued use to a high-valued use—surplus that would otherwise be captured by government actors or developers. Whether because monitoring and enforcement are imperfect, or because local collectives green-light the transactions and provide some protective cover from adverse governmental action, a significant amount of property is transferred in this way.42

These small title sales occur at a large discount (in Beijing, reportedly at about 25–30% of the price of a legitimate housing unit).43 The discount is presumably due to the greater risk or reduced marketability associated with the lack of a legally recognized title. Questions might arise as to the purchaser’s rights against interloping private parties, as well as against the government in the case of dispossession. We would expect to see the price reduced by the expected costs of holding property that lacks legal approval, whether those costs come in the form of legal sanctions, non-compensable losses inflicted by public or private actors, or greater difficulty retransferring the property.44

The magnitude and composition of the expected costs associated with small title are empirical questions that I must leave to others. The generalizable point, however, is that parties will evaluate outlawed options based on their expected costs and benefits, which must in turn be compared to the costs and benefits associated with the available legal options.45 The following stylized example illustrates some dimensions of the choice to transact outside the law.46

42. See Deng, supra note 31, at 1 (relating reports “that about 20% of all new housing sales in Beijing in 2007” were small title housing units).
43. Id.
44. As Ruoying Chen has suggested, and as discussed below, difficulty in transferring may actually be a strength from a policy perspective if it induces self-selection along normatively desirable lines. Chen, supra note 31, at 31–36; see also infra notes 62–63 and accompanying text.
45. An analogy can be found in discussions of the opportunity costs of crime, which focus on how much someone has to gain and lose from violating the law, relative to her current position. See, e.g., Richard H. McAdams, Economic Costs of Inequality, 2010 U. CHI. LEGAL F. 23, 27–28.
46. This example dovetails in some respects with Tom Ginsburg’s “actuarial theory of property rights protection.” Tom Ginsburg, The “China Problem” Reconsidered: Property Rights and Economic Development in Northeast Asia 13–20 (2011) (unpublished manuscript, on file with author). Under that theory, a risk of undercompensated expropriation does not entirely negate the investment-inducing benefits of a property regime, if the risk is kept within acceptable bounds by outside constraints, political or otherwise. My point in the ensuing example and in the later discussion of property hydraulics is that both public and private expropriation risks nonetheless form the backdrop against which other embedded real
1. A Stylized Example

Suppose that there are 100 parcels in a particular rural community, each worth 500 in its present use. Ten of the parcels will be randomly selected to have its value to the owner diminished by one half (thus, to 250) without compensation (whether through outright appropriation with undercompensation or otherwise). The background expected loss per parcel, then, is 25, and the value of each parcel given the risk of appropriation is 475. At present, all 100 parcels are legally restricted to a low-intensity residential use (one small cottage per acre) but would be twice as valuable (that is, worth 1000 rather than 500) if developed for use at a higher density for multifamily urban housing.

The present occupants are legally precluded from removing the use restriction or transferring new use rights to someone else. But suppose both moves are accomplished anyway, outside of the law. Suppose further that the only negative consequence that will follow is a risk of a completely uncompensated appropriation that will destroy the value of the property to its owner. If the chance of appropriation remains at 10%, but compensation drops to zero (owing to the lack of formal title held by the in-movers), then the property now has an expected value, given the appropriation risk, of 900 (1000 minus 100). This is much better than 475. Of course, the risk of appropriation might rise, whether because the government seeks to deter future transfers of this sort or simply because the property has become a more attractive target to a price-sensitive government.

property options are exercised, and against which decisions about activities will be made. In my view, this analysis can also be applied to highly property-protective liberal democracies like the United States; Ginsburg, in contrast, limits his actuarial theory to “developmental states.” See id. at 16.

47. To keep the example simple, I assume a single-period interaction rather than a series of periods to which we might apply a hazard rate. Because the alternatives being compared all extend risks across time in a similar way, the simplification does not interfere with the main point of the example. I also assume that the appropriation simply drops the value to one half of what it presently is in its current use, setting aside the possibility that the appropriation of half the parcel would be coupled with other changes that would increase or reduce the value of the remaining portion.

48. Each owner runs a 10% chance of losing 250 (half of 500), for an expected loss of 25. When this expected loss is subtracted from the original value of 500, the resulting expected value is 475.
But even if the risk rises fivefold, the expected value of the transformed land would still be 500 (1000 minus 500), in excess of the starting value of 475.

With numbers like these, it is not hard to see both why such transactions might happen, and why they would happen at a substantial discount (as compared with a legally valid transfer). In this example, the background risk of governmental option exercise plays only a small role in the story; the sharp rise in value associated with urban use seems to be doing most of the work. But such background risk could well play a larger role than the expected value numbers alone suggest, leading to a preference for outlawed transfers even when the value increase from the land’s transformation is more modest. This is particularly likely to the extent that risk-averse current residents are able to enter into or influence informal transfers.\footnote{Small title sales have reportedly included both transfers by individual peasant households and sales by local village collectives. \textit{See} Pils, \textit{supra} note 41, at 41. The fact that local collectives own the land complicates the decision-making picture even in the former case. Where collectives transact over large blocks of rural land, the preferences of particular rural households may or may not be taken into account by the village leadership. I thank Donald Clarke for comments on this point.} For such households, the ability to replace the specter of an uncertain displacement with a certain departure would be very valuable.\footnote{See, \textit{e.g.}, Pils, \textit{supra} note 41, at 40–41 (noting the advantages alienability would hold for peasant households).}

2. Remaining Puzzles

The simple example above is not meant to (and does not) capture the empirically complex picture of small title in China. But it does help to illustrate the impetus behind small title transactions. If the gains from trade are large enough, they may swamp the disadvantages associated with a transfer that lacks legal approval—especially when considered against a backdrop in which undercompensated appropriation risks already loom relatively large. Two questions remain, however. First, why are in-movers, who may also be risk averse, willing to take their chances with small title? And second, why does the government seem to tolerate small title transfers?
Why Do In-Movers Chance It? If the effect of the housing transaction is to shift risk to the in-movers, and perhaps amplify it in the process, shouldn’t the in-movers’ own risk aversion make such transactions unattractive?

An initial question is whether risk is actually amplified or reduced by the transfer. One hypothesized repercussion of engaging in unapproved transactions might be a heightened risk of government appropriation, if the lack of legal title eliminates the government’s obligation to compensate. But it is far from clear that this has been the case. The government is likely to be sensitive not only to the legality of holdings but also the identity of the holders, and the political power that they have. Even if the in-movers are legally easier to dispossess, they may be politically harder to dispossess than the rural residents who were previously on the land.51 Moreover, the longer the new residents remain in place, the more entrenched their expectations may become, and the higher the political strike price will rise for the government to exercise its expropriation option. Another potential disadvantage of small title might be a reduced ability to enforce one’s property claims against private encroachment. Here too, however, some indications point in the opposite direction.52

It is also possible that the urban in-movers are a self-selected group that tend to have lower levels of risk aversion than other would-be urban home buyers. Urban in-movers may also have access to other advantages (relatively greater wealth, better access to urban employment, or stronger claims on the social insurance system) that make them systematically better able to bear risk than the rural out-movers.53 Under these circumstances, the large discount in home

51. I thank Donald Clarke for discussions on this point.
52. Suggestive in this respect is the treatment of land disputes that have arisen between villagers who sold their property through small-title transactions to artists in what is now the Songzhuang art district in Beijing. LAIKWAN PANG, CREATIVITY AND ITS DISCONTENTS: CHINA’S CREATIVE INDUSTRIES AND INTELLECTUAL PROPERTY RIGHTS OFFENSES 155 (2012). Because land prices rose sharply after the sales, the villagers came to regret the bargains. In one decided case, the villager Ma Haitao sued the artist Li Yulan four years after a small title land transaction, seeking to have the deal struck for illegality. The court recognized that the deal was illegal and invalidated the sale—but also held that Ma had to compensate Li for the loss. Id.; see also Chen, supra note 31, at 5.
53. China’s Household Registration System (hukou) historically drew sharp distinctions between rural and urban residents that kept rural migrants from securing the benefits of urban dwellers. Although these barriers have been lowered considerably in recent decades,
prices (compared with legally approved purchases) may prove sufficient to compensate in-movers for the risk they bear. Put another way, the gain from changing the use of the property is so great as to swamp both the increased expected value of appropriation and risk-averse reactions to it.54

Why Does the Government Tolerate It? When small title transfers occur, the transacting parties glean surplus that could otherwise go to the government.55 Why, then, are small title transactions tolerated,56 given the ability of the government to adopt polices (with respect to eminent domain, for example) that would diminish their attractiveness?

Here, I can only speculate and ask for information from those who know the situation better. As a matter of theory, three possibilities are worth considering. An initial and relatively uninteresting one would turn on enforcement costs. While some commentators report that monitoring problems are considerable in some contexts,57 these


54. The fact that surplus exists sufficient to cover the heightened risk does not, of course, tell us whether the in-movers or the out-movers are the efficient risk-bearers. If the transaction costs are too high for leaving appropriation risk on the rural out-movers (as through some form of warranty or seller insurance program) the in-movers might end up with the risk even if they are not systematically better at bearing it.

55. The surplus from a rural to urban redesignation might flow to developers instead of to the government, but the government’s role in directing that flow would presumably produce valuable political capital. It is also possible that some of the surplus could be captured by corrupt government officials.

56. The government’s stance toward small title transactions appears to be in flux as of this writing, although the direction of movement is unclear. I have been advised of a recent Chinese news report indicating the government will allow collectively owned land to be leased (email communication from Donald Clarke, citing http://china.caixin.com/2012-01-08/100346665.html). I have also been advised of a pronouncement in November 2011 by China’s Ministry of Land and Resources that rural land registrations will be accelerated but small title transactions will not be registered (email communication from Yun-chien Chang, citing http://www.mlr.gov.cn/zwgk/zytz/201111/t20111110_1024313.htm).

57. See Gregory M. Stein, Acquiring Land Use Rights in Today’s China: A Snapshot from on the Ground, 24 UCLA PAC. BASIN L.J. 1, 29 (2006) (noting reports of difficult enforcement, including that of “[o]ne professional” in China who stated “that the central government has been taking satellite photos of agricultural areas on a regular basis and examining them to confirm that cultivable land is being used for agricultural purposes throughout the growing season and is not being used in other ways without the knowledge of the central government”).
transformations of rural land to urban residential use seem to be relatively easy to spot. Moreover, following Gary Becker's observations, more severe sanctions could compensate for a lower rate of detection to achieve a desired level of enforcement. Yet, as Eva Pils observes, enforcement to date has mostly been “half-hearted and inefficient.”

A more interesting possibility is a price discrimination story. The government might be viewed as providing land use transformation services when it acquires rural land through condemnation and conveys it anew as urban land. Urban developers and in-movers who desire the benefits of such land use transformation may be unwilling to pay the going rate. Small title transactions offer a cheaper mechanism of accomplishing the transformation. If the in-movers would not have paid full price, the government may not have lost a revenue stream. Governmental losses are controlled in any event by the appropriation option that it maintains over these properties, especially if compensation requirements are diluted by the lack of formal title.

The market-thinning work that legal restrictions perform has other implications as well. Ruoying Chen builds on the idea of self-selection prompted by legal restrictions to argue for delinking formal title in rural property from free alienability. The lack of legal approval for informal small title transfers currently thins the market by ruling out the risk averse and those bent on speculation. Formalizing title would carry clear advantages, but unless it is accompanied by alienability restrictions that perform a similar function in

58. Pils, supra note 41, at 41 (“While the phenomenon of 'minor property rights' share important features with black—or gray—markets, it is a market in a commodity that is startlingly difficult to hide away, and that can only be thought to exist because it is to some degree tolerated by officials.”).


60. Pils, supra note 41, at 42; see also Chen, supra note 31, at 5 (noting the absence of public reports of eviction of small title urban buyers, aside from two resettlement cases in which urban buyers were relocated and received back the full original purchase price).

61. The price discrimination story works better if the central government gains some revenue (or saves costs) as a result of these transfers. The local collectives play an important role in informally ratifying the sales, and the repeat-play interactions between these local governing bodies and the central government might afford opportunities for some of the surplus from small title sales to flow to the latter.

restricting market participation, the character and pace of transfers would be very different from what is observed now.63

A third possible explanation flows from the real options literature. When parties exercise options in ways that are visible to others, those exercises provide information.64 For example, if one owner drills an oil well or develops a shopping area, nearby owners learn something as a result.65 Thus, there may be instances in which a party would not want to be the first mover in exercising a particular option. If the government wants to observe and gather information from the option exercises of others, it cannot simultaneously maintain a complete monopoly on exercising options of that sort. A compromise position would be a formal monopoly with some degree of tolerance for informal option exercises on the ground. Seeing where development is taken up and where it succeeds in attracting buyers (even within the somewhat constrained setting of small property rights) yields useful information.

III. LESSONS FOR SOCIAL POLICY

The discussion to this point has focused primarily on describing and analyzing how ERPOs work—both inside and outside legal parameters. In this last Part, I want to offer some brief thoughts on the lessons that an appreciation of ERPOs can hold for social policy.

A. Get Beyond Ownership

The first and clearest takeaway point is for social planners to recognize the ERPOs that already exist, and to understand the ways in which they interact with legal rules and governmental policies. Because these options are embedded rather than explicit, it can be easy to miss their significance and to fall back on legal categories like “ownership” that are ultimately less helpful.66 Whether or not

63. Id. at 35–36.
65. Id. at 126–27.
66. See Donald Clarke, China’s Stealth Urban Land Revolution 1 (June 2011) (unpublished manuscript, on file with author) (arguing that “[t]he concept of ownership . . . ultimately proves useless as an analytical tool”).
the law deems an occupier to be an “owner” may tell us little or nothing about what set of options the person holds—she may be designated as a non-owner but yet have a robust set of valuable options, or be considered an owner but have a tightly curtailed set of options. Moreover, informal arrangements and de facto rights, along with tolerated forms of illegality, can make property rights look quite different on the ground than they might appear in formal legal descriptions.

Translating de jure and de facto entitlements into the common currency of ERPOs is particularly important when cross-country comparisons are involved. For example, inordinate emphasis is often placed on the fact that entitlement-holders in China do not actually own the land they occupy but rather only own rights in the land.67 But rights in land are all that anyone can really own, whatever labels we may apply to the legal relationship.68 Indeed, in the U.S., the lofty title of “owner” often corresponds to highly restricted sets of options.69

This is not to deny the power of labels. Surely it is significant as a matter of ideology and politics that one society calls holders of entitlements landowners and another does not. Moreover, the cultural meaning associated with particular ways of describing property entitlements can shape the social and political reality in very important ways.70 Yet unless policymakers can get behind the labels to see what a system of entitlements actually lets a given party do (both inside and outside the prescribed legal parameters), they cannot fine-tune the contents of the package or even assess the implications of one label or another.

B. Heed Hydraulics

A second takeaway lesson suggested by a focus on ERPOs relates to what we might call the hydraulic nature of property rights: pressures along one margin can produce responses along other dimensions.71 Suppose that, through some combination of legal restrictions

67. See generally id.
68. See id. at 2.
69. See, e.g., id. at 4.
71. The hydraulic metaphor has been used in many legal contexts. See, e.g., Peter K. Yu, Intellectual Property and the Information Ecosystem, 2005 MICH. ST. L. REV. 1, 16 (2005)
and market interactions, people end up with entitlements that are not well suited to their needs. These kinds of mistakes fall under the general head of misassigned entitlements. If transaction costs are zero, the mistake does not matter, but where transaction costs (or other barriers) are significant, the mistake can stick. In between the frictionless plane of zero transaction costs and the deep mire of locked-in suboptimality lies a range of possibilities that can be collectively understood as hydraulic in nature.

Adaptations can reduce the costs associated with suboptimal property interests, but at a price. Like any hydraulic system, property can be expected to adapt in the way that offers the least resistance (that is, where the largest marginal gains can be achieved per unit of cost). Sometimes transactions outside of the law’s approved structure will be the cheapest path, while at other times a limitation or removal of one embedded option will prompt the exercise of a different option. Significantly, adaptation does not always involve changes in property uses alone; people’s behavior may change as well, if this represents the cheaper path. Thus, property rights (or the lack thereof) can change the way that people live and work.

Consider, for example, settings where formal property rights are not available and squatters maintain their claims by continually physically possessing the land. A thicker form of property rights might be better suited to the set of activities that the household would prefer, such as pursuing employment and social opportunities away from the home. Without a ready way to thicken those rights unilaterally, however, the response may be to adapt behaviors by moving employment and socialization to the home, or by


73. In this respect, regulation can operate like a tax that alters the relative attractiveness of the available options. The taxation analogy has been made explicit in the literature on inclusionary zoning. See, e.g., Robert C. Ellickson, The Irony of ‘Inclusionary’ Zoning, 54 S. CAL. L. REV. 1167, 1170 (1981) (describing most inclusionary zoning programs as “essentially taxes on the production of new housing”).

74. Put into an options framework, the lack of formal title raises the exercise price of the option to remain by requiring that it be perpetually paid in kind through actual possession.
otherwise pursuing activities that are complements to staying at home.\textsuperscript{75} In other words, a form of functional bundling—using the home for more purposes than just residential—operates as a response to thinness in formal rights.

The fact that behavior changes in response to a property system does not necessarily carry negative normative implications. Like a Pigouvian tax that is designed to internalize externalities, a property system can quite consciously and rationally put pressure on certain behavioral choices and ease the path for others. Indeed, property systems as a whole can be understood as mechanisms for channeling behavior along certain lines, such as investment and trade, rather than others, such as shirking and fighting.\textsuperscript{76} The difficulty is in identifying when a property system’s design is inducing needless behavioral distortions, and when the design is actually correcting a distortion of some kind.

To return to the example above, it is possible that very thin possessory rights that induce functional bundling of residency, work, and socialization could produce important positive spillovers within a given social context. On the other hand, we can easily imagine instances where this same bundling would produce large deadweight losses. Tracing the likely adaptive responses offers policymakers opportunities to avoid unintended consequences and channel behavior in desired directions. It also underscores a fact that may go underappreciated—that property as experienced on the ground is the result of an iterative process involving not only law and markets but also the choices of owners and other possessors.

\textsuperscript{75} See Timothy Besley & Maitreesh Ghatak, Property Rights and Economic Development, in 5 HANDBOOK OF DEVELOPMENT ECONOMICS 4525, 4531–32 (Dani Rodrik & Mark Rosenzweig, eds., 2010) (noting the possibility of such complementarity, as where constant presence on agricultural property by a farmer can simultaneously serve purposes of guarding the property and maximizing its productivity). A more skeptical view is suggested in SPENCER HEATH MACCALLUM, THE ART OF COMMUNITY 77 (1970) (noting the losses in productivity for one who “must rest one hand always on the sword, leaving but one for the tiller or the plow”); see also Field, supra note 22 (finding differences between titled and untitled squatter communities in Peru with respect to household members remaining at home during the day).

\textsuperscript{76} See, e.g., Carol M. Rose, The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems, 83 MINN. L. REV. 129, 131 (1998) (explaining that “property allows owners to trade with one another, rather than getting into unproductive and wasteful fights over resources”); Besley & Ghatak, supra note 75 (reviewing empirical and theoretical literature and developing an analytic framework for assessing how property rights affect economic development).
C. Learn from Option Exercises

Responses to legal constraints, including the use of outlawed options, can create challenges for legal policy. But, along with other observed option exercises, they can also offer opportunities for learning. An anecdote from Jane Jacobs about sidewalk placement provides a useful analogy:

Back in the 1950s when plans started to appear for one-story, spread-out high schools instead of three or four storied traditional buildings, architects for one of these first new schools—in Connecticut if I remember correctly—weren’t sure where to locate walks for students and staff criss-crossing outdoor grounds between classrooms and other facilities like gyms, auditoriums, and cafeterias. Should they rely on guesswork? Or depend on neat geometric schemes? Should perhaps everything be paved? The architects let the problem stand unsolved until the school had been in use throughout its first winter, during which they mapped the paths which users had made in the snow. The architects let users inform them where paths should go.77

The idea that social planners can learn something from those who blaze new paths or deviate from the ones that society has laid down is an intriguing one. Eduardo Peñalver and Sonia Katyal have explored the potentially valuable role of “outlaws” who break property rules.78 Although, as the authors acknowledge, lawbreakers can inflict high social costs, there may be some silver linings associated with their behavior. Perhaps the most important of these is the informational signal produced by a violation or pattern of violations—which is all the stronger for being a violation, and hence something the violator is willing to risk punishment for.79 Interpreting and

77. Jane Jacobs, Random Comments, 28 B.C. ENVTL. AFF. L. REV. 537, 539 (2001); see also CHRISTOPHER ALEXANDER ET AL., A PATTERN LANGUAGE 586 (1977) (“The layout of paths will seem right and comfortable only when it is compatible with the process of walking. And the process of walking is far more subtle than one might imagine.”).


responding to these signals requires a clear understanding of the outlawed options embedded in the possession and use of property and their relationship to other legally approved ERPOs.

CONCLUSION

In this brief essay, I have only introduced in a general way the considerations that follow from understanding property entitlements as packages of embedded real property options. An option-based understanding of property can offer useful guidance to those who are charged with pursuing workable adjustments in legal rules and social policy. Such an approach can also facilitate comparative work, by providing an analytic framework that emphasizes functional commonalities and resists labels and rigid categories. While others are better equipped than I to speak to the on-the-ground situation of small title transactions in China, I hope to have shown how options analysis offers a useful tool for examining this property puzzle and many others.

INFORMAL INSTITUTIONS AND PROPERTY RIGHTS

LAN CAO*

In recent years, the call for strong and clear property rights has grown in law and development circles. In the landmark book *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, de Soto put forth the claim that “strong and clear” property rights, formalized rather than informal, are necessary for economic efficiency and for the protection of the poor, who occupy through squatting, for example, property that they do not own. De Soto believes that for capitalism to work in poor countries, as it does in the West, poor countries must establish a system in which individual property rights are protected and formally titled. A formal land title system empowers the poor by assuring them rights to property critical to economic self-sufficiency. De Soto and the Institute for Liberty and Democracy, which he founded, pushed for reforms to modernize Peru’s laws and regulations, transferring land titles to more than a million Peruvian families who had previously subsisted in an informal land system that gave them no rights over property they worked or occupied. “Until you have universal, well-protected, clear, and transferable private property rights, you cannot have a market economy in Peru, in the ghetto, or anywhere else. And you are going to have all the problems those places have,” de Soto remarked. According to de Soto, unreported, unrecorded economic activity in the informal sector creates a titling void for the poor because they are deprived of access to a formal system that gives them legal ownership of their property. Without legal title, the poor struggle to get credit and engage in economic transactions. Because they lack legal ownership, legal remedies are also beyond their reach should land disputes arise. When the poor are trapped in the informal, extralegal sector, they are excluded from the formal, legal sector and from

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gaining access to the benefits of law and globalization—their assets, adding up to more than $10 trillion USD worldwide, as estimated by de Soto, languish as dead capital.  

De Soto’s efforts have been widely praised. Bill Clinton, for example, called him “The world’s greatest living economist.”  Secretary General Kofi Annan of the United Nations said, “Hernando is absolutely right, that we need to rethink how we capture economic growth and development.” But de Soto’s ideas have also been critiqued by many scholars and activists. His property rights initiative has generated strong backlash from non-governmental organizations and social movements because they believe that his policy prescriptions may be inappropriate for the poorest of the poor. According to these scholars and activists, incorporating the poor conspicuously into the formal economy, without more, will simply enfold them into an onerous tax base that might be counterproductive for those living on the edge. Others charge that titling creates incentives for individual struggles to get titles and could erode the much-needed solidarity that the poor must forge to progress economically. Critics also charge that de Soto oversimplifies the informal economy and its property relations. For example, according to these critics, it is unclear how de Soto would want the legal system to be adjusted to accommodate other parallel systems and “the unsettling implications for mainstream property systems, are skirted, not confronted.”

De Soto’s main point boils down to “converting informal property into private property through systematic titling” in order to ensure

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6. Ben Cousins et al., Will Formalising Property Rights Reduce Poverty in South Africa’s ‘Second Economy’? Questioning the Mythologies of Hernando de Soto, PLAAS POL’Y BRIEF, Oct. 2005, at 1, available at http://www.icarrd.org/en/proposals/Policy2018.pdf; see also Mike Davis, Planet of Slums 80 (2006) (arguing that formal titling may help some by incorporating them into the economic system, it is a double edged sword but for tenants who are unable to pay the taxes that follow titling).
7. Davis, supra note 6, at 80–81.
8. Cousins et al., supra note 6, at 2.
9. Id.
a system of strong and clear property rights. As observers have noted, de Soto’s primary argument is that “clearly defined property rights generate what economists call positive externalities, or benefits shared by everyone.” This claim, however, has been incisively critiqued by Professor David Kennedy, who argued that “[t]he case for a straightforward link between ‘clear and strong’ property rights and robust growth or development in today’s industrial societies is more ideological assertion than careful history.” According to Professor Kennedy, the developed economies of the modern West “have experienced periods of aggressive industrialization and economic growth with a wide range of different property regimes in place.”

De Soto’s notion of clear and strong property rights rests on the mistaken assumption that “property rights’ have an ideal form—capable of being clarified and strengthened—which can be disentangled from the warp and woof of social and economic struggle in a society.”

This paper will expand on one of the points Professor Kennedy espouses, specifically positioning property rights against a “complex system of forces” that include not just the “legal fabric” but also “the informal world of custom and business practice which transform the meaning of entitlements for different actors.”

[t]he focus on strong and clear rights . . . obscures the fact that no property law regime is composed solely of rights, however strong or clear. There are always also lots of reciprocal obligations, duties and legal privileges to injure. Property law is a complex system of forces pulling in contradictory directions. As such, it offers myriad opportunities for fine-tuning the relationship

10. De Soto is not the only one who has made this claim, although he has been most identified perhaps with this principle. Scholars in the field of New Institutional Economics have made similar arguments. The World Bank too asserts that secure and well-defined land rights are key to growth and development.


13. Id.

14. Id. at 8.

15. Id. at 6.
among economic and social interests in pursuit of a development strategy.\footnote{Id. at 4.}

In other words, an emphasis on strength and clarity “has tended to take the focus off the sorts of social, cultural, institutional and political transformations generally associated with ‘development.”\footnote{Id. at 29.} Indeed, simply making property rights strong and clear does not begin to address a host of thorny issues that implicate distributional considerations or rights and obligations that are associated with a country’s historical or cultural fabric. Thus, the call for strong and clear property rights cannot sidestep allocative determinations, whether those determinations are made as a matter of explicit public policy or implicit cultural norms.\footnote{One reason the “strong and clear property rights” idea continues to seem innocent of any allocative public policy commitment is the lay notion that property rights concern the relationship between an individual and “his property.” Strengthening and clarifying that relationship does not seem to implicate anyone else. It seems merely to empower him to participate more effectively in the economy. For a legal professional, however, property is not about the relationship between persons and things. Rather it concerns the relationship between people with respect to a thing. Id. at 26.}

Because property is a “bundle of rights”\footnote{James Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. REV. 711–820 (1996).} which are themselves embedded in institutional regimes, it is important to place property rights against an institutional framework. In this respect, Douglas North’s observation that institutions are “rules of the game” or “humanly-devised constraints that shape human interaction”\footnote{Douglas C. North, Institutions, Institutional Change and Economic Performance 3 (1990).} is especially relevant. For North, constraints include both what are prohibited and what are permitted, providing the “incentive framework” that guides human behavior.\footnote{Indra de Soysa & Johannes Jütting, Informal Institutions and Development: Think Local, Act Global?, OECD DEV. CENTRE & DEV. ASSISTANCE COMMITTEE—NETWORK ON GOVERNANCE 3 (Dec. 11–12, 2006), http://www.oecd.org/dataoecd/52/16/37790393.pdf.} And institutions can be formal or informal,\footnote{Id. at 2; see also Hans-Joachim Lauth, Informal Institutions and Democracy, 7 DEMOCRATIZATION 21 (Winter 2000); Guillermo O’Donnell, Another Institutionalization: Latin America and Elsewhere 10 (Kellogg Inst. for Int’l Stud., Working Paper No. 222, 1996),} consisting of both “formal written rules as well as
typically unwritten codes of conduct and regularized behavior that underlie and supplement formal rules.”

23. De Soysa & Jütting, supra note 21, at 3.

24. De Soysa & Jütting, supra note 21, at 3.

25. Id. at 2.

26. Id.

27. Id. (emphasis omitted).
and hence “rules in operation.” They are, in other words, “socially sanctioned norms of behavior (attitudes, customs, taboos, conventions, and traditions).” By contrast, formal rules and constraints that are part of formal institutions are “constitutions, laws, property rights, charters, bylaws, statute[s] and common law, and regulations.”

Property rights are embedded in an existing institutional regime, which includes formal institutions as well as informal institutions such as culture. Thus, property rights are themselves a reflection of formal institutions as well as informal institutions. Law and development objectives such as the call for “strong and clear” property rights—without more—seemingly address only one component of the overall framework—formal institutions—while ignoring the other equally important component—informal institutions, such as culture. Rights, including property rights, are embedded in a cultural regime. Certainly property can be an instrumental component for development strategy, but simply asserting that having clear property rights is a baseline sidesteps other important considerations. Such considerations include, for example, who will be entitled to have property rights, what kind of property rights will be protected—even if the rights, however defined, are defined clearly and strongly. In other words, just because a property right is clear doesn’t answer at all the question of who can be a right holder or what kinds of rights will be entitled to legal protection. To understand all these other issues requires understanding the relationship between the formal and informal institutions, between property rights and the background cultural norms that animate those rights.

The purpose of this paper is to examine precisely this relationship. The presence or absence of property rights must be examined against the backdrop of culture. “Property rights are not the be all and end all of progress but a simple reflection of the larger culture.” As I discuss in the section below, it is important, especially in law and development, to realize that formal institutions such as property rights are affected by informal institutions. Law and development
has historically focused only on formal institutions and thus it should not be any surprise that “not everyone finds strong effects from formal institutions, such as the rule of law to development outcomes.” 33 In other words, law and development as a field has been characterized by failures which scholars and practitioners within the field themselves bemoan and acknowledge. An almost exclusive emphasis on formal institutions, I argue, has resulted in the field’s systematic exclusion of culture from its lens. Yet,

changing formal (macro- and micro-level) institutions that might be compatible with particular structural forms might yet not fit very well with informal institutions given underlying cultural factors that remain resistant to change, factors that have a more proximate bearing on the outcomes we are interested in, such as corruption, education, governance, or questions of gender equality. 34

So assuming that law and development efforts wish to establish property rights in order to attract foreign investment, ensuring that they are strong and clear does not address the important question of the cultural framework in which the newly established property rights are to operate. One needs to turn to background cultural norms to more fully examine the issue. Thus, “the question of institutions and development may depend greatly on how informal institutions moderate formal ones as they affect outcomes.” 35 It is important to understand whether or not property rights introduced by law and development projects are in sync with local culture or not. This issue would seem to be as important as whether or not these rights are “strong and clear.” More discussion on this issue will follow in the section below.

attitudes and existing levels of social capital, or the patterns of interaction that individuals assume in any shared activity, understanding where informal institutions come from and how they change is crucial to understanding how the interaction between formal and informal institutions can be harnessed to effect desirable policy goals.

De Soysa & Jütting, supra note 21, at 5.
33. Id.
34. Id.
35. Id. at 5.
I. FORMAL INSTITUTIONS AND INFORMAL INSTITUTIONS:
PROPERTY AND CULTURE

The development of a law of property is certainly important for a law and development agenda. But “[b]efore ‘property rights’ can be strong or weak, they must be allocated.” 36 And how they are allocated by law in the formal rule of law regime will depend on political considerations and informal institutions such as culture.37 Property rights “are embedded in a larger complex of legal rules, institutions and procedures which alter the meaning of entitlements, and in a dense fabric of social expectations and informal arrangements which affect the meaning and usefulness of entitlements.”38 The question that law and development is preoccupied with—introducing property rights—is itself dependent on how informal institutions modify formal ones.39

Numerous studies have reinforced what Douglass North termed “rules of the game” and the extent to which behavioral guides could be found in informal constraints. These studies generated calls, from scholars such as Guillermo O’Donnell, for greater attention to informal institutions and to “the actual rules that are being followed.”40 The phrase “informal institutions” has had varied uses.41 There is disagreement as to whether informal institutions should be distinguished from culture.42 But for the purpose of this paper, I adopt a broad understanding of the phrase so that it can purposefully encompass culture. Informal institutions can be understood as a set of informal, socially shared rules and norms that structure social

37. Id.
38. Id.
39. North observed that actors respond to a mix of “formal and informal constraints.” North, supra note 20, at 67.
40. O’Donnell, supra note 22, at 10 n.2. For example, an emerging body of research suggests that informal rules do in fact influence formal institutional outcomes in a variety of settings. In some African and Latin American countries, patrimonialist norms of unregulated executive control over state institutions have resulted in executive power assertions over legislative and judicial branches in ways unanticipated by the constitution. Guillermo O’Donnell, Delegative Democracy, 5 J. DEMOCRACY 55 (Jan. 1994).
41. The phrase “informal institution” may refer to aspects of traditional culture, personal networks, clientelism, corruption, clan and mafia organizations, civil society, and a wide variety of norms. Helmke & Levitsky, supra note 22, at 7–8.
42. Id. at 10.
interaction by shaping and constraining actors’ behavior.\textsuperscript{43} Indeed, in the context of developing countries especially, where the rule of law is weak and informal rules may be relatively strong,\textsuperscript{44} it is important to understand how culture affects, modifies or tempers the establishment of rights, such as property rights. This is especially important because once established and allocated, “it is not always easy to remake entitlement regimes. The existence of settled expectations about the meaning and significance of legal entitlements can also slow both economic and political change. . . . [T]hose with entitlements from round one will often be able to exercise political, economic or legal influence in round two, making it more difficult to begin again.”\textsuperscript{45} Professor Kennedy was referring more specifically to those “[l]arge economic actors in every economy [who] seek to use their entitlements to consolidate their political and economic position.”\textsuperscript{46} But the same can be said of actors who rely on and leverage existing informal institutions—cultural norms, for example—to resist reallocations of resources through the recognition of new property rights or the reconfiguration of entitlements.

In many cases, it is undoubtedly true that cultural norms such as clan or ethnic solidarity or community-based trust facilitate economic transactions by solving various coordination problems and thus reduce transaction costs.\textsuperscript{47} But certain cultural norms can also have a negative impact. Many “studies highlight phenomena—such as clientelism, corruption, patrimonialism, and clan politics—that undermine the performance of markets, states, democratic regimes,

\textsuperscript{43} NORTH, supra note 20, at 3–4 n.9.
\textsuperscript{44} De Soysa & Jütting, supra note 21, at 8 (“People in both rich and poor countries rely on informal institutions to varying degrees to facilitate transactions, but these institutions are relatively more important in poor countries and small, traditional communities where formal institutions are less developed and the reach of formal law and state power relatively weak.”).
\textsuperscript{45} Kennedy, supra note 12, at 11–12.
\textsuperscript{46} Id.
\textsuperscript{47} Robert Axelrod, An Evolutionary Approach to Norms, 80 AM. POLITICAL SCI. REV. 1095 (1986); Lan Cao, The Diaspora of Ethnic Economies: Beyond the Pale, 44 WM & MARY L. REV. 1521 (2003); Lan Cao, Looking at Communities and Markets, 74 NOTRE DAME L. REV. 841 (1999).
and other formal institutions,”48 the very institutions that law and
development work to establish.

Take the example of family law. Assume that private property
rights that meet the criteria called for—“strong and clear”—are es-
tablished in a given society. Whether the formal institution of such
property rights grants entitlements to the family, to the head of the
household, or to women and men, it is highly likely that this formal
arrangement will be heavily affected by the cultural framework of
that society.49 This cultural framework transcends the standard
paradigm that has conventionally presented the issue as a “choice
between private property rights and state control, . . . [or] a choice
between public and private ownership”50 and rather, reflects “a
dense network of entitlements reflecting specific social histories of
allocative struggle.”51

There will be, in other words, the pull and tug, between formal
and informal institutions. Cultural norms may interact with formal
institutions in four ways—complementary, accommodating, compet-
ing and substituting.52 In some instances, cultural norms may coexist
with and are complementary to or accommodate effective formal
institutions.53 Or they may converge with or operate in lieu of state
law.54 But often, in developing countries where law and develop-
ment projects operate, competing cultural norms create incentives
and exert pressure on actors in ways that may be incompatible with
the objectives of law and development. For example, civil servants
in Ghana’s public administration believe they would lose their
social standing in the community if they adhered to administra-
tive rules rather than kinship norms that obligated them to provide
jobs to family and clan members.55 In the past, the introduction of

49. For example, when implementing land reform, “ought title to be given to the ‘head of
the household,’ ‘the family,’ to the ‘matriarch,’ or to the community in common?” Kennedy,
supra note 12, at 47.
50. Id. at 16.
51. Id.
52. Helmke & Levitsky, supra note 22, at 12.
53. Id. at 12–13.
54. For examples, see id. at 14–16 (“[C]omplementary and accommodating informal
institutions exist in stable institutional settings, which are generally found in advanced
industrialized countries . . . and substitutive and competing informal institutions exist in
context of formal institutional weakness and instability, which are more likely found in
developing and post-communist countries.”).
55. See, e.g., id. at 12–13.
European legal systems to the colonies created “multiple systems of legal obligation.”\(^56\) Because local and European systems each “embodied different principles and procedures,”\(^57\) adherence to one often meant violating the other. Thus, it is not sufficient to issue a single-bullet prescription without fully understanding how a prescription to alter formal institutions will affect or be affected by existing informal institutions.

The increasingly loud call in law and development for clear and strong property rights, through formal titling programs, for example, has had mixed results in Cape Town, South Africa. Clear and strong property rights were instituted for households occupying vacant land owned by a parastatal company in the manner exhorted by de Soto. A housing project was implemented and individual ownership was granted. Title was registered in the name of only one member of each household, resulting, not surprisingly, not only in “a decrease in security of tenure,” but also “reduced security for women and members of the extended family.”\(^58\)

Similar examples abound. In the Ekuthuleni region in South Africa, residents of a rural community consisting of 224 households, mostly headed by elderly women, live on state-registered land. These residents, many of whom receive welfare, wish to formally acquire title to the land and hold it in collective ownership primarily for two reasons. The first is because the group wishes to retain “group control . . . to prevent strangers from coming in and causing conflicts,” and the second is because members “cannot afford the costs of maintaining individual title.”\(^59\) However, a system that focuses only on establishing strong and clear property rights misses the fact that informal institutions such as cultural norms may in fact compete with formal property norms. The property rights system, for example, requires that certain conditions must be met before rights over property can be registered: “an individual rights holder must be identified; the exclusive rights of this rights holder must be precisely described; and the boundaries of land parcels must be accurately depicted through beaconing and geo-referencing.”\(^60\)

\(^56\) Id. at 14.
\(^57\) Id.
\(^58\) Cousins et al., supra note 6, at 3.
\(^59\) Id.
\(^60\) Id.
this particular region, property ownership is rarely exclusively individual and is often shared by family members.

This is a concept that is clearly in competition with South African property law. Even a family trust does not fully capture the cultural dynamics that animate the informal norms of the region. “There are many nuanced layers of rights in Ekuthuleni (of access, use, transactions and decision-making) and it would be extremely difficult to precisely describe these in title deeds.”61 Indeed, it may very well be that formal titling and strong and clear property rights do not benefit the poorest of the poor.62 Informality means flexibility and flexibility may benefit the most vulnerable63 because, for example, boundaries are ever adaptable to reflect social needs or household emergencies. Informality and flexibility may be important, as transactions involving land and housing in the informal sector in Cape Town are socially embedded and social relations are an important component of land tenure,64 reflecting the layered and relative nature of rights and duties. Thus, there may be a “fundamental incompatibility between property rights in community-based systems and the requirements of formal property. Formalization of property rights is therefore not neutral with respect to existing rights; it does and will transform and alter both the nature of the rights and the social relations and identities that underlie them.”65 Studies concerning land use in rural South Africa show that “rights to land and natural resources

61. Id.
62. Some have suggested that clear and strong property rights through formalization does not necessarily yield the benefits claimed. For example, it has not been the case in rural South Africa that formal property rights promote lending to the poor. Banks still do not lend to the poor because of the high risk of default, the low value of their assets and the high transaction costs. Indeed, “formalization could expose the poor to the risk of homelessness: If banks could be persuaded to lend to the poor with their assets as collateral, foreclosure of loans would result in repossession.” Id. at 4. The poor who need to borrow may do so instead from microfinance institutions or other informal sources.
63. In many instances, homeowners were “not interested in a formal sale because their incomes were too low to move up the housing ladder, and most viewed their homes as a family asset rather than as ‘capital.’” Id. Moreover, a study of township property showed that there was a weak secondary market for houses. Hence, emphasizing title deeds here is inappropriate, given the “real constraints of affordability and the limited availability of housing stock.” Id.
64. “Property systems are embedded in many institutional arrangements, not only in registers. Registers are thus only one component of the formal system, and it is the system as a whole that makes property ‘visible’, manageable and exchangeable in the eyes of public and private investors and service providers.” Id. at 3.
65. Id.
are socially and culturally embedded, and nested within social and political units operating at different scales."

The South Africa example suggests that formalization and low-cost mechanisms for titling may be appropriate, from a law and development perspective “only for those already on the way out of poverty.”\(^\text{66}\) In addition, clear and strong property rights may not be appropriate because cultural norms embedded in pre-existing informal institutions are not complementary to formalization. Some have suggested in response that the formal system should be more cognizant and supportive of the informal sector and its cultural norms, which “have widespread legitimacy” rather than replace the latter with the former.\(^\text{67}\) Approaches based on Western property regimes ignore this cultural context and “can lead to distortions that impact negatively on the poor . . . ”\(^\text{68}\) “The entire legal and social complex around which notions of formal and informal property are constituted needs to be interrogated.”\(^\text{69}\)

In other circumstances and contexts, however, it may be the case that after examining the informal property system and the cultural institutions that support it, law and development may indeed conclude that the norms of the informal system are at odds with the legitimate objectives of the law and development project and should instead be challenged. What are the objectives of law and development, one would then ask. Development viewed exclusively in terms of economic growth is passé and in recent years, development has been viewed more broadly. American governmental officials at the top echelon, such as Secretary of State Hillary Clinton, increasingly understand that “development, democracy, and human rights can and must be mutually reinforcing.”\(^\text{70}\) Indeed it is now generally accepted in many circles that there is a positive linkage between development and human rights\(^\text{71}\) and that development should be

\(^{66}\) Id. at 5.
\(^{67}\) Id.
\(^{68}\) Id.
\(^{69}\) Id.
\(^{70}\) Hillary Rodham Clinton, Sec’y of State, Remarks to the Center for Global Development, Washington D.C. (Jan. 6, 2010), available at http://www.state.gov/secretary/rm/2010/01/134838.htm. (“So those who care about making human rights a reality know that development is an integral part of that agenda.”).
understood within a broader framework of political and social institutions that promote basic rights. This broad view of development has been endorsed by scholars as well. Amartya Sen, the noted Nobel laureate in economics, has argued eloquently in favor of a holistic vision for development. For Sen, development means freedom and maximizing well-being, taken broadly to mean maximizing capabilities—to participate freely in the political process, to satisfy hunger, to have access to social networks and connections, reliable information sources and structures. The anthropologist Arjun Appadurai calls...
this capacity “voice.” For Appadurai, alleviating poverty means working to strengthen the capacity of the poor to exercise their voice, not only because this capacity is tied to democratic principles of inclusion and participation but also because “[i]t is the only way in which the poor might find locally plausible ways to alter . . . the terms of recognition in any particular cultural regime.”

Thus, a cultural regime that subverts the legitimate property rights of the poor or the marginalized in any given community must be examined and evaluated. Notably, efforts to reform inheritance and land rights concerning women in sub-Saharan Africa have been subverted by informal institutions and traditional cultural norms that have the effect of systematically constricting the rights and voice of African women. For many in sub-Saharan Africa, issues such as marriage, divorce, burial, and inheritance rights continue to be governed by customary law. As noted, “[a]lthough conceptually distinct from culture, customary law is a legal expression of cultural norms and values.” Many African states have retained a legal structure wherein the customary law of inheritance, which generally excludes women as potential heirs, and statutory law operate simultaneously. Driven by traditional notions of culture and gender relationships, customary law has excluded women from property ownership and inheritance. A woman’s relationship to land has traditionally been defined through her relationship to her father or

75. See also Arjun Appadurai, The Capacity to Aspire: Culture and the Terms of Recognition, in CULTURE AND PUBLIC ACTION 63, 66 (Vijayendra Rao & Michael Walton eds., 2004). Using Hirschman’s framework laid out in his groundbreaking book, ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970), Appadurai argued that it is especially important in law and development to focus on increasing the capacity of the poor to have their voice heard. Exit is not an option for the world’s poor and loyalty is not clear-cut, leaving voice as the only viable and potentially powerful tool to alleviate poverty.

76. Appadurai, supra note 75, at 63, 66.


78. Id. at 430; Thandabantu Nhlapo, Indigenous Law and Gender in South Africa: Taking Human Rights and Cultural Diversity Seriously, 13 THIRD WORLD LEGAL STUD. 49, 53 (1994) (“Sometimes termed customary law, indigenous law is the system of norms which governs the lives of millions of African people, particularly (but not exclusively) in the rural areas.”).

79. Bond, supra note 77, at 430, 434.

husband. While married, a woman gains access to use of the land, however, following the death of a husband, the woman no longer holds any rights in the land. The practice of “property-grabbing” has recently developed, wherein following the death of a father or husband, family members and elites repossess the male’s property often leaving widows and orphans homeless and destitute.

Where statute has been at odds with customary law, the latter has generally prevailed when the underlying issue involves gender relations. The Supreme Court of Zimbabwe, for example, refused to interfere with tribal customary law when the tribe of the deceased man refused to appoint his eldest daughter as heir to the estate because the man is also survived by a son. The Court rejected the daughter’s allegation that tribal law constituted a prima facie violation of the Zimbabwean Constitution’s guarantee of equality for women, holding instead that the Constitution exempts customary law.

In these instances, it would be appropriate for law and development to call for the enforcement of property rights for women even if such enforcement conflicts with existing cultural norms. Clear and strong property rights that are available to men should be equally available to women. However, for these rights to be meaningful on the ground and not just on the books, culture might need to be engaged more robustly and even challenged. Therefore, the case for strong and clear property rights cannot occur only at the statutory level. Given “the persistence of traditions and cultural norms that give preference to men,” and that seek to preserve “religion and culture as spheres of despotism,” experts in this area have suggested “massive awareness campaigns” at both the national and local levels. Yet, unless cultural norms are confronted and altered, through deliberate education campaigns “[t]hese statutory changes generally have no practical effect on the great majority of the population.”

81. Id.
82. Id.
83. Id.
86. Sunder, supra note 84, at 1434.
87. Dormady, supra note 85, at 640.
88. Richardson, supra note 80, at 22.
89. Id. at 19.
CONCLUSION

Strong and clear property rights have always been an objective of law and development but the call for such rights has markedly increased with the popularity of de Soto’s titling program and the publication of *Mystery of Capital*. I have argued in this paper that clear and strong property rights can only be part of a complex development picture because clarity and strength obscure and sidestep certain other considerations—specifically how formal as well as informal institutions influence or modify a property rights regime. Moreover, I have argued in support of greater scholarly attention to informal institutional norms, such as culture, especially for a discipline such as law and development for several reasons. This is because law and development has been marred by failures and disillusionment. Indeed, for years scholars and practitioners in the field have bemoaned its decline and flaws.90 It is time to shake up the field and adopt a different approach towards achieving development objectives by going beyond the call for the establishment of clear and formal rights. Indeed, precisely because law and development has had an almost exclusive focus on formal institutions, it is all the more important that the latter approach be supplemented by a systematic examination of informal institutions and their impact on formal rights.

THE COSTS OF COMPLEX LAND TITLES: 
TWO EXAMPLES FROM CHINA

ROBERT C. ELLICKSON*

For thousands of years, Chinese customs and law typically have directed an owner of land, when transferring it, to retain a right to reclaim it in the future. Prior to the Communist Revolution of 1949, the pertinent rules were provided by the custom of dian, which emerged in ancient China and was formally recognized in legal codes as early as the Ming Dynasty (1368–1644). Dian provided the seller of a tract of land the option of buying the tract back many years later at the original sale price. When the seller died, this right of redemption descended to his heirs. Current Chinese policies also prohibit the outright sale of land. Since the 1980s, when China began to dismantle many of the collectivist policies characteristic of the Mao era, the government has authorized the conferral of land use rights on private individuals and entities. But Chinese law does not permit the national government, or a village collective, to transfer use-rights in perpetuity. Instead, a private land interest is limited to a fixed term, for example, forty years in the case of urban commercial land.

Someone who possesses land under either of these arrangements holds it subject to a future interest. In the case of dian, the future interest is the former seller’s right of redemption. In the case of a fixed-term contract, the future interest is the reversion that will return ownership to the transferor when the fixed term expires. Under

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1. In Anglo-American law, an owner of perpetual land rights is said to have title in fee simple.

2. This is the phrase applied in Anglo-American law to property interests that do not include a right of current possession.
both these land-tenure arrangements, a current possessor of land is aware that the owner of the future interest can, at some point in time, oust him from the land. Legal policies that complicate land titles in this way tend to result in both the misuse of land and too little investment in land improvements.

China's economy has suffered, and potentially will continue to suffer, from these sorts of land practices. In 1600, according to some historians, residents of the densely populated Yangtze Delta region were roughly as prosperous as the English. All analysts agree, however, that by 1900, the people of China generally were far less well off than most residents of Western Europe. Drawing heavily on the pioneering work of historians Philip Huang and Taisu Zhang, I argue in this essay that the dian tradition may have significantly contributed to China's relatively poor economic performance during both the Qing Dynasty (1644–1912) and the Republican period (1912–1949). I also offer comments on contemporary land issues. The current Chinese government is aware of many of the problems that fixed-term contracts create and is debating legal reforms that would compel the automatic renewal of these contracts. In the absence of sensible

3. At that time, the typical farm in the Yangtze Delta was a small paddy where a farming household would plant wet rice in the spring, and, after the rice harvest, a crop of winter wheat. Philip C.C. Huang, Development or Involution in Eighteenth-Century Britain and China?, 61 J. ASIAN STUD. 501, 506 (2002) (book review).


7. Historians have offered varying theories of why England, for example, was able to surge ahead of China after 1600. Some stress factors such as England’s superior access to coal, the resources of England’s colonies, weak internal governance during the Qing Dynasty, and rapid population growth in China. I steer clear of these debates and concentrate on land tenure practices, the only topic on which I may have some comparative advantage.
reforms, I predict that the continuation of the fixed-term contract approach will seriously impair China’s economic prospects.8

I. THE ADVANTAGES OF SIMPLE LAND TITLES

To illuminate the problems that dian and contemporary leasing practices both create, I start with a brief introduction to the basics of land tenure. To prosper, a nation must incentivize its people to use land appropriately, for example, to grow the most suitable crops, to conserve soils, and to build appropriate structures. In a totalitarian state, government bureaucracies control most of these decisions. In a liberal state, by contrast, the multitude of individuals, households, and firms that privately own land mostly control how their parcels are used. Instead of micromanaging land, the state focuses primarily on the foundational tasks of establishing and enforcing the rules of the game, in particular, property law, contract law, and association law.9

Private property in land has been a prominent feature of Chinese culture for thousands of years.10 Moreover, subject to constraints such as dian, private landowners in China have generally been entitled to sell and otherwise alienate their lands. The Shang Yang reforms of 356 B.C.E., for example, promoted land alienability, and sale documents of private lands have been found as far back as the Han Dynasty (206 B.C.E.–220 C.E.).11

In ancient China and countless other pre-commercial civilizations, local populations embraced private property in land because they found it to be a simple and effective way to incentivize a household to

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8. China currently confronts many other critical land law issues, including the legality of land transfers and mortgages, and the amount of compensation to be paid when land is requisitioned. The issue of the extension of fixed-term land-use contracts, while important, may be no more pressing than some of these other issues.

9. For the sake of simplicity, I omit discussion of various challenges that must be addressed when private ownership of land is widespread. These include the externalities, negative or positive, that may emanate from a private land-use decision, and landowners’ needs for public goods.

10. See Kenneth Pomeranz, Land Markets in Late Imperial and Republican China, 23 CONTINUITY & CHANGE 101, 107 (2008) (asserting that the “vast majority” of land was privately held from the Ming Dynasty (1368–1644) through the Republican period).

make the best choices about the use of the land under its control. When a private farmer is entitled to keep a crop he grows, for example, he is automatically rewarded for choosing the best crop to plant, planting at the right time, weeding, applying fertilizer, fallowing a field when appropriate, and so on. State and village agricultural collectives have rarely been as productive as private farmers, primarily because collective production weakens the link between work and reward. China has relearned this basic lesson the hard way. In 1981, the central government’s approval of the Household Responsibility System helped enable villagers to abandon the collectivist agricultural practices that had mired them in poverty.

As noted, dian transactions and fixed-term contracts are examples of the temporal division of land ownership. One party has a present interest, which provides a right of current possession, and one or more other parties own future interests. Legal systems permit the division of ownership across time because, in many instances, arrangements of this sort are advantageous to all involved. Instead of owning a farm outright, for example, a farmer might actually prefer to pay a share of the crop as rent to a landlord. This temporal division of ownership enables a farmer to shift to the landlord some of the risks of crop failure, and may enable the efficient supply of specialized inputs, for example, the tenant’s provision of field labor, and the landlord’s provision of irrigation.

By contrast, both dian and fixed-term contracts generally divide up land ownership in a wasteful manner. The value of each of the parts, when summed together, is less than the value of the undivided whole. Many legal systems have rules that are designed to prevent damage from the inefficient splintering of ownership interests. The Anglo-American law of private property, for example, includes doctrines,


such as waste and the Rule Against Perpetuities, which attempt to mitigate the mischief that potentially may arise from the temporal division of property ownership.

In general, time-divided titles are least likely to create problems when there are only two temporally defined interests, both are easy to value, and both are owned by individuals who trust one another. To illustrate, suppose that a rice farmer in the Yangtze Delta were to have one year remaining on the lease of a paddy from a landlord whom he trusts. Suppose further that during the growing season, a severe rain storm were to damage a portion of the paddy wall, threatening the farmer’s crop. The farmer could either work for one week to make a low-quality repair to the wall, or two weeks to make a high-quality repair. The cheaper repair would keep the wall functional for one year, but not thereafter. The two-week repair, by contrast, would last indefinitely. Assume that the high-quality repair would be the more efficient choice, that is, the repair that both the renting farmer and his landlord would individually choose if either of them were to own the land outright. Because only one year remains on the tenant farmer’s lease, however, he might be expected to choose to repair the wall on the cheap. But if the tenant and landlord were to know and trust one another, this inefficient outcome would be unlikely. For example, after discussing the problem, the landlord might agree to compensate the tenant for the additional costs entailed in a high-quality repair. Or the tenant might simply choose to spend two weeks on the repair, in the hope that the trustworthy landlord, after the tenant told him about these efforts, would later renew the lease on more advantageous terms.

In other scenarios, however, a cooperative outcome is less likely. The tenant might distrust the landlord, or rarely encounter him. Instead of there being just one future interest, there might be several, as there would be if the landlord had already granted several other farmers one-year leases on the same paddy for specific ensuing years.¹⁶ In the worst case, some of the owners of future interests would be unborn, for example, abstractly identified male descendants of the

¹⁶ When too many stakeholders are empowered to veto proposed uses, the splintering of ownership rights can give rise to the under-use of land. See Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 HARV. L. REV. 621 (1998) (developing the seed of an idea planted by Frank I. Michelman in Ethics, Economics and the Law of Property, in 24 NOMOS 3, 6 (1982)).
owner of the present interest. Or, the landlord might be an untrustworthy bureaucratic institution. Under any of these scenarios, the tenant, unable to readily bargain with the holder of the future interest, might choose the inefficient one-week repair. Dian gave rise to this risk, and so does a fixed-term land contract.

II. CHINA’S DIAN TRADITION

Kenneth Pomeranz, in his influential but controversial book, *The Great Divergence*, asserts that the “overwhelming majority of land in all parts of China was more or less freely alienable” during the Qing Dynasty, the period during which China fell behind England. Pomeranz correctly asserts that much land in Western Europe was fettered during that era with entails and other encumbrances that would have slowed land transfer. In England, however, land titles generally became simpler and more alienable after 1600 on account of the continuing decline of, for example, entails and open-field villages. In China after 1600, by contrast, the works of Philip Huang and Taisu Zhang reveal no steady trend toward the simplification of land tenure. Following Zhang, I stress the possible negative influence of the custom of dian on the Chinese economy during Qing and Republican times. (Other complexities of Chinese land tenure may also have been pertinent. For example, entitlements to rented agricultural land commonly were divided between a tenant who “owned” the topsoil, and a landlord who owned the subsoil.)

17. POMERANZ, supra note 4, at 71; see also Pomeranz, supra note 10, at 136. Reviews sharply critical of many of Pomeranz’s claims in this book include Robert Brenner & Christopher Isett, *England’s Divergence from China’s Yangzi Delta: Property Relations, Microeconomics, and Patterns of Development*, 61 J. ASIAN STUD. 609 (2002), and Huang, supra note 3.

18. POMERANZ, supra note 4, at 73–80.


20. See HUANG, supra note 5, at 99–118; Pomeranz, supra note 10, at 131–36. To maintain topsoil rights, a tenant typically had to pay rent, perhaps nominal in amount, to the landlord. On the possible interaction between dian and topsoil rights, see infra text accompanying notes.
about dian are tentative, both because the historical record available in English is thin and ambiguous, and because it is reckless to generalize about the laws and customs in a nation as large and diverse as China, especially over many centuries.

A. The History of Dian

Pomeranz asserts that dian did not “emerge” until the mid-Ming period (c.1500 C.E.). This understates the ancient roots of the custom. The Chinese character representing dian appeared as early as the Shang Dynasty (1600–1046 B.C.E.). The legal code of the Song Dynasty (960–1127 C.E.) made informal reference to the dian tradition, and the Ming code formally referred to it. While it could be said that dian “matured” during Ming times, it had emerged long before.

According to Zhang, a solid majority of land transfers during Qing and Republican times were dian transactions. The nature of dian interests varied. I first introduce a variety—what I call “strong-form dian”—that would have seriously impaired the efficiency of land allocation in China. In a subsequent section, I briefly describe weaker variations of dian that may in fact have been more prevalent.

B. Strong-Form Dian

The dian custom, as noted, gave the seller of a parcel of land the option of repurchasing it—redeeming it—at a later date. When dian was strong-form, this right of redemption theoretically lasted indefinitely.

56–59. Several other features of land tenure in China may also have inhibited land transfers during Qing and Republican times. One was the importance in some regions (but not the Lower Yangtze, see Zhang, supra note 6, at 153) of land ownership by family lineages. See SUCHETA MAZUMDAR, SUGAR AND SOCIETY IN CHINA: PEASANTS AND TECHNOLOGY AND THE WORLD MARKET 217–30 (1998); Pomeranz, supra note 10, at 113–15. Another was the reluctance of landlords, perhaps out of a desire to evade taxes, to own parcels lying near one another. See Zhang, supra note 6, at 193–94.

23. Id.; Zhang, supra note 6, at 157 n.151.
24. Zhang, supra note 6, at 191. In some instances, the seller would remain in possession (see Pomeranz, supra note 10, at 124, 128), suggesting that in these instances the “sale” actually was a mortgage substitute.
When the seller died, the right to redeem descended to his heirs. In addition, according to both custom and Republican Supreme Court decisions, the redeemer had to pay back only the sum that the original buyer had paid to the original seller. This buy-back price was not adjusted upward to account for either a general rise in land values or inflation of the currency. Under strong-form dian, a land seller thus could benefit from an appreciation in land values while bearing little or no downside risk.

From an economic development perspective, a crucial issue is whether the redemption price was adjusted upward to account for the value of the buyer’s post-sale land improvements, such as new dikes, irrigation canals, or buildings. Huang and Pomeranz think that the answer is unclear. For several reasons, however, I follow Zhang in assuming that a strong-form dian redeemer would not have to compensate a buyer for improvements. Huang cites an 1868 case in which a redeemer asserted that this indeed was the proper rule.

It is also noteworthy that the amount of compensation was rarely contested in the cases that Huang and Zhang discuss—a hint that there was a simple answer to this question. Most important, the structure of actual dian transactions suggests that a redeemer did not owe compensation for improvements. Land sale contracts involving dian commonly included a clause granting the buyer what Zhang calls a “guaranteed usage period” (xian) that extended a specified number of years after the date of the transaction. It is estimated that subjecting a parcel of land to dian reduced its market value to 60 to 80

26. Huang provides a lengthy catalogue of dian disputes in Huang, supra note 5, at 71–99. None of these revolved around the question of which heir held the entitlement to redeem. The nonappearance of this issue suggests both that Chinese inheritance law was clear during the pertinent centuries, and also that the social bonds among members of a redeeming family tended to be tight.

27. See Huang, supra note 5, at 91 (describing Republican Supreme Court decisions issued in 1915 and 1945); Zhang, supra note 6, at 156–57.

28. See Huang, supra note 5, at 91.

29. Huang, supra note 5, at 74–75; Pomeranz, supra note 10, at 124.

30. Zhang repeatedly states that the redemption price was pegged at the original sale price. See, e.g., Zhang, supra note 6, at 156–57, 161.

31. Huang, supra note 5, at 82–83.

32. Zhang, supra note 6, at 157. Zhang persuasively argues that both Huang and Pomeranz have misconstrued the meaning of these xian periods. Id. at 157 n.154, 163. In contemporary China, a fixed-term contract conferring land-use rights similarly starts off a new possessor with a longish initial time-horizon.
percent of its value without dian (i.e., if sold outright). During non-inflationary times at least, if the rule was that a redeemer had to compensate the buyer for the value of improvements, it is unlikely that this price discount would be so great.

Could a seller waive dian redemption rights, presumably in return for the buyer’s agreement to pay a higher sale price? As noted, some land sale contracts included a guaranteed usage period, which essentially did waive dian rights during the first years after a sale. But when dian was strong-form, waivers of rights in later time periods were not permitted. According to Zhang, the dian custom generally forbade a seller either to completely waive redemption rights, or to waive them beyond some specified end-date, for example, thirty years after the date of the original sale. The grip of the custom of unending and non-waivable dian was so strong that Qing magistrates declined to enforce statutes and regulations through which the state had attempted to establish end-dates (e.g., 11 years, 30 years) for redemption rights.

Huang presents a case from Suzhou in the Yangtze Delta that illustrates what appears to be strong-form dian in action. In 1663, Sang, the seller, gave Shen, the buyer, dian title to a parcel of land in return for 4 taels of silver. Dian traditions would have given Sang the right to redeem at that exact price. Possibly to secure prospective guaranteed usage periods, the Shen lineage made additional payments to the Sang lineage of 4 taels in 1680, 2 taels in 1701, and 2 taels in 1716. In 1730, the Qing state adopted legislation that sought to limit a buyer’s post-sale payments to a dian seller to a single payment. This law may have had some effect, because, according to court records, in 1733 the Shen lineage made a final payment (zhaotie) of 2.4 taels to the Sang lineage.

33. See Huang, supra note 5, at 74 (60–70 percent in North China); Zhang, supra note 6, at 191 (around 70 percent in North China, up to 80 percent in Lower Yangtze and South China).

34. In addition, if Chinese landowners were to have favored a system that automatically compensated a buyer for the value of improvements made, they might have supported a custom that would have entitled a land seller to retain a right of first refusal. Under that approach, if an improving buyer were to receive a purchase bid from a third party (a bid that would reflect the value of the improvements), the seller would have been entitled to reacquire the land only by matching that bid. But dian conferred on a seller a right to redeem, not a right of first refusal.

35. See Zhang, supra note 6, at 161–62; but see Pomeranz, supra note 10, at 127 (implying that an outright sale was always an option).

36. See Zhang, supra note 6, at 158, 168–75.

37. Huang, supra note 5, at 90.
C. The Costs of Strong-Form Dian

Strong-form dian, had it indeed prevailed during Qing and Republican times, would have significantly impaired economic growth in China.\(^{38}\) Four sorts of potential costs warrant highlighting.

First and foremost, the dian tradition, which required a land seller to retain a right of redemption at the original price, would have greatly discouraged a land buyer from conserving soils and improving the transferred land.\(^{39}\) Land buyers certainly were aware of this problem, because, as noted, they often insisted on a guaranteed usage period during which they could amortize some of the costs of relatively permanent land improvements. Nevertheless, a dian sale brought in on average only about 70 percent of the proceeds of an unconditional sale.\(^{40}\) This figure suggests that buyers, in non-inflationary times, recognized that many land improvements would generate benefits that would last beyond the guaranteed usage period. A dian buyer would have to choose between either not making these improvements, or making them and running the risk that the holder of the redemption right would either threaten redemption, or, less commonly, actually redeem, in order to capture much of the improvements' value. Because a seller could not fully waive strong-form dian rights, ex ante the parties had no way of bargaining around this problem.

Second, strong-form dian, by introducing complexity and uncertainty, would have increased the transaction costs of land transfers and title disputes. As a result, a larger fraction of China's scarce human resources would have been devoted to the tasks of negotiating dian contracts ex ante and resolving dian disputes ex post. Dian appears to have been a major source of grief. A significant amount of the historical evidence regarding the institution comes from records describing the prosecution of homicides arising out of dian disputes.\(^{41}\)

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38. But see Pomeranz, supra note 4, at 70–73 (doubting that dian created major difficulties); Pomeranz, supra note 10, at 103 (similar).

39. See Zhang, supra note 6, at 138, 189–90; cf. Huang, supra note 5, at 89 (quoting Guomindang lawmakers' statement that dian was “hinder[ing] the development of the country”).

40. See supra note 33 and accompanying text.

41. See Thomas M. Bovy, Manslaughter, Markets, and Moral Economy: Violent Disputes over Property Rights in Eighteenth-Century China 167 (2000) (reporting that 92 of 300 homicides arising out of property disputes were provoked by "redemption/sales" issues).
Third, these transaction costs would have been the equivalent of a tax on land transfers, and thus reduced the volume of land sales. The historians who have studied dian typically portray dian sellers as competent farmers who had encountered financial distress. This doubtless is accurate in many instances. But a small farmer who was not in financial distress might want to sell simply because a buyer who could better manage the farm had offered a purchase price that would generate gains from trade for both the seller and the buyer. The selling farmer might be, for example, aged, disabled, or relatively inept at farming, and also lacking in close kinfolk with agricultural skills as good as the buyer’s. By raising the transaction costs of land transfers, strong-form dian therefore would have inhibited the transfer of China’s agricultural lands to abler managers.

Fourth, strong-form dian would have discouraged an agricultural entrepreneur from trying to assemble small adjacent plots to create a large farm whose operation would give rise to efficiencies of scale. In the Yangtze Delta during Qing times, the average farm included only 1 to 2 acres (6 to 12 mu). In many settings, the coordinated construction of paddy walls, dikes, and irrigation systems to serve these tiny fields would have given rise to efficiencies of scale. It is also possible, as Zhang asserts, that a “managerial farm” entailing supervision of hired labor on a much larger tract (characteristic of England at the time), would have been a relatively efficient form of farm organization in China. Faced with a custom of strong-form dian, however, a would-be land assembler might decide against attempting an assemblage. Too many potential redeemers would have the power to threaten to ruin a completed assemblage by extracting a key parcel.

42. See, e.g., HUANG, supra note 5, at 73 (stating that “peasants usually sold their land out of necessity for reasons of survival”); Zhang, supra note 6, at 188 & n.325 (citing numerous sources); cf. HUANG, supra note 5, at 88 (quoting Guomindang lawmakers’ statement that dian was “a strong point of our country’s morality of providing help for the weak”).
43. See Ellickson, supra note 12, at 1375–80. Pomeranz doubts that “the most talented farmer” would obtain a much higher crop yield from a given plot than would a “less-skilled farmer.” POMERANZ, supra note 4, at 70–71. Even if the distribution of talent were to be that compressed, which is far from certain, factors such as a farmer’s health, industriousness, and capacity to make land improvements might significantly affect relative crop yields.
44. See Brenner & Isett, supra note 17, at 620.
45. See Zhang, supra note 6; see also Huang, supra note 3, at 515.
46. See Zhang, supra note 6, at 189.
D. Varieties of Weak-Form Dian

In many contexts, the law and custom of *dian* differed from the form just portrayed. The leaders of Ming, Qing, and Republican governments at times all adopted legislation and regulations aimed at weakening the practice in order to spur economic growth, enhance tax revenues, and stem violence arising out of *dian* disputes.47 Some laws authorized a seller to sell land unconditionally—that is, to waive all redemption rights ex ante.48 Others attempted to establish a maximum length for the redemption period. The 1929 Republican Code, for example, set a limit of thirty years after the date of the initial sale.49 And some legal measures aimed to restrict a *dian* seller to the receipt of only one additional transfer payment (*zhaotie*) from a *dian* buyer.50 As noted, however, magistrates did not necessarily pay heed to statutes and regulations that cut back on customary *dian* rights.51

The custom of *dian*, however, may itself have been less “strong” than the prior discussion suggests. In certain times and regions, *dian* may have applied more firmly to, or perhaps only to, patrimonial lands that either included or were adjacent to the grave-sites of the seller’s ancestors, and not to, for example, non-patrimonial lands of absentee landlords.52 In at least a few counties, local norms set an informal end-date on the exercise of redemption rights.53 Although Huang states that redemption rights theoretically were perpetual, in the handful of *dian* disputes that he discusses, the largest gap he mentions between a *dian* sale and a claim of redemption is 77 years.54

47. See Pomeranz, supra note 10, at 130, 138–39 (implying that the Qing state opposed *dian* in part because *dian* disputes led to violence); supra note 41.

48. See HUANG, supra note 5, at 72, and Zhang, supra note 6, at 164 (both discussing the Qing Code of 1730). The prior Ming Code also recognized the possibility of an outright sale.

49. See Zhang, supra note 6, at 174; see also id., at 165–67 (describing Qing attempts to limit redemption rights to 11 to 20 years after the initial sale). Because these laws fell far short of abolishing *dian*, they may have legitimized aspects of the custom. See HUANG, supra note 5, at 74, 77.

50. See HUANG, supra note 5, at 75–76; see also Zhang, supra note 6, at 157.

51. See supra text accompanying note 36.

52. See HUANG, supra note 5, at 79–81 (noting relative strength of redemption rights affecting grave-sites); Pomeranz, supra note 10, at 129 (asserting that landlords rarely negotiated to retain redemption rights); see also supra note 24 (suggesting that some *dian* “sales” were actually mortgage substitutes).

53. See Zhang, supra note 6, at 160 n.179.

54. HUANG, supra note 5, at 78–79.
And, in that particular instance, the great-grandson who was claiming redemption rights settled for receipt of the wheat crop currently growing on the land. This outcome suggests perceived weaknesses in his claim.

The Chinese institution of virtually permanent tenant topsoil rights also may have mitigated, in some instances, the economic costs of dian. Topsoil rights first appeared during the Song Dynasty (960–1279), spread widely, and persisted into Qing and Republican times, when they drew hostility from legal reformers in part because they impeded tax collection. The carving-out of separate topsoil rights, by further complicating land tenure, on balance may have inhibited China’s economic growth. But this is far from clear. In situations where topsoil rights were essentially perpetual, a tenant farmer considering improvements or conservation measures would plan with an infinite time-horizon, the economic ideal. In a society saddled with dian, topsoil rights thus may have been an adaptive second-best institution that on balance stimulated improvements to agricultural land. The interrelationship, positive or negative, between dian and topsoil rights appears to be a fruitful topic for future research.

E. Why Did the Custom of Dian Emerge and Endure?

Zhang persuasively argues that by Qing times the dian tradition was hampering China’s economic growth. In prior work, I advanced the hypothesis that the norms of members of a closely knit group tend to enhance the welfare of the group’s members. Zhang asserts that the persistence of dian is evidence that tends to disprove this hypothesis. I agree. Although all of China has always been far too large to be regarded as closely knit, the residents of a particular rural area commonly have intimate and enduring relations. I am indeed

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55. Huang, supra note 5, at 78.
56. See supra note 20 and accompanying text.
57. See Huang, supra note 5, at 100, 107–18.
58. See Ellickson, supra note 12, at 1368–71.
59. For discussion of investments in land improvements by tenants holding topsoil rights, see Huang, supra note 5, at 117–18, and Pomeranz, supra note 10, at 105–06, 134.
60. Zhang, supra note 6, at 140, 195–96, 198–99.
62. Zhang, supra note 6, at 140, 197–98.
puzzled that, under those social circumstances, they seem to have so rarely cast aside a custom that was holding them back.

In Huang’s elegant phrase, dian exemplified “the precommercial ideal of permanence in landholding.”63 China is hardly the only society to have honored this ideal. Many ancient societies embraced a tradition that both tied family members to a patrimonial estate and bestowed on selected family members non-waivable rights to redeem that land from creditors or buyers.64 The Israelites’ Holiness Code, for example, baldly states that “Throughout the land that you hold, you shall provide for the redemption of the land.”65 In a pre-commercial society, as opposed to a commercial one, non-waivable redemption rights have fewer costs and greater benefits. Costs are lower because, with the near absence of trade, specialized labor, and advanced technologies for improving land, the disadvantages of tying up land in a family are smaller. Benefits are greater, in part because a pre-commercial state is likely to be relatively inept at providing defense and social insurance. Redemptive rights help to keep rural social networks closed by impeding land purchases by strangers, who tend to be less reliable allies in times of trouble.66 Enduring patrimonial estates also provide a crude form of insurance. It is harder for members of a household to dissipate the soils of a land parcel than to squander the purchase money they receive from a land sale. The right to redeem ancestral land therefore can be viewed as a paternalistic method of assuring the availability of at least some resources to the descendants of members of landholding families.67

It thus is not surprising that dian emerged in ancient China. The puzzle instead is why China, after it had commercialized, was so slow to cast off this pre-commercial norm. After 1600, England persisted in its continuing quest to eradicate encumbrances, such as restraints on alienation, entails, and open-field villages, that had been

63. HUANG, supra note 5, at 71.
64. See Ellickson & Thorland, supra note 11, at 400–01.
65. Leviticus 25:24; see also, e.g., 1 Kings 21:3 (quoting Naboth as he refuses to sell his vineyard to King Ahab, saying “The Lord forbid that I should give you my ancestral inheritance”).
66. See Ellickson & Thorland, supra note 11, at 387–93; see also Zhang, supra note 6, at 196 (stating that dian may have contributed to social stability and cohesion).
67. See Ellickson & Thorland, supra note 11, at 390; see also Pomeranz, supra note 10, at 124 (interpreting dian as an expensive form of insurance against destitution). See also infra text accompanying note 92 (discussing the analogous contemporary Chinese policy that ties a rural household to a particular village by means of a registration permit).
rigidifying its land markets. Why didn’t China, then enjoying its Golden Age, continue as briskly down that same path? Over the course of the eighteenth century, the dian tradition did weaken in China. But the tenacity of its grip endured until the revolutionary government took over in 1949. During the first half of the twentieth century, for example, Guomindang authorities felt compelled to laud aspects of the ancient custom.

Several significant social, political, and cultural differences between China and England may help explain why China would have had a harder time throwing off a pre-commercial tradition. China is far larger in both area and population, conditions that may make its nationwide norms stickier. China also is a far more ancient culture. The entails that England had to weed away, for example, dated only from 1066, two thousand years after dian had taken root. China’s long tradition of strongly centralized governance, including, for example, its venerable system of national examinations, may have contributed to the rigidity of its norms. Conversely, the gradual emergence of democratic institutions in England may have given that nation greater capacity to institute effective legal reforms. Finally, Confucianism, which features norms of filial piety and the veneration of elders, may have helped underpin a non-waivable norm of land redemption, especially in instances where patrimonial land was adjacent to ancestral grave-sites.

III. THE CHINESE GOVERNMENT’S CURRENT POLICY OF LIMITING PRIVATE LAND-USE RIGHTS TO A FIXED NUMBER OF YEARS

In China today, urban land is owned by the national government and rural land by some form of village collective. Since 1978, these landowners have increasingly been transferring fixed-term possessory rights to private parties. As mentioned, the transferor of a fixed-term contract retains a reversion, that is, the right to repossess at

68. See supra note 19 and accompanying text.
69. See Pomeranz, supra note 10, at 122 (citing Buoye, supra note 41, at 181–82).
70. See supra note 27 and accompanying text & note 42.
71. See KARL A. WITTFOGEL, ORIENTAL DESPOTISM: A COMPARATIVE STUDY OF TOTAL POWER (1957) (a classic source on the roots of centralized Chinese governance); SPENCE, supra note 14, at 229 (describing the national examination system).
72. See Pomeranz, supra note 10, at 126 (stating that it would be “blameworthy” to lose land “entrusted to you by your ancestors”).
the end of the term. This retained future interest is analogous to a seller’s right to redeem under dian, and creates similar risks of short-sighted land management by the owner of the possessory interest.

A. Urban Land-Use Contracts

When urban land is involved, a state contract confers private rights to use a specific parcel of land for a fixed time period. When the intended use is commercial, Chinese law permits a maximum term of 40 years; when industrial, 50 years; and when residential, 70 years.73 To obtain land-use rights, an urban contract holder may have to pay the state a lump sum in advance.74

As the years pass, a contract holder, especially one considering land improvements, is likely to become increasingly concerned about several issues:

• whether the holder could compel the state to extend the length of the term;
• if so, the dates on which the holder could first and last apply for such an extension;
• what charges, if any, the state could exact when authorizing an extension; and
• in the event that the state would not agree to extend the term, whether it would have to compensate the holder for improvements made to the land.

Contemporary Chinese law and practice on all these issues are unsettled.75 The 2007 Property Law purported to clarify land rights by providing for the automatic renewal of any fixed-term contract on land used to build houses.76 For two reasons, however, this provision will not bring peace of mind to the holders of these sorts of contracts. First, the 2007 Property Law did not address the third issue listed

73. See Gregory M. Stein, Mortgage Law in China: Comparing Theory and Practice, 72 Mo. L. Rev. 1315, 1321 (2007). The source of these various maximum periods is Article 12 of the Interim Regulations of the PRC on Grant and Transfer of Urban State-Owned Land Use Rights, promulgated by the State Council and effective as of May 1990.
74. Stein, supra note 73, at 1323.
75. Id. at 1324–35, especially n.32.
above, namely, the charges that the state is entitled to impose as a condition for granting a contract renewal. In the absence of a bearable ceiling on renewal charges, a contract holder’s right to renew lacks teeth. Second, even if the statutory provisions were intended to be truly protective, a contract holder might doubt that Chinese courts would enforce the holder’s statutory rights over the objections of government officials.

China’s practice of conferring private land-use rights in this manner threatens to impair its rate of economic growth. Consider the perspective of the owner of a profitable private factory built in reliance on a fifty-year land-use contract signed in 2000. The date is now 2047 and the owner still is not certain that the state will renew the contract. The factory owner might act in a short-sighted manner by, for example, skimping on basic maintenance. And, years before, the owner might have stopped making long-lasting improvements to the manufacturing facility, in part because uncertainty about contract renewal would have made capital investors and mortgage lenders reluctant to finance those improvements. In the direst scenario, if current policies continue, the health of every private industrial, commercial, and residential enterprise in China will fade as its fixed-term land contract winds down.

This picture certainly is overly grim. There are only two owners of temporal interests, namely the person or entity that holds the contract, and the state agency that owns the reversion. These two parties usually could communicate without difficulty and, if they trusted one another, could easily negotiate a cooperative solution before the contract began to cause trouble. They could agree in mid-term, for example, to extend the contract term. In reality, however, the two parties may not trust one another. The owner of the private land-use rights, for example, might possibly view state agents as inept or corrupt. If so, the policy of using fixed-term contracts will increasingly cause trouble in urban China.

B. Rural Land-Use Contracts

Farmers’ contract rights are significantly less secure than the rights of their urban counterparts. In the case of arable land, the usual term
of a village cooperative’s contract with a farm household is relatively short—thirty years. Many of these contracts were signed in the late 1990s. Unless village cadres soon undertake to extend the terms of these contracts, farming households will begin to manage their fields in a short-sighted manner.

But the shortness of the contract term is not the primary title risk that a farm household bears. Unlike an urban land contract, in practice a rural land contract typically does not confer the right to use particular fields in a village, but only the right to use some arable land, which cadres periodically reallocate to households, primarily on a per capita basis. During the past three decades, cadres in a large majority of Chinese villages have adopted the practice of “readjusting” land holdings among member households. A “small” readjustment affects only a few fields, perhaps to take into account changes in the number of residents in particular households. A “big” readjustment, by contrast, reshuffles many or most of the pairings between households and fields. A survey carried out in 2005 by the Rural Development Institute (“RDI”) suggests that a typical villager would have experienced a big readjustment roughly once every ten years.

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78. The thirty-year term for arable land seems to have first appeared in various state decrees issued in the mid-1990s. Robin Dean & Tobias Damm-Luhr, A Current Review of Chinese Land-Use Law and Policy: A “Breakthrough” in Rural Reform?, 19 PAC. RIM L. & POLY J. 121, 128 (2010). The Land Management Law of 1998 explicitly confirmed that 30 years was the proper period. Zhu et al., supra note 14, at 771–72. Article 20 of 2002 Rural Land Contracting Law and article 126 of the 2007 Property Law both repeat the thirty-year figure. A 2005 survey found that over half of Chinese villagers had some form of written land-use contract. Id. at 787–92. About 90 percent of these contracts indeed specified a 30-year term. Id. at 790.

79. Zhu et al., supra note 14, at 788. To obtain rights to use arable land, a farm household actually needs two documents: a contract signed by village officials, and a certificate approved by provincial officials. Id. For information on the contents of these documents, see id. at 790.

80. See id. at 777 n.33. Readjustment is a defining characteristic of a so-called “repartitional village,” of which the mir of czarist Russia is perhaps the most discussed example. See Robert H. Bates & Amy Farmer Curry, Community Versus Market: A Note on Corporate Villages, 86 AM. POL. SCI. REV. 457 (1992), and sources cited therein.

81. Zhu et al., supra note 14, at 775 (reporting, prior to 2006, one or more readjustments in 74.3% of villages, and two or more in 55.0%). On readjustments generally, see id. at 770–72, 775, 792–96, 825–29.

82. Id. at 770.

83. Id.

84. This rough estimate is based on figures provided in id. at 775 tbl. 2. Additional RDI data on the frequency of big and small readjustments are presented in Brian Schwarzwalder, et al., An Update on China’s Rural Land Tenure Reforms: Analysis and Recommendations Based on a Seventeen-Province Survey, 16 COLUM. J. ASIAN L. 141, 167–69 (2002).
readjustments plainly foster wasteful land practices. Why improve a rice paddy if tomorrow your village may take it away?85

Recognizing this risk, in both 2002 and 2007 the Chinese government approved strongly worded statutory provisions designed to help protect a farm household, during the term of its thirty-year contract, from losing a field as a result of a readjustment.86 History indicates, however, that many village cadres do not comply with directives from Beijing. The authors of the 2005 RDI survey concluded, for example, that almost one quarter of the villages in its sample had carried out an “illegal readjustment.”87 Because China lacks a judiciary capable of ruling against the interests of the politically powerful, farm households have few means of legal recourse.

C. What Is to Be Done?88

Deng Xiaoping’s vision of a socialist China clearly recognized the need to incentivize improvements by decentralized land users. The Central Committee’s “Document Number 1,” issued in 1984, states in part:

> Extending the period for which land is contracted will encourage peasants to increase investment, conserve the natural fertility of their land and practice intensive farming. In general, the period for which land is contracted should be more than 15 years.

85. See Zhu et al., supra note 14, at 807–10 (marshaling sources that indicate the positive effects of secure titles on investment in land improvements).


87. The villages in the survey numbered 1,773. Zhu et al., supra note 14, at 768. Of these, “probably 423 . . . have conducted illegal readjustments.” Id. at 794.

88. The temporal dimension of land ownership is the only issue addressed in this section. China also confronts other pressing issues of land law. See supra note 8.
Where production is of a developmental nature or takes longer to be realized—for example fruit growing, forestry or the reclamation of barren hillsides and wasteland—the period should be even longer.89

The Chinese government then was, and still is, fully aware that making property rights more secure will help further unleash the remarkable creativity and energy of the Chinese people. As the clock ticks down on current fixed-term contracts, contract holders, financiers, and government economic officials can be expected to push ever more intensely for some sort of reform.

Most boldly, China could jettison the fixed-term contract approach altogether, and authorize perpetual grants of urban and rural land to private parties.90 This would promote better land stewardship by lessening the short-sightedness that is risked when the temporal division of ownership is mandated. In virtually all of the world’s most prosperous nations, perpetual private land rights are routine. The Chinese government’s resistance to outright private ownership of land may be a vestige of a fantasy that Marx and Engels, two young men devoid of rural experience, famously championed in 1848.91

Some government officials, however, may oppose perpetual private land rights, especially in rural areas, for more pragmatic reasons. The full privatization of land would disrupt China’s current system of providing a minimum level of social insurance to rural households. Currently, each household is registered in a particular village, which is obligated to periodically allocate to registered households, but no

89. Quoted in Spence, supra note 14, at 700.
90. See also Zhu et al., supra note 14, at 834 (urging China to consider granting perpetual private land rights).
91. In The Communist Manifesto, Marx and Engels called for “the abolition of private property in land” and the “centralization of all instruments of production in the hands of the State.” Karl Marx & Friedrich Engels, The Communist Manifesto, reprinted in Karl Marx: Selected Writings 221, 237 (David McLellan ed., 1977). During the first few years after 1949, China’s new revolutionary government nonetheless largely tolerated a “land-to-the-tiller” program under which former tenants expropriated the rural lands of landlords for their own use. See Zhu et al., supra note 14, at 764–66. As the 1950s progressed, however, the state increasingly took Marx and Engels’s prescription literally and compelled farm households to join cooperative agricultural enterprises. This effort culminated in 1958–1961 with the disastrous Great Leap Forward, when the government collectivized most remaining private land holdings and placed local farm cooperatives under the direction of larger organizations. See id. at 768–69 (placing estimates of the resulting deaths at 15–30 million); Spence, supra note 14, at 578–83; Justin Yifu Lin, Collectivization and China’s Agricultural Crisis in 1959–1961, 98 J. POL. ECON. 1228 (1990).
others, some share of the village’s lands. Because these land rights are inalienable, a household cannot sell its holdings and squander the proceeds. As a result, resident members of a registered household, when they become old or feeble, are assured of having an asset of some value.

Providing social insurance is indeed an essential function of government. But China’s current system is highly wasteful. It encourages a villager to pursue a life of traditional farming on tiny plots of land, and not to seek a better life in a city. Per capita income in China’s rural areas currently is less than one-third of income in its urban areas. This disparity is a recipe for social unrest. Making the land titles of poor farmers more secure and alienable would free up the nation’s workforce and increase prosperity in the hinterland by stimulating land improvements and enhancing agricultural productivity. Because the current system does function as a system of social insurance, albeit a highly inefficient one, these land reforms would have to be accompanied by some form of tax-supported aid to the elderly and disabled.

Currently, the conferral of perpetual urban and rural land rights may not be politically feasible. If it is not, the Chinese government should consider less bold legislative steps for making private land titles more secure. It could require, for example, every contracting authority, when the term of a land-use contract has half elapsed, either to renew the contract or to agree to compensate the contract holder, at the end of the lease, for the market value of improvements. Just as crucially, the government should consider setting a ceiling on the charges that a contracting authority is entitled to impose as a condition of contract renewal. In many instances, the state would be justified in exacting some monetary payment to compensate it for relinquishing a portion of its valuable reversionary rights. But, in the absence of a legislative ceiling on this renewal charge, a statutorily proclaimed right to renew might be meaningless.

The histories of both dian and the current fixed-term contract policy illustrate the mischief that may arise when land is possessed in the shadow of a future interest. Both histories also illustrate how ineffectual law can be in the face of well-entrenched custom.

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92. See Zhu et al., supra note 14, at 764–66.
the Qing Dynasty, magistrates continued to honor the dian tradition despite statutes and regulations that had been adopted to limit it.\footnote{See supra text accompanying note 36.} Currently, many village cadres continue to readjust rural land holdings despite laws that forbid that practice.\footnote{See supra text accompanying notes 80–87.} In its efforts to clear its land titles, China would benefit from having judges with both the power and inclination to enforce national legislative mandates over the wishes of regional or local authorities. As long as China continues to confer complex time-limited land rights, its lack of an independent judiciary will be particularly worrisome. When law makes private land rights perpetual, informal social norms soon bolster these entitlements. One of the many advantages of a simple system of perpetual private land rights is its lesser dependence on the existence of effective courts.

(contending that development specialists tend to exaggerate the influence of the “law on the books”).

94. See supra text accompanying note 36.
95. See supra text accompanying notes 80–87.
GOVERNING THE POST-SOCIALIST TRANSITIONAL COMMONS: A CASE FROM RURAL CHINA

SHITONG QIAO

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‡ Website translations were provided by this author.

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PROPERTY LAW WITH CHINESE CHARACTERISTICS:
AN ECONOMIC AND COMPARATIVE ANALYSIS

YUN-CHIEN CHANG*

ABSTRACT

Commentators have contended that China’s Property Law of 2007 ("CPL") demonstrates “Chinese characteristics”; yet only the most obvious ones have been spelled out. Whether the unique features of the CPL increase or decrease welfare has not been explored either. In this article, I use comparative and economic approaches to analyze this important enactment that presumably will lead socialistic China closer to capitalism. Taiwan’s civil code, because of the similarity of its structure, contents, and origins to the CPL, is compared to the CPL in order to identify the CPL’s other Chinese characteristics. Then, economic analysis of law is used to evaluate the efficiency of the CPL’s unique features or to explain their economic functions.

I find that the CPL contains peculiar contents that are unseen in other civil codes but at the same time omits some doctrines (such as the rule of first possession) that are widely recognized in other jurisdictions. I argue that the most salient Chinese characteristic of the CPL is centralization of power. Some unique stipulations of the CPL (or lack thereof) make economic sense in China’s context or demonstrate that China has learned lessons from other civil codes’ interpretive problems. Nevertheless, sometimes what makes the CPL special also reduces welfare.

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INTRODUCTION

China’s Property Law of 2007 (“CPL”) is the latest addition to the family of civil property law. The CPL was highly controversial in China before its enactment. A law professor at Peking University Law School (a top law school in China) even wrote a public letter on the internet, contending that the CPL would be unconstitutional because of its capitalistic bent. 1 This high-profile incident delayed the enactment of the CPL for a couple of years. The story of the CPL is not only socialism versus capitalism, but also the competition between the U.S. and Germany (or American common law and German-model civil law). The Ford Foundation in the U.S. and the German

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2. There are, of course, other legal systems, such as the French-model civil law, the Nordic legal system, and the Islamic legal system. See, e.g., KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998). Nevertheless, because of network effects, it makes more sense for the CPL to base its system on either the common law (also used by, for instance, Hong Kong and Singapore) or the German-model civil law (also used by Japan and Taiwan, to name a few), as adopting either regime makes it easier for Chinese businessmen to communicate with China’s major trading partners and attract more foreign direct investment.
Academic Exchange Service (“DAAD”) Foundation in Germany, among others, have poured grants into China since the 1980s, partly hoping to convert the Chinese legal system to their own camp. Eventually, the CPL and the preceding Contract Law of 1999 followed the model of civil law, probably due to the difficulty of transplanting the bottom-up common-law system, and due to the more centralized structure in civil-law systems. Below I will demonstrate that centralization of land use power is the most prominent “Chinese characteristic” in the CPL.

Chinese scholars have emphasized the “Chinese characteristics” of the CPL. Indeed, since former Chinese leader Deng Xiaoping used this term in the 1980s, the political structures, economic institutions, and legal system characteristics in China that are different from those in other countries have been described as having Chinese characteristics. One example is “socialism with Chinese characteristics,” which was written into the preamble of the PRC Constitution in 1993. This essay takes this claim of Chinese characteristics seriously and tries to flush out the unique features of the CPL. Some leading property scholars in China have identified the major Chinese characteristics of the CPL as adopting state and collective ownership of land and inventing three new types of superficies rights. Others even argue

3. According to DAAD official website, DAAD “is the largest funding organisation in the world supporting the international exchange of students and scholars.” See http://www.daad.de/portrait/wer-wir-sind/kurzportrait/08940.en.html. DAAD has funded, among others, the translation of many German legal textbooks and treaties into Chinese.

4. According to its official website, the Ford Foundation has “made grants totaling more than $275 million dollars in China.” See http://www.fordfoundation.org/regions/china/history. The Ford Foundation has funded, among others, the translation of many books by American legal scholars into Chinese.

5. At the outset of the twentieth century, when China, then ruled by the Qing Dynasty, was considering whether to emulate the civil law or the common law, the former was preferred because of its more centralized power structure. See Feng Deng, Qingmo Bianfa De Falu Jingjixue Jieshi: Weisheme Zhongguo Xuanzele Dalufa [Why China Adopted the Civil Legal System: A Political Economic Explanation of Transitional Justice in Later Ch'ing’s Empire], 21 PEKING U. L.J. 165 (2009) (in Chinese).

6. Proponents of this view include Lixin Yang, a professor at Renmin University of China Law School; Lian Zhang, a professor at Wuhan University Law School; and Baoyu Liu, a professor at the Law School of Beihang University, to name a few. See Lixin Yang, Woguo Wuquanfa Nonglie De Zhongguo Tese [The Strong Chinese Characteristics of the Chinese Property Law] (Apr. 2, 2007), http://www.civillaw.com.cn/article/default.asp?id=31848; Lian Zhang & Hao Wang, Zhongguo Tese Shehui Zhuyi Tudi Wuquan Zhidu De Jiangou Yu Fazhan [The Construction and Development of a Land Use and Property System with Chinese Socialistic
that the most salient Chinese characteristic is "equal protection" of public property and private property. Nevertheless, the "equal protection" achievement of the CPL might be more aptly viewed as an improvement in property jurisprudence within China than viewed as a theoretical breakthrough or a Chinese characteristic. Protection of private property has been emphasized in property scholarship outside China, but it does not follow that state ownership (or collective ownership, if recognized as a form of ownership) is not "equally" protected. As for the special forms of ownership and superficies, they are indeed Chinese inventions, but they are not the only Chinese characteristics of the CPL. Many other interesting and special features of the CPL have not yet been identified by commentators.

In order to spell out other Chinese characteristics of the CPL, the comparative law approach is necessary. Surely, comparative law scholarship regarding the CPL is not in short supply, but the literature has only emphasized the CPL's inheritance of the German Civil Code (Bürgerlichen Gesetzbuches) (“BGB”) and Swiss Civil Characteristics

7. “Equal protection” became an issue because the PRC Constitution of 1982 stipulates that public property is sacred and inviolable (Article 12) while private property is only inviolable, but not sacred (Article 13), leading to the interpretation that public property enjoys more constitutional protection than private property. The equal protection argument is that the CPL has given private property and public property “equal protection.”


9. For example, in the U.S., the federal government is required to pay just compensation to states or local governments if the latter's properties are condemned by the former. See Michael H. Schill, Intergovernmental Takings and Just Compensation: A Question of Federalism, 137 U. PENN. L. REV. 829 (1989).
The important role of the TCC in understanding the CPL deserves further explanation. First of all, enacted around 1930, the TCC was the law of the land in China for twenty years, until the Chinese Communist Party abolished every law stipulated by the Republican government, which continued to rule Taiwan after 1949 and implemented the TCC there. In addition, the TCC was also modeled after BGB and the Swiss Civil Code. With the same legal origins, a comparison of the differences between the TCC and the CPL is more likely to reveal the real Chinese characteristics than comparing the CPL with the private laws in Hong Kong, Singapore, or Macau. Similar cultural traditions between China and Taiwan further enable us to rule out Confucianism or other aspects of Chinese culture as the reasons for the differences. Moreover, the CPL may have imported German and Swiss property law by emulating the TCC. The TCC, intended to govern the whole of China, remained...
intact when the CPL was drafted and enacted,\textsuperscript{16} making the TCC a fitting starting point for the CPL lawmakers. Indeed, the structures of the German and Swiss Law of Things in their respective civil codes differ greatly from the structure of the CPL,\textsuperscript{17} whereas the structure of the CPL is more congruent to that of the TCC.\textsuperscript{18} Finally, long before the enactment of the CPL, leading Chinese property scholars heavily cited their Taiwanese colleagues’ doctrinal interpretations of the TCC, as well as decisions, “precedents,” and interpretations rendered by the ordinary courts and constitutional court in Taiwan. Since the passing of the CPL, scholars continue this practice.

This essay classifies the unique features of the CPL into two types: (1) stipulations that are available elsewhere but are omitted in the CPL; and (2) stipulations that cannot be found elsewhere. The two types are discussed in Parts I and II, respectively.

Dissatisfied with merely describing these unique features, this essay employs the law-and-economics approach to analyze them. Because extant literature in English focuses more on the evolution of Chinese property law\textsuperscript{19} or security rights such as mortgage,\textsuperscript{20} this essay, to the best of my knowledge, is the first to apply economic analysis to the CPL. Specifically, this essay examines the costs and benefits with and without such unique features, and explores the possible economic reasons behind them.\textsuperscript{21} Because China is contemplating

\textsuperscript{16} Only one article in the Book of Law of Things in the TCC was revised before the CPL was passed.

\textsuperscript{17} But see Chen, supra note 12, at 991 (arguing that the structural layout of the CPL resembles that of the BGB and the Japanese Civil Code).

\textsuperscript{18} The CPL and the TCC both start with general principles, registration for real estate, delivery of personal property, etc.; then both stipulate ownership, condominium law, neighborly relations, and co-ownership; what follows is several types of superficies and then servitude; then comes (ordinary) mortgage, maximum amount mortgage, pledge of personal property, pledge of rights, and right of retention; and finally possession.


\textsuperscript{21} Granted, economic analysis of law, if anything, is a capitalistic methodology, and yet many unique features of the CPL are arguably driven by socialistic ideology and the communist party’s political concerns. Here I do not intend (or pretend) to excavate the actual rationales behind the decisions by the CPL lawmakers, but instead explore whether there may be economic reasons that are also supporting the unique features of the CPL.
the incorporation of the CPL, Contract Law of 1999, Tort Law of 2009, and other laws into a comprehensive Chinese Civil Code, this essay's economic evaluations of the unique features in the CPL should provide the Chinese policymakers with an alternative viewpoint.

My analysis reveals that the most salient Chinese characteristic of the CPL is the centralization of (thing use) power, as the CPL subjected the three types of superficies rights to public regulations (rather than to private negotiations), and chose not to recognize the right of first possession. Adding administrative regulations into the CPL also increases controls by Beijing.

Some Chinese characteristics of the CPL make economic sense. For example, because land in China is not privately owned and cannot be transferred, optional registration of farming rights will not impose high information costs on third parties. Also, not recognizing the right to abandon minimizes the social costs of abandonment, given that the right of first possession is not included in the CPL. Giving up the venerated accession doctrine (specificatio) and adverse possession doctrine in the CPL is more efficient than incorporating it. Nevertheless, the omission of the accessio and confusio doctrines in the CPL is welfare-reducing.

The CPL also demonstrates China’s late-mover advantage. The definition of property rights in the CPL is more logically consistent than that in other civil codes. Paring down the contents in the “neighborly relations” part of the CPL and leaving it for regulatory statutes avoids the interpretive problems between the civil code and regulations that other civil law countries have experienced.22

I. NOTABLE OMISSIONS

The omissions discussed below are no doubt conscious decisions made by the CPL lawmakers. The right of first possession, the right to abandon, the accession principle, and the adverse possession doctrines are stipulated in most, if not all, civil law jurisdictions, including Germany and Taiwan, and many Chinese legal scholars have elaborated on them in their works before the enactment of the CPL.

22. For example, the TCC has eleven articles on stipulating the right to appropriate water, whereas several regulatory statutes also prescribe matters regarding water appropriation. It becomes complicated even for property scholars like me to sort out when TCC stipulations can and should be used.
In addition, most of these rights or doctrines have been included in one or more drafts of the CPL but left out in the final version. In this Part, I will discuss the possible reasons for the omissions and evaluate their economic consequences.

A. Right of First Possession

While the right of first possession has been long lauded as the root of titles in U.S. law, and at least still has a place in most civil codes, the CPL lawmakers avoided giving such a right, supposedly because the rule of first possession is impractical (as there will be very few such cases), it encourages “gains without pains,” and it may contribute to the loss of state properties. Nevertheless, even if the rule of first possession is impractical, it will not lead to loss of state properties, and in any case the CPL could easily put state properties off-limits. In addition, possession still requires effort; thus, first possession should not be considered a windfall. Furthermore, the rule of first possession may only be used in practice occasionally, but containing a provision on first possession in the CPL takes only a small amount of fixed costs in legislating, and this would avoid a lot of confusion in practice and save the judges from the laborious work of reinventing this rule. As for encouraging windfall gains, most jurisdictions in the world recognize the rule of first possession, and this rule does not seem to create such a bad incentive scheme.

There should be deeper reasons for ousting the rule of first possession from the CPL. The first reason which comes to mind is socialist ideology. The doctrine of first possession transforms resources from being held in common to being owned privately, averting much

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24. See Weixing Shen, Wuquanfa Yuanli [Principles of Property Law] 221–22 (2008) (in Chinese). In a 2004 CPL draft, one article gave the titles to abandoned properties and, under certain circumstances, wild animals and plants, to the private parties who first possess them. Nevertheless, this stipulation was thereafter deleted for the above reason. See id.
26. Weixing Shen, a leading property scholar at Tsinghua University Law School, China, told me that he believed if courts in China handle a case that is best dealt with by the doctrine of first possession, they will still do it, notwithstanding the rejection of the doctrine by the legislature.
of the tragedy of the commons along the way. Socialism (particularly Chairman Mao’s communism), however, praises resources held in common, and believes that as long as everyone acquires only what she needs from the commons, there will be no tragedy of the commons. Thus, for socialists, the rule of first possession provides no benefits.

The second reason is maintaining centralized power. As Richard Epstein pointed out more than 30 years ago, either first possession or common ownership has to be the root of title, but the latter requires much more extensive public control than the former. In other words, the rule of first possession decentralizes the process of resource allocation. Hence, not recognizing the right of first possession in the CPL retains centralized controls on allocation of unassigned resources. Indeed, the CPL does just that. The things that are usually subject to first possession, such as city land, mineral resources, water, wild animals and plants, and the broadcast spectrum, have all been declared state-owned by the CPL (Articles 46–50). In addition, rural land and other natural resources are collectively owned (Article 58). Finally, the CPL does not recognize the right to abandon, so there is no abandoned chattel for first possession. Consequently, even if the CPL stipulates a right of first possession, there is hardly anything to get first possession of. Still, not recognizing such a right leaves the state to allocate resources that have not been designated as publicly or collectively owned in statutes.

B. Right to Abandon

While in the U.S. the abandonment of fee simple interests and other possessory interests in real property is flatly prohibited, in

30. For discussions of these things, see, e.g., Dean Lueck, The Rule of First Possession and the Design of the Law, 38 J. L. & Econ. 393, 412–21 (1995).
31. Article 49 of the CPL prescribes that wild animals and plants are state-owned only if so stipulated in statutes. Thus, certain wild animals and plants (stray dogs probably) could have been subject to first possession.
32. See Lior Jacob Strahilevitz, Unilateral Relinquishment of Property, in Research Handbook on the Economics of Property Law 125, 142 (Kenneth Ayotte & Henry E.
the civil law systems the rights to abandon both personal and real properties are usually recognized by the civil codes.\textsuperscript{33} The CPL, however, for unknown reasons, is silent about the general right to abandon.\textsuperscript{34} Theoretically, it does not matter, as, following Tom Merrill’s argument, one can deduce the right to abandon from the right to exclude,\textsuperscript{35} which is defined as the core element of property rights in Article 2 of the CPL. Nevertheless, traditional civil property law scholarship never links the right to exclude with the right to abandon. It will be almost a leap of faith for the Chinese courts to make such a deduction.

Doctrinal interpretations aside, the more pressing issue for China should be whether it will be welfare-enhancing to formally recognize the right to abandon in the future Chinese civil code. Lior Strahilevitz provides the most comprehensive and insightful cost-benefit analysis of the right to abandon.\textsuperscript{36} He pointed out three costs of abandonment: third parties’ confusion as to the state of ownership of property (that is, whether the assets are lost, mislaid, or abandoned); deterioration of an asset’s value during the time period of abandonment; and lawless-race costs to be the first one to capture the abandoned assets.\textsuperscript{37} To apply Strahilevitz’s insights to the Chinese context, first consider Table 1, showing the social costs of abandoning chattels:

\begin{table}[h]
\centering
\begin{tabular}{|c|c|}
\hline
Social Cost & Description \\
\hline
Third parties’ confusion & Due to ambiguity over title to assets
\hline
Deterioration of asset value & During the time period of abandonment
\hline
Lawless-race costs & Race to capture abandoned assets
\hline
\end{tabular}
\end{table}

\textsuperscript{33} See, for instance, Sections 928 (real property) and 959 (personal property) of the BGB; Article 764 of the TCC. See also Lior Jacob Strahilevitz, The Right to Abandon, 158 U. PA. L. REV. 355, 394–98 (2010) (describing the escheat system employed in several civil law countries, in which a real property owner can only relinquish land to the state).

\textsuperscript{34} Holders of security interests, however, are allowed to abandon their mortgage or pledge right (Articles 177, 194, and 218). It has also been argued that construction rights generally can be abandoned. See Jianyuan Cui, Wuquanca [PROPERTY LAW] 23 (2d ed. 2011) (in Chinese). Some Chinese scholars have gone even further and argued that in principle all property interest holders can abandon their rights. See Liang & Chen, supra note 25, at 109.

\textsuperscript{35} See Yun-chien Chang, An Economic Analysis of the Article 826-1 of the Taiwan Civil Code: The Distinction Between Property Rights and Quasi-Property Rights, 40 NAT’L TAIWAN U. L.J. 1255 (2011) (in Chinese). This argument is derived from Tom Merrill’s insights that “if we start with the right to exclude, it is possible with very minor clarifications to derive deductively the other major incidents that have been associated with property.” Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. REV. 730, 744 (1998).

\textsuperscript{36} See Strahilevitz, supra note 33; Strahilevitz, supra note 32, at 125. For a thoughtful and critical examination of the right to abandon in American common law, see Penalver, supra note 32.

\textsuperscript{37} See Strahilevitz, supra note 33, at 372–75; Strahilevitz, supra note 32, at 127.
Table 1: Social Costs of Abandoning Chattels in Four Scenarios

<table>
<thead>
<tr>
<th>The de jure right to abandon</th>
<th>The de jure right of first possession</th>
<th>Yes</th>
<th>No</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>Deterioration costs: Low†</td>
<td>(1)</td>
<td>(2)</td>
</tr>
<tr>
<td></td>
<td>Confusion costs: High</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Race costs: High</td>
<td></td>
<td></td>
</tr>
<tr>
<td>No</td>
<td>Deterioration costs: Zero</td>
<td>(3)</td>
<td>(4)</td>
</tr>
<tr>
<td></td>
<td>Confusion costs: Low‡</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Race costs: Low</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

† I mark the costs as high, low, or zero by comparing the same type of costs in each cell.
‡ There are still confusion costs in the absence of the right to abandon, because not all unowned assets are abandoned assets.

Table 1 has at least two limitations. First, it only includes positive market value chattels. Nevertheless, the right to abandon negative market value chattels in any case will be qualified by public regulations or criminal laws. And most law-and-economists would agree that it is welfare-reducing to allow people to abandon negative market value chattels and impose external costs. Thus, whether in the CPL or other statutes, abandonment of negative market value chattels should be discouraged.

Second, Table 1 assumes that people will abandon or first possess movable things only if they have a de jure right to do so. It is unclear how often people exercise the de facto rights in the absence of de jure rights. Part of the answers to these empirical questions lie in the enforcement level of other regulatory statutes and criminal laws that, for instance, punish people for dumping toxic wastes at will or misappropriating state-owned assets.

That being said, from Table 1 one can get a sense of why the CPL does not recognize a right to abandon chattels. While Strahilevitz focused on Cells (1) and (3) in Table 1, given that the CPL does not recognize the right of first possession, our discussions on China

38. For the distinction between positive and negative market value chattels in the right to abandon context, see Strahilevitz, supra note 33, at 362–72.
39. For example, people littering or throwing toxic waste on public land without being caught have a de facto right to abandon.
should focus on Cells (2) and (4). The comparison of these two cells (indeed, all four cells) immediately reveals that, as long as the exercise of de facto rights can be reasonably curbed, not recognizing the right to abandon minimizes the social costs of abandonment.

The social costs of abandoning real properties should be lower than those of abandoning chattels. Given my analysis above and the fact that land is publicly owned in China, it is not surprising that if China recognizes the right to abandon constructions or apartments in the future, it will adopt the escheat system, in which abandoned real properties automatically become state-owned. In this case, race costs and confusion costs are essentially zero. As long as a notification to the registrar is the prerequisite to abandoning real properties, deterioration costs should be low—as compared to the high deterioration costs for abandoned chattels (see Cell (2) in Table 1).

Of course, to complete the cost-benefit analysis, we have to pay attention to the benefits of abandonment as well. As Strahilevitz pointed out, the major benefits of abandonment are “reduced transaction and decision costs.”41 Theoretically, however, it is difficult to determine whether Cell (3) or Cell (4) will produce higher net benefits. Consequently, it might make economic sense for the CPL to aim for the (relatively) sure thing—minimizing social costs of abandonment by not recognizing the general right to abandon.

C. The Accession Principle

Although specificatio, accessio, and confusio are stipulated in four drafts of the CPL, ultimately the CPL does not say a word about them, purportedly because they rarely happen in the real world and in any case are better dealt with in tort law.42 Below I will argue that it is efficient to leave the specificatio doctrine out of the CPL, but efficient to incorporate accessio and confusio doctrines into the CPL.

First of all, a primer on the three doctrines for readers immersed in common law: What the venerable doctrines of specificatio, accessio, and confusio do is reallocate titles to property. Specificatio arises when a man’s labor is mixed with another’s thing, whereas accessio...
and *confusio* arise when two things owned by different parties are combined or intermingled, respectively. Tom Merrill has used the term “the accession principle” to cover *specificatio, accessio, confusio,* and some other related doctrines, but in the U.S., the term “accession” is more often used to cover only *specificatio* and *accessio,* distinguished from “confusion” (*confusio*). This American typology will certainly confuse civil lawyers, who instead group *accessio* together with *confusio.* From an economic standpoint, the civil-law classification makes more sense, because *specificatio* and the other two doctrines are different in terms of their economic efficiency (more on this below).

1. Specificatio

The U.S. common law and the second draft of the CPL have adopted similar *specificatio* doctrines. The basic structure of this doctrine is as follows: a bad-faith improver can neither gain title nor request compensation; a good-faith improver will gain title if the “disparity-of-value test” is met, but will have to compensate the owner the value of the object before the improvements were undertaken. According to the “normative Hobbes theorem,” “the law should allocate property rights to the party who values them the most.” Elsewhere I have demonstrated that the *specificatio* doctrine fails this test and proposed abolishing it. China may be the

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44. For example, in Sections 946–948 of the BGB and Articles 811–813 of the TCC, the stipulations of *accessio* are applied, *mutatis mutandis,* to *confusio.*
46. See *SHEN,* supra note 24, at 227.
49. See Chang, supra note 47. But see Epstein, supra note 29, at 116–18 (defending the efficiency of the *specificatio* doctrine).
first country to adopt my proposal, though for very different reasons. In any case, in my opinion, the CPL lawmakers make a wise choice in not reallocating titles to properties when nonconsensual improvements happen.

2. Accessio and Confusio

The *accessio* and *confusio* doctrines in the second draft of the CPL transplant those in the BGB (Sections 946–948) and resemble those in the TCC (Sections 811–813). If a movable thing is combined with an immovable thing (building or land) in such a way that the former becomes an essential part of the latter, the ownership of the immovable thing extends to the movable thing. And if two movable things are combined or intermingled in such a way that they both become an essential part of a unified thing, the previous owners become co-owners of this thing, except when one of the things can be regarded as the “principal thing,” in which case its owner acquires the sole ownership but has to compensate the other owner. Below I will first argue that the CPL should have contained provisions on *accessio* and *confusio*, and then demonstrate how these two doctrines can be interpreted economically.

Although in practice very few people would litigate over *accessio* or *confusio* (particularly that of personal properties), these two doctrines should be an indispensable part of any civil code. Disputes regarding *accessio* or *confusio* arise when, for instance, paints are attached to tables, liquid fertilizers are sprayed onto the land, or two cans of tomato juice are poured into one big jug. Without the force of these two doctrines, two ownerships exist in the colorful table, fertilized plot, and full jug. Yet any previous owner (say, that of the paints) who tries to control or possess her “thing” will at the same time lose her ownership.

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50. See SHEN, supra note 24, at 227.

51. The opposite of a principal thing is an accessory thing. Pursuant to Article 68 of the TCC, an accessory thing is not part of a principal thing, but the former usually facilitates the utilization of the latter. The disposition of a principal thing extends to its accessories. In the TCC, a principal thing and an accessory thing have to belong to the same owner, while the BGB does not have such a requirement.

time possess the thing (say, the table) of the other party. Neither has the right to claim sole title to the combined or intermingled thing. Absent the doctrines of accessio and confusio in the CPL, if the Chinese court takes the legislative history of the CPL seriously and refuses to infer new doctrines similar to accessio and confusio from other articles in the CPL, the only plausible way to solve the dispute seems to be dividing the combined or intermingled thing apart, which often leads to destruction of both things, if such division or separation is possible at all. Hence, it should be clear that when accessio or confusio happens, there are good economic reasons to reduce the number of titles from two to one, and this is exactly what the doctrines of accessio and confusio serve to do.53

If the doctrines of accessio and confusio are added to China’s civil code, they should not be structured, or at least interpreted, in the traditional way. The TCC, BGB, and the second draft of the CPL all contain an obscure criterion to judge whether accessio and confusio have happened—that is, the “essential part” test, which requires the court to determine whether the two originally separate things have become essential parts of the newly combined thing. The “essential part” test is too abstract to make economic sense. The “high separation costs” test that is used occasionally in the TCC and the BGB is a more operable standard for judging accessio and confusio.54

Specifically, “high separation costs” should be interpreted as follows: if \[\text{[separation costs]}>\text{[the market value of thing A after separation] + [the market value of thing B after separation] - [the market value of the combined or intermingled thing]}\], separation costs are high.55 In other words, if the marginal costs of separation are higher than its marginal benefits, from a social standpoint separation is not worth doing; the law should either assign the title of the combined or intermingled thing to one of the parties or make both parties co-owners, instead of ordering separation.

53. **Specificatio** does not suffer from similar problems; thus, a civil code can do without the **specificatio** doctrine. The reason is that the improver’s labor is not a well-defined property. Absent the **specificatio** doctrine, the improver can neither claim lost title for her labor nor claim title to the improved thing. Thus, the law can simply ignore the contribution of the improver, and allow the thing owner to keep a sole title.

54. To be more exact, in **confusio**, the criterion is “high identification costs.”

D. Adverse Possession

Adverse possession (or prescriptive acquisition) is a complicated and controversial doctrine. To apply the doctrine, the court has to know the mental state of the possessor,56 the type of the possessed things (personal properties or real estate), the nature of the possession (open, notorious, continuous, etc.), and the various issues regarding statute of limitations.57 While most scholars agree on treating bad faith adverse possessors worse than good faith ones (although there is still no consensus on the treatment and its justifications),58 Lee Anne Fennell has made a strong case for limiting the use of adverse possession doctrine to only bad faith adverse possessions that meet certain requirements, mainly because only a bad faith possessor could be conscious of her making better use of the resource she is possessing.59 Partly due to its doctrinal complexity, and partly due to its controversial nature,61 the CPL does not incorporate the adverse possession doctrine.

Law-and-economics scholars have provided several justifications for the American adverse possession doctrine, including slothfulness of the true owner, rewarding diligent possessors, as well as clearing land records and stale claims.62 Not all of these economic rationales are applicable to China’s context, however. Countries (such as China)

56. Unlike in the U.S., where common law courts do not always inquire whether the adverse possessors are good faith or bad faith, in civil law countries like Germany, France, and Taiwan, the courts have to ascertain whether the adverse possessors are good faith, in order to determine whether to apply the prescription doctrine, or which sets of prescription doctrines to apply.
60. See Shen, supra note 24, at 223–24 (noting that the scholarly debate on whether to follow the Japanese or the German system of statutes of limitations has yet to be settled, and that this is one of the reasons for the CPL not recognizing adverse possession doctrine).
61. The CPL lawmakers worried that adverse possession is against “socialistic morality” and may encourage “gains without pains.” See Liang & Chen, supra note 25, at 148; Sun, supra note 1, at 310.
62. See Merrill & Smith, supra note 27, at 37–38. See also Epstein, supra note 52, at 678; Merrill, supra note 58, at 1128–31.
that adopt the registration system (rather than the recording system employed in almost all American jurisdictions) have much less of a need to clear land records, as old records do not matter anyway—the registration system is designed to avoid the hassles of examining previous land records. Moreover, without any legally recognized future interests in the CPL, there will not be many old claims to be cleared.

As for other justifications for adverse possession, I agree with Fennell that the goal of property law should be facilitating transfer of property rights to higher-value users, and the adverse possession doctrine in the U.S. common law is not helpful in this end. Fennell has advocated that the adverse possession doctrine should be narrowed and applied only when two conditions are met: (1) the difference between parties’ valuations of the property is very large; (2) a market transaction is not available. Still, I doubt whether even this shrunken version should have a place in the future Chinese civil code.

As far as adverse possession of immovable property is concerned, land in China is publicly owned, and Chinese lawmakers are highly unlikely to allow adverse possession of land. Thus, the adverse possession doctrine is only applicable to ownership of constructions, superficies rights, or servitudes. The case for adverse possession of

63. As Robert Ellickson’s article that also appears in this issue shows, a redeeming right to a Dian right and the landlord’s right to take back the property after the lease expires are, functionally speaking, future interests. Robert C. Ellickson, The Costs of Complex Land Titles: Two Examples from China, 1 Brigham-Kanner Property Rights Conf. J. 281 (2012). But note that lease is a type of contract in China law and Dian is a customary property right. Other functional future interests in the CPL are registered and thus will not produce great information costs.

64. See the discussions of the “quieting title” argument in Merrill, supra note 58, at 1129.


66. The adverse possession doctrine in the TCC, the BGB, and many other civil codes, though different in details, share the same contour and will be considered inefficient under Fennell’s framework.


68. But see Liang & Chen, supra note 25, at 148 (arguing that the future Chinese civil code should stipulate the adverse possession doctrine).

69. I believe that Fennell’s insights are also applicable to movable properties as well, but I will concentrate on frying the bigger fish—real properties—here.
superficies rights or servitudes on land\textsuperscript{70} is weak, because Fennell’s second condition does not hold. A market transaction is not available when one does not know who the true owner is or where she is—in China, the government or the collective, who owns the land, is always there. Granted, adverse possession of buildings could meet the two conditions above. Nevertheless, building ownership is subject to mandatory registration; thus, it is not often difficult to locate the owner.

Not recognizing the right to adversely possess real properties at all in the CPL, therefore, seems to be welfare-increasing. The above discussions show that even a narrow adverse possession doctrine that aims to transfer property rights to higher-value users can at most be infrequently used, mainly due to China’s public ownership of land and real property registration system. Discarding the doctrine altogether has the advantage of simplifying the legal rule, thus reducing (social) judicial costs, as no one will litigate in court to claim adverse possession, and the court thus does not have to examine the complicated issues and evidence involved. Eliminating any hope of acquiring titles to real properties through adverse possession should facilitate voluntary transactions, which generally promote efficiency. Moreover, like in the case of the accession doctrine, the property law system can work smoothly without the adverse possession doctrine, because in their absence property law can simply stick to its norm—the property rule protection of titles.\textsuperscript{71}

\section*{II. Unusual Contents}

This Part demonstrates and analyzes several groups of unusual contents in the CPL. Subpart A shows that the CPL contains a lot of stipulations of regulatory nature that are not included in other developed countries’ civil codes; these unique stipulations are sometimes symbolic and sometimes substantive. Subpart B observes that in at least three ways the CPL uses the governance strategy differently from other civil codes. Subpart C argues that the CPL makes quite

\textsuperscript{70} In practice, servitudes on constructions are not plentiful. See, e.g., SHEN, supra note 24, at 293.

\textsuperscript{71} See Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. Rev. 1719, 1722 (2004) (“the law treats property rule protection as the norm and liability rule protection as the exception”).
a few exceptions to the rule of mandatory registration. Subpart D
points out that the CPL defines property rights, which is a rare feat
among civil codes.

A. Mixture of Administrative Law and Property Law

One of the most salient differences between the CPL and the
TCC—indeed, probably any developed country’s civil code, is the
mixture of administrative law and property law.72 A handsome
portion of the relatively short CPL is devoted to declaring prohi-
bitions or mandates—but usually without specifying the penalties
for violations. Some of the public law-like stipulations direct gov-
ernment agencies and employees to do or not to do certain things.
For instance, Article 22 stipulates that the registrar should charge
by the number of filings, rather than by the size or market value of
the registered real estate.73 Article 13 forbids the registrar to require,
among other things, repetitive registration in the name of annual
inspection. Article 57 essentially asks government employees in
charge of state-owned properties to work harder. Besides, Articles 10
and 43 declare the legislature’s policy stance on a national real estate
registration system and rezoning, respectively.

Some of the public law-like stipulations target property interest
holders. For example, Articles 83, 89, 90, and 120 tell them to obey
the relevant law, whereas Article 11 lists the documents necessary
for real estate registration application.

Other stipulations shall find an audience in the general public.
For example, Article 42 stipulates that no institution or individual
shall withhold, misappropriate, or embezzle the takings compen-
sation. In addition, after Article 4 announces that state-owned, col-
lective, and private properties are protected by law and shall not be
infringed upon by any institute or person, Articles 56, 63, and 66

72. Note that the public-private distinction is well recognized in China. See, e.g., SUN, supra note 1, at 30 (distinguishing between property rights and regulatory power).
restate that these three types of property are legally protected and are prohibited from occupation, theft, cheating, or being withheld or damaged by any institution or person.

These unusual contents may appear in the CPL because Chinese lawmakers have been accustomed to the command-and-control approach in legislating. The CPL lawmakers thus did not notice that such regulatory contents do not square with other private law contents. Nevertheless, the Contract Law of 1999 and the Tort Law of 2009 do not intermingle administrative contents and private law contents; therefore this argument thus does not hold much water.

An alternative explanation is that the CPL lawmakers may have wished to use the CPL as an educational document for government officials and even the general public. Most Chinese people have grown up immersed in communism, in which every righteous citizen has a right to take resources from the common and has little respect for private properties. Hence, the CPL has to tell its readers: “You, you, and you, we mean it. These are private (or state-owned or collective) properties, not common resources. Get your hands off them.” In addition, iteration of “the obvious” in the CPL may also signal the Party/state’s will to protect property rights.

B. Different Uses of Governance Strategy

Henry Smith has famously distinguished the strategies for delineating property rights into exclusion and governance. In the exclusion strategy, “decisions about resource use are delegated to an owner,” whereas the governance strategy “pick[s] out uses and users in more detail.” For transaction cost reasons, property law has to rely on the exclusion strategy most of the time and as a default, while using the more costly governance strategy to delineate property rights when the stakes are high. Interestingly, the CPL uses the governance strategy in a different fashion than the TCC and other civil codes do. I discuss three examples below.

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1. Superficies Subject to Public Regulation

The CPL frequently uses public regulation in delineating the three types of superficies rights: the farming right (Articles 124–134), the construction right (Articles 135–151), and the residence right (Articles 152–155). Ordinarily, the term, renewal, transfer, and other contents of a superficies right is subject to negotiation between the “bare owner” and the (potential) holders of lesser property interests. Under the CPL, due to the state ownership of land in the city (Article 47) and collective ownership of farmland (Article 60), the bare owners in a superficies relation are always the state or “the collective,” whereas the holders of farming, construction, or residence rights are private parties. Still, the CPL can authorize the “quasi-public” collectives and the local governments that manage the state properties to negotiate, as if they were private parties, the contents of the superficies with the (potential) holders of lesser property interests. The CPL, however, chooses instead to rely on the governance strategy more heavily than the TCC and other civil codes do.

The CPL deprives the collectives and local governments (as managers of state properties) of discretion, and controls various contents of superficies rights. For example, Article 126 stipulates that upon expiration of farming rights, the bare owners generally are obliged

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76. For an overview of these three types of superficies rights, see Rehm & Julius, supra note 13, at 208–16.
77. This right can be literally translated as the “right to manage land through contracting” (tudi chengbao jingyingquan). Article 125 of the CPL stipulates that a holder of such a right enjoys the right to possess, utilize and obtain profits from the farmland, forestland and grassland.
78. This right can be literally translated as the “right to use construction land” (jian-sheyongdi shiyongquan). Article 135 of the CPL prescribes that a holder of such a right shall, according to law, be entitled to possess, utilize and obtain profits from the state-owned land, and have the right to build buildings and their accessory facilities.
79. This right can be literally translated as the “right to use residential housing land” (zhaijidi shiyongquan). Article 152 stipulates that a holder of such a right shall enjoy the right to possess and utilize collectively owned land, and the right to build residential buildings and their accessory facilities on such land.
80. A bare owner or a nude owner is an owner of a thing that is burdened by a lesser property interest, such as mortgage or servitude.
81. Many other different types of resources are state-owned or collectively owned. See Articles 45–52, 58, and 59 of the CPL.
82. Article 60 defines how and when the resource is collectively owned. For discussions of the meaning of “the collective” in the CPL, see Chen, supra note 10, at 19–22.
83. The nature of the collectives is a complicated question and I will defer the discussion to another paper.
Similarly, Article 149 stipulates that construction rights on residential land are automatically renewed upon expiration. In addition, Article 126 prescribes the exact term of farming rights on arable land (30 years). Moreover, according to Article 153, the acquisition, exercise, and transferal of residence rights are regulated by the Land Management Act, among other statutes. Finally, Articles 128 and 140 require holders of farming rights and construction rights to obtain approvals from relevant competent administrative agencies if they plan to use the land in a different way.

The rationales behind these unconventional uses of the governance strategy are probably to centralize land use power. If the length of term and the standards for renewal and allowing changes of land use are not specified by a national law, but are left to the discretions of the collectives or local governments, the central government would lose the power to shape land use policy. Additionally, as Steven Cheung pointed out in China’s context, “[t]he right to decide and allocate land use is the key issue in a developing country,” and the economic power has already by and large rested in the xians (a level of local government below provinces and cities) in today’s China.

Given the non-private land ownership under the CPL, centralization of power, however, is not necessarily a bad thing. The farming right and the residence right are so-called “member rights,” meaning that one has to be a member in the collective to qualify for acquisition of such rights in the first place. In addition, the constitutional right to travel freely within the country (or, for that matter, to change “membership”) is still in its infancy. Consequently, the collectives are monopolists in agricultural land and land for residential use in the

84. See Cui, supra note 34, at 278.
85. Interestingly, the automatic renewal of construction rights on residential land and the bare owners’ obligation to renew farming rights make these superficies rights, economically speaking, essentially full ownership.
86. Eva Pils also pointed out that “both rhetorical 'over-protection' in the private sphere and under-protection against the government result in a concentration of power in the hands of the State . . . .” Eva Pils, Chinese Property Law as an Image of PRC History, 39 Hong Kong L.J. 595, 597 (2009).
88. In the context of police control, Tanner and Green argue that decentralization of law enforcement power constitutes “a major obstacle to building rule of law in China.” Murray Scot Tanner & Eric Green, Principals and Secret Agents: Central Versus Local Controls Over Policing and Obstacles to “Rule of Law” in China, 191 China Q. 644, 645 (2007).
89. See Shen, supra note 24, at 273, 289 (noting that the farming right and the residence right are generally member rights); Liang & Chen, supra note 25, at 275–76.
countryside and face no competition from other collectives, because peasants hardly have the right to “exit.” Granted, for most home-owners in most jurisdictions, exit is always a costly option. Nevertheless, there are always some people looking for new places to live, and the possibility of “entrance” (particularly entrance of people from the upper echelon, who contribute to the local tax receipt) often stimulates juridical competitions. In China’s context, due to the nature of membership right, peasants simply cannot move to different villages. Therefore, local governments have fewer incentives to reduce corruption to attract new taxpayers.

If the land use power is decentralized to the collectives, and they abuse the power, peasants can still “voice.” Voice, however, is much less powerful without regular, competitive local elections. A unique type of voicing in China, xinfang or shangfang, is not always very effective and certainly very costly. It is doubtful whether peasants’ voice alone is enough to curtail the local corruption. Therefore, the heavy use of the governance strategy in superficies rights to centralize the land use power and to reduce abuse of such power by the collectives may be more welfare-enhancing for Chinese peasants.

2. Neighborly Relations Lightly Treated

The “neighborly relations” part in a civil code is usually a gathering point for governance strategies, but the CPL contains a relatively short and simple neighborly relations part. Many civil codes contain long and sophisticated stipulations in the neighborly relations part. For example, in civil codes of Portugal, Italy, Taiwan, and Germany, neighborly relations takes up roughly 20%, 12%, 10%, and 5%, respectively, of their Book of the Law of Things in terms of the

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90. For discussions of voice versus exit, see, e.g., ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 72–74 (2001).

91. For discussions of xinfang, see, e.g., Taisu Zhang, The Xinfang Phenomenon: Why the Chinese Prefer Administrative Petitioning Over Litigation, 3 SOCIOLOGICAL STUD. 139 (2009).

92. Note that the governance strategy used here does not simply transfer the decision-making power from local officials to officials in central government. If done this way, it may be the officials in central government that are taking bribes. The crystal-clear rule stipulated by the national legislature, instead, gives no official the opportunity to take bribes.

93. In civil law systems, the law of neighborly relations contains doctrines that in the common law would usually be discussed in nuisance law, and sometimes in trespass law.
number of articles. And many of these stipulations are typical examples of the governance strategy.94 By contrast, only 4% (9 out of 247) of the CPL concerns neighborly relations, and the nine articles are brief.95

I have two conjectures on the light treatment of the neighborly relations by the CPL. First, land is either collectively owned or state-owned; thus, there is no private dispute between neighboring landowners, simplifying the neighborly relations. Second, many civil codes were enacted before the rise of the regulatory state. Adjustments of property rights in a civil code will not be in conflict with an existing public regulation. In China, the development is the other way around—many regulations were already in place by 2007. Thus, sophisticated governance of neighborly relations in the CPL may confuse the administrative agencies or the court as to when and whether the CPL or regulatory statutes should prevail. Therefore, the CPL shies away from beefing up the contents in the neighborly relations part, but only because the governance strategy has already been employed elsewhere—in regulatory statutes.

3. Imposition of a Market Standard

The socialistic CPL at times imposes a market standard when capitalistic civil codes fail to.96 Articles 195, 219, and 236 require that market prices shall be used as benchmarks when mortgaged,
pledged, and retained assets are “sold” by the court (or other independent institutions) or “converted into money” through bilateral bargaining. Nevertheless, this market price standard is not imposed when these assets are “auctioned” by the court. The CPL does not specify the consequences for failure to comply (for example, when the court sells an asset for 80% of its market value). To my knowledge no Chinese scholars have elaborated on these stipulations, either. If these articles are interpreted to mean that a mortgagor’s debt claim equivalent to the asset’s market price will be written off, no matter how much the asset is actually sold for, Articles 195, 219, and 236 use a strong governance strategy. If these articles are instead just a gentle reminder or a wish by the lawmakers, the governance strategy adopted here is at most symbolic.97

C. Occasional Optional Registration

Registration of real property rights is not always mandatory, declarations by Articles 9, 14, and 17 of the CPL notwithstanding.98 For instance, servitudes and residence rights need not be registered (Articles 158 and 155, respectively).99 China has yet to have a unified registration system or an electronic real estate registration database,100 and many lesser property interests had not been registered before the enactment of the CPL in 2007, either. The huge

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97. At the private law workshop in Renmin University Law School, the attending scholars, judges, and doctoral students all have a different take of what these three articles mean. Notably, a judge in the People’s Supreme Court informed me that in practice, “market prices” are a floating concept. Secured assets are usually auctioned first. After two rounds of auction, if no one bids, the court will try to sell the secured assets at half price—because in the second auction, the asset is listed at 80% × 80% = 64% of its original market price, and it is expected that only by further lowering the sale price can the court actually sell the asset. The judge contends that the practice will not violate Articles 195, 219, and 236, because the asset’s “market price” has decreased as the foreclosure process drags on.

No matter how these three articles are interpreted, their ambiguity imposes transaction costs on parties who need to use secured transactions.

98. Pursuant to Articles 9 and 14, modifications of real property rights shall take effect upon registration, unless otherwise provided by law. Article 17 adds that the land register is the final authority on real property rights.

99. See LIANG & CHEN, supra note 25, at 275.

100. Although Article 10 of the CPL proclaims that it implements a “unified registration system,” the real estate registration system in China as it now stands is extremely complicated, as various administrative agencies are in charge of registration for different property rights. For a list that matches the property rights with the agencies in charge, see SHEN, supra note 24, at 167–70.
administrative costs of integrating all the current real estate registration systems, investigating all unregistered interests to put them on record, and daily updating of registration records must have prevented the CPL from sticking to the system of mandatory registration that is quite common in civil-law jurisdictions such as Germany and Taiwan.

One particularly interesting example of optional registration is farming rights.101 Local governments are obliged to issue certificates to farming right holders and keep an up-to-date registry, which is separate from the land registry (Article 127). Farming rights that are not registered in the local government’s registry are invalid only in relation to third parties acting in good faith (Article 129). For example, Abby is the original holder of a farming right; Abby first sells the right to Bob, without updating the transfer in the local government’s registry, and then to Christine who is unaware of the previous transaction between Abby and Bob. Christine will acquire the farming right.

It has been argued that the optional registration of farming rights makes economic sense for the following reasons. First, only peasants who are “members” of the collective are qualified to acquire farming rights, and these peasants would know each other and everyone’s rights—information costs are low for potential farming rights acquirers. In addition, the certificates issued by the local governments serve as notice and further decrease third parties’ information costs. Finally, mandatory registration of all—literally millions—of farming rights would overwhelm the land registrar.102

I would add one more economic rationale for the optional registration of farming rights. The key is that a bare owner has incentives to conceal the existence of superficies to her potential buyer (to increase prices), while a holder of superficies rights has incentives to prove to her potential buyer that her right exists (to make a deal). Uniform and mandatory registration, therefore, reduces information costs mostly for land buyers. But since under the CPL, farming land is collectively owned and cannot be sold, no potential buyers exist to

101. For criticism of optional registration of farming rights, see CUI, supra note 34, at 266–67. But see LIANG & CHEN, supra note 25, at 260–61 (arguing that it is impractical to mandate registration).
102. See CHEN, supra note 8, at 222.
benefit from mandatory registration. As for buyers of superficies rights, the official certificate and records kept by the local governments are enough evidence to show them that the farming rights indeed exist. Therefore, optional registration of farming rights shall not hamper market transactions of farming rights.

D. Definition of Property Right

A surprising fact regarding civil property law is that the civil codes rarely define what a property right is. As a result, civil property law theories often fail to distinguish between property rights and ownership. Article 2 of the CPL manages to avoid such conceptual confusion and define a property right as a right to directly control a specific thing and to exclude others. Article 2 further articulates that property rights are composed of ownership, usufruct, and security rights, dispelling any notion that property rights are co-terminous with ownership. In doing so, the CPL also demonstrates that it follows the civil-law tradition in conceptualizing a property right as “men versus things,” rather than “men versus men regarding resource,” which is rooted in the common-law tradition. Elsewhere, Henry Smith and I have already criticized the concepts of property rights in both traditions, so I will stop here.

Article 2 also stipulates that the objects of property rights include movable and immovable things, which is quite conventional. What demonstrates the CPL’s late-mover advantage is the unusual clause that ensues: “Rights can be objects of property rights if the law so stipulates.” Movable and immovable things are corporeal, while rights are incorporeal. The BGB has been criticized as inconsistent because, on the one hand, it recognizes only corporeal things as objects of property rights and, on the other hand, pledge of rights is

104. See Chang & Smith, supra note 75.
105. For discussions of these two traditions, see id.
106. See id.
107. For a critical discussion of rights as objects of property rights, see Chen, supra note 12, at 992.
list as a property right. By adding the aforementioned clause, the CPL, at least doctrinally speaking, avoids the inconsistency.

CONCLUSION

After years of fierce debates, in 2007 China finally enacted the first comprehensive property law since the communist party took over China in 1949. Using civil law logic and “style,” the CPL firmly declares its stance of protecting private properties. For a country that is only thirty plus years removed from the Cultural Revolution and, despite the economic reforms, is still under socialism, the achievement of the CPL, its lawmakers, and the large number of property scholars that have worked on or commented on the drafts of the CPL should be lauded.

Nevertheless, to integrate capitalistic ideas into a socialistic structure, and to maintain social and political stability, the CPL makes quite a few compromises, some of which are unique in modern property law—thus, the CPL is called a law with Chinese characteristics. This article finds that the compromising choices by the CPL lawmakers often lead to the (unintended?) consequence of centralizing the power to determine the use of immovable things and even movable things, although this is not necessarily inefficient, given the current overarching structure of the CPL. In addition, a few stipulations that are unique features of the CPL have unfortunate welfare-reducing effects.

The long-awaited Chinese civil code had been expected to come out in 2010, but has since been postponed. Still, it may be enacted in the near future. Hopefully, being informed of the inefficiency of certain stipulations with Chinese characteristics in the CPL, Chinese lawmakers can fix them in the civil code. Without doubt, property law and property theory should be adjusted to reflect the idiosyncrasy of a country; hence, enacting a law with a jurisdiction’s own characteristics is a laudable endeavor. Nevertheless, eventually, at least from the law-and-economic perspective, the welfare of the people should be the priority concern.


109. For the common law’s and civil law’s different styles of delineating property rights, see Chang & Smith, supra note 75.
THE USE AND ABUSE OF PROPERTY RIGHTS IN SAVING THE ENVIRONMENT

JAMES S. BURLING*

“The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!”

Private property creates for the individual a sphere in which he is free of the state. It sets limits to the operation of the authoritarian will. It allows other forces to arise side by side with and in opposition to political power. It thus becomes the basis of all those activities that are free from violent interference on the part of the state. It is the soil in which the seeds of freedom are nurtured and in which the autonomy of the individual and ultimately all intellectual and material progress are rooted.

INTRODUCTION

While freedom and property may be inseparable, the temptation to sacrifice one or the other to seemingly more critical societal goals is ever present. And when either one is threatened, so is the other. Yet, the temptation to yield either is an inexorable imperative of those who govern. In the United States, for example, the threat to security in the post-9/11 world has led to the Patriot Act, which some claim intrudes upon individual liberty and privacy of American citizens.

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Starting with the rise of progressivism and continuing through the post–New Deal era, the compulsion to reengineer society for the “common good” has been effected at great cost to originalist understandings of individual rights.5

Another artifact of progressivism was the wide-scale adoption of zoning and other land-use controls, a trend that received its first major imprimatur of legitimacy in an opinion written by the conservative Supreme Court Justice George Sutherland, in *Euclid v. Ambler.*6 When it comes to the transfer of the control over established rights in property and wealth, nothing has come close to the revolution engendered by the widespread adoption of zoning and land use controls in the United States.7 Where land use decisions were once exclusively made by owners of the land, subject only to the proscriptions against creating common-law nuisances, the decisions rest today in myriad boards, commissions, and regulatory agencies at the local, state, and federal level, all of whom have one or more hands in the decision-making process. This curtailment of an individual’s liberty to make choices over the use of property is the functional equivalent of the impressment of various easements and negative covenants on the property. Thus while neighbors could once have voluntarily negotiated the terms of neighboring land uses through easements containing, for example, height or density restrictions, in the new zoning world these same restrictions are imposed on a broader scale by political bodies. Moreover, these governmental bodies can and often do use this power to leverage exactions, fees, and other direct wealth transfers from owners to government.

Landowners today are facing another reality: the rise of pressure to put property into conservation easements. While there can be tax

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7. But see Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property,* 28 Yale J. on Reg. 91 (2011) (Euclid v. Ambler represents not so much a usurpation of property rights as a fundamental change in the definition of property ownership. Specifically, Shoked argues that with the rise of suburban ownership, the Jeffersonian ideal of the independent yeoman farmer has been transformed into an ideal of yeoman suburban owners. In order to protect the interests of these suburban owners, the meaning of property entails less liberty of action in order to promote the stability interests of suburban owners.).
advantages of donating land to conservation easements, the long-term consequences of splitting estates though the conservation easement process is unknown. Similarly, when landowners feel compelled to put land into conservation easements, either to stave off more severe zoning or to appease government regulators and environmentalists during a development process, the resulting land patterns may be more haphazard than planned.

There are some checks imposed upon governmental avariciousness. There can be a democratic response to attempts by government to take property from small landowners for the benefit of politically well-connected developers. But that response has largely been confined to the post-
Kelo
backlash and some of that response was “engineered” by redevelopment interests to render reform into a joke. Ordinarily, democratic instincts do not treat landowners particularly well as the leveling instinct criticized by Madison remains with us today. Rent control in cities with politically powerful renter constituencies is a classic example of democratic usurpation of property rights.

But both supporters and critics of property rights recognize the decline. Some of this has been reflected by replacing the common-law language of property (related to a hard and fast physical thing) with reference to a “bundle of sticks” or an invocation of social norms that promote “human flourishing.” The bundle of sticks metaphor

8. One such example is the reaction to redevelopment in the wake of
10. Madison argued that the structure of the federal government would resist “A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project . . . .” The Federalist No. 10 (James Madison).
is just another way of dividing up ownership rights, taking some, and leaving the owner with the remainder and without compensation. Property in terms of “human flourishing” may be a fine exercise for the academy but it fails to provide a means for defining and understanding property by lawyers, judges, and lay people. Both of the latter constructs are also, conveniently, much more malleable in the hands of those seeking to restrict more traditional understandings of property rights.

Imprecision in language reigns supreme. As far back as 1922 we learned that a regulation that goes “too far” may be proscribed by the United States Constitution as an uncompensated regulatory taking.15 But what is too far? Ninety years later we can only wish for a judicial nostrum as precise as Justice Stewart’s quip about pornography.16 We do know when there is a total wipeout of all use or value, there may be a categorical taking.17 We know that a physical invasion of any magnitude is a taking.18 And, to some extent we know that in at least some circumstances, an exaction that is untethered to an impact caused by land development may be determined unconstitutional by Supreme Court doctrines articulated in Nollan v. California Coastal Commission19 and Dolan v. City of Tigard.20 And, of course we know that there may or may not, but usually not, be a taking in other circumstances after various ambiguous and undefined “factors” are weighed against each other.21 Today, after 90 years of chasing the quark,22 the promise of relief suggested by the law of regulatory

18. Id. at 1015; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 428 (1982).
19. 483 U.S. 825, 836–37 (1987) (requiring that there be a “nexus” between the impacts caused by a development and exactions demanded by a permitting agency).
20. 512 U.S. 374, 385 (1994) (requiring that there be “rough proportionality” between an exaction and an impact caused by a development).
takings exists more in theory than as practical reality for the typical landowner of ordinary means.

New challenges to rights in property surfaced in the 1960s with a revolution in land use controls. With rising environmental consciousness, Euclidean zoning schemes, which supposedly existed to provide reciprocal economic and aesthetic benefits to all landowners, have been supplanted by more overarching and pure environmental controls. Such controls have ranged from an early utilitarian ethic to conserve natural values for the benefit of people and their future generations to a later embrace of an ethic to preserve environmental values for the sake of preservation itself. In some cases the public’s thirst for environmental amenities has given way to expressions of classic Nimbyism and even into cooption by those who harbor the misanthropic dreams of deep ecology.23

The doctrine of regulatory takings has been powerless to protect any but the most extreme regulatory assaults on property rights. If rights in property are vulnerable to majoritarian desires for zoning, rent control, and all manner of environmental controls, and if freedom and property are interdependent,24 does this pose a genuine threat to “freedom?”

This article will focus upon the threats to property represented by the environmental initiatives of the past forty years and how these initiatives have evolved from the ideals of conservation to the schemes of preservation, including conservation easements. Finally, it will ask whether the threats to freedom are truly dangerous assaults on individual liberty or simply bumps in the road to a green Nirvana.

I. A Few Words About Freedom and Rights in Property

If the regulatory state poses a threat to freedom, it must be asked, freedom to do what? Freedom to stand up to the government bureaucrats who hold the keys to the regulatory kingdom? Freedom to earn a living from the use of privately owned property? Freedom to use property and property-derived wealth to challenge the government

23. See BILL DEVAL & GEORGE SESSIONS, DEEP ECOLOGY, LIVING AS IF NATURE MATTERED (Gibbs Smith 1985). For an account of the deep ecology, the forests, and the spotted owl, see ALSTON CHASE, IN A DARK WOOD: THE FIGHT OVER FORESTS AND THE MYTHS OF NATURE (Transaction Publishers, 2001) [hereinafter IN A DARK WOOD].
24. See, e.g., supra notes 1 and 2.
itself? I do not presume in this article to suggest any new or novel ideas about the meaning of freedom. Nor do I presume it is possible to suggest that there is a universally accepted definition of the word. Freedom is universally considered a good thing to have—in varying degrees at any rate. Even those states unwilling to allow it to flourish in the classical liberal sense have often adopted the Orwellian tactic of providing freedom to the state’s citizens after redefining what freedom means. Thus, some states are in the habit of defining freedom to be the availability of whatever the government provides for its citizens—jobs (freedom from want), security (freedom from fear), and food (freedom from hunger). Other states have an even more paternalistic way of suggesting to its citizens that they have all the freedom they will ever need—conservative religious-based dress codes for women provide freedom from male harassment, proscriptions on Islamist or Christian preaching provides freedom of the fear of an Islamist or Christian state. In other states restrictions on “hate speech” can provide citizens with freedom from blasphemy and unwanted societal intolerance for one’s race, religion, or gender orientation. And zoning, of course, by limiting the freedom of one set of owners to utilize their property, may provide freedom from unwanted neighborhood uses to another set of owners.

Generally, however, at least for the purposes of this paper, freedom means, or meant, something entirely different in the tradition of Western democracies. Reflecting the classical liberal tradition, freedom in these states traditionally meant not the positive provision of goods and services, and not even the protection from the slings and arrows of one’s fellow citizens, but the freedom from government itself, spelled out in terms of negatives imposed on government. The best example is in the Bill of Rights—the government shall not restrict free speech,25 the government shall not infringe on the practice of religion or the beliefs of its citizens, the government shall not take property except in limited circumstances and only after the payment of just compensation, the government shall not deprive one of his life or liberty without due process of law, the government shall not

search one’s home or effects without a warrant, and so on.\textsuperscript{26} Moreover, just because a proscription doesn’t exist in the Constitution, it doesn’t mean the government can infringe upon an unenumerated freedom.\textsuperscript{27} This sense of freedom permits one to speak for or against the government and for or against a particular religious belief without fear of being punished. It permits one to believe any legitimate or cockamamie philosophy one likes without being locked up.\textsuperscript{28} It permits one to worship the One True God, several middling False Gods, the Devil, Gaia,\textsuperscript{29} some Really Big Trees,\textsuperscript{30} or the holy of the holies—the Great Pumpkin\textsuperscript{31}—all without the benefit or impediment of government sponsorship or persecution. At the same time, freedom in the classical liberal tradition permits the Greta Garbos of the world to exercise their freedom to be let alone.\textsuperscript{32}

Property provides a buffer between government and the individual. If an individual may utilize property as a means to a livelihood, as a cushion against economic want, and as a physical place to be free from the prying eyes of officious government employees, then the essential relation between property and freedom is apparent. But if property cannot be used without obtaining an assortment of arbitrary permissions from a multitude of officials, if the right to earn a living from property is made dependent on the good will of others, and if property may be routinely entered and inspected as a condition of its use, then the hallmarks of a free society are diminished.

Thus, the freedoms embodied in classical liberalism cannot be considered in isolation. They are not hermetically sealed off from one another and there are common threads running through them all. In the views of the Founding Fathers, first and foremost of the

\begin{enumerate}
\item \textsuperscript{26} See, e.g., U.S. Const. amend. I, IV, V.
\item \textsuperscript{27} U.S. Const. amend. IX.
\item \textsuperscript{28} Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253 (2002) (A First Amendment case, Justice Kennedy wrote, “The right to think is the beginning of freedom.”).
\item \textsuperscript{30} For more, see Tree Worship, WIKIPEDIA, http://en.wikipedia.org/wiki/Tree_worship (last visited June 23, 2012).
\end{enumerate}
common threads was the right to own and use property. In his *Essay on Property*, James Madison took a generous view of property, explaining that property and rights are one and the same, “As a man is said to have a right to his property, he may be equally said to have a property in his rights.” He later posited that if the United States keeps the promise to respect property, greatness would be in store:

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

The Founders’ respect for individual rights in property is understandable. To varying degrees, they were influenced by the likes of John Locke and William Blackstone. In his Second Treatise on Government, Locke had an almost libertarian take on property. In one passage, for example, Locke suggested that the preservation of property is the essential reason why government is instituted among men:

And 'tis not without reason, that he [man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual Preservation of their Lives, Liberties and Estates, which I call by the general Name, Property.

The consequence of a government’s failure to protect the property of its citizens was severe:

> Whenever the Legislators endeavor to take away, and destroy the Property of the People . . . they put themselves into a state of War with the People, who are thereupon absolved from any further Obedience . . .

34. Id.
36. Id. § 222. Accordingly, the Declaration of Independence echoed this theme: “Whenever any Form of Government becomes destructive of these ends [life, liberty and the pursuit
William Blackstone was equally effusive on property. In his *Commentaries on the Laws of England*, he wrote:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.\(^{37}\)

The recognition of the inseparable bond between property and freedom remains alive to this day. In *Lynch v. Household Finance Corp.*, the Supreme Court noted:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a “personal” right, whether the “property” in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.\(^{38}\)

This long Western, British, and American embrace of a natural law conception of property rights—rights that are inherent to mankind and not the boon of a magnanimous government—has not been of course universally acknowledged or appreciated. Jean Jacques Rousseau lamented the nature of private property:

The first man, who, after enclosing a piece of ground, took it into his head to say, “This is mine,” and found people simple enough to believe him, was the true founder of civil society. How many crimes, how many wars, how many murders, how many misfortunes and horrors, would that man have saved the human species,

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37. 1 WILLIAM BLACKSTONE, COMMENTARIES *2.  
who pulling up the stakes or filling up the ditches should have cried to his fellows: Be sure not to listen to this imposter; you are lost, if you forget that the fruits of the earth belong equally to us all, and the earth itself to nobody!\textsuperscript{39}

There have been many successors to Rousseau. From Karl Marx to Lenin to Mao, many scholars and political leaders have had little use for a philosophy of rights that elevates individuals above their governments and that attempts to justify and cement the inequalities that inevitably arise in a system of laws that distributes property and wealth on principles other than total equality. Rousseau also presaged a more modern attack on private property—the notions of deep ecology that animates a core ethos within the environmental movement. In his Discourse on Inequality he posited that without civilization and all its accouterments, men would be in a state of perfect health and bliss.\textsuperscript{40}

This tradition is seen today in the deep ecology movement, which eschews modern industrialization and technology.\textsuperscript{41} As will be shown, while the egalitarianism most famously championed by Marx and Engels was the greatest threat to traditional understandings of and respect for private property in the 19th and 20th centuries, the rise of environmentalism poses an equally serious challenge in the 21st.

\section*{II. The Rise of Environmental Regulation}

On the eve of the first Earth Day in 1970, the propaganda machine was in full swing. The earth was in decline. The world’s population was headed toward massive famine of apocalyptic dimensions.\textsuperscript{42} Our air and water were poisoned.\textsuperscript{43} The great animals were on a fast train to extinction, and Noah was absent, his God having recently died.\textsuperscript{44} A mock documentary on public television portrayed two greedy capitalist developers in the near(?) future shaking hands as the last

\begin{itemize}
  \item \textsuperscript{39} \textit{Jean Jacques Rousseau, On the Inequality Among Mankind, Part II,} at 1, \textit{available at} http://www.bartleby.com/34/3/2.html.
  \item \textsuperscript{40} \textit{Jean Jacques Rousseau, On the Inequality Among Mankind, Part I,} at 9, \textit{available at} http://www.bartleby.com/34/3/1.html (“Man therefore, in a state of nature where there are so few sources of sickness, can have no great occasion for physic, and still less for physicians . . . .”).
  \item \textsuperscript{41} See, e.g., \textit{Deval & Sessions, supra} note 23.
  \item \textsuperscript{42} See, e.g., \textit{Paul R. Ehrlich, The Population Bomb} (Ballantine Books 1971).
  \item \textsuperscript{43} See, e.g., \textit{Rachel Carson, Silent Spring} (Houghton Mifflin Co. 1962).
  \item \textsuperscript{44} The death was reported in a \textit{Time} cover story. \textit{Is God Dead?}, \textit{Time}, Apr. 8, 1966, \textit{available at} http://www.time.com/time/covers/0,16641,19660408,00.html.
\end{itemize}
square foot of land in America was paved under. It wasn’t subtle, but it was effective.

In order to stave off the coming calamities, Congress and the Nixon White House lurched into action. In the space of a few short years, Congress passed the National Environmental Policy Act of 1969, Clean Air Act of 1970, turned relatively ineffectual water pollution laws into the powerhouse of the Clean Water Act in 1972, and, in what turned out to be true wolf in endangered megafauna’s clothing, the Endangered Species Act (“ESA”) in 1973. In addition, in order to combat toxic wastes, Congress passed the Toxic Substances Control Act in 1976 (“TSCA”) and the Resource Conservation and Recovery Act of 1976 (“RCRA”). A few years later, in response to a perceived toxic waste calamity at Love Canal, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“CERCLA” or “Superfund”). There are other federal statutes as well. In addition, and largely beyond the scope of this article, all the states have adopted their own environmental laws which serve to complement the federal laws.

These statutes changed everything, and everything was changed in ways that were mostly unanticipated by those who adopted them. If there is one truism about the combined weight of these statutes, it is that they went way beyond Euclidean zoning in their ability to convert the right to develop and use property into a privilege where the ultimate decision-making powers were wrested from the owners and given to the public, the bureaucrats, and the courts. The enactment of each one of these statutes, combined with the associated regulations and enforcement actions, have served to reduce the freedom of individual landowners to utilize property as the owners see fit. In

51. Love Canal was the site of a toxic waste site that later became a residential neighborhood. It became the subject of national and international attention in the mid-1970s. See Love Canal, WIKIPEDIA, http://en.wikipedia.org/wiki/Love_Canal (last visited June 23, 2012).
53. For a complete list, see Summaries of Environmental Laws and EOs, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, http://www.epa.gov/lawsregs/laws/#env (last visited June 23, 2012).
some cases, the freedom of individuals has been circumscribed in other ways as well. The alleged external harms caused by particular land uses may well have justified the expansion of the statutory law after the common law proved inadequate to prevent and remedy concerns over pollution. Nevertheless, the question of how much individual freedom has been sacrificed in pursuit of an environmental utopia has been seldom asked. In a few years we will be entering the fifth decade of robust environmental regulation. It may be time to consider what we have wrought, and whether it is time to alter course.

A. The Endangered Species Act

The Endangered Species Act54 (“ESA”) is the most powerful of all environmental laws.55 In the early 1970s, public angst over the fate of charismatic megafauna such as the bald eagle, trumpeter swan, peregrine falcon, various whales, grizzly bears, and similar animals led to a clamor for federal protection. With the ESA, species received federal protection. But we also got a whole lot more than virtually anyone anticipated. The reach of the Act is not confined to megafauna; it covers virtually every plant and animal including many that Congress never considered in its wildest collective imagination as deserving federal protection. Nor is it likely that Congress appreciated that species would be protected, “whatever the cost.”56

The mechanisms of the Act are far-reaching and the impacts of the ESA on economic activity have been legendary.

1. **Spotted owl**—imperiled the timber industry in the Pacific Northwest after a series of lawsuits filed by environmentalists.57

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55. For a description of the impacts of the ESA and suggestions to reform the act, see JOHNATHAN ADLER, REBUILDING THE ARK: NEW PERSPECTIVES ON ENDANGERED SPECIES ACT REFORM (Jonathan H. Adler, ed. 2010).
56. In Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978), the Supreme Court held that a major federal dam project must be stopped because of a small fish called the snail darter. The Court explained that the ESA required the protection of species above all else, “whatever the cost.” Id. at 184. But see Brandon M. Middleton, Restoring Tradition: The Inapplicability of TVA v. Hill’s Endangered Species Act Injunctive Relief Standard to Preliminary Injunctive Relief of Non-Federal Actors, 17 Mo. Envtl. L. & Pol’y Rev. 318 (2010) (arguing that costs should be a factor in ESA enforcement).
57. See IN A DARK WOOD, supra note 23.
2. **Delta Smelt**—severe water cutbacks in California’s central valley so more water is available for a five-inch minnow-like fish have caused a regulatory drought—meaning farmers have had to fallow hundreds of thousands of acres of farmland and farmworkers have experienced much higher levels of unemployment.58

3. **Klamath Basin**—severe water cutbacks to save salmon have caused severe economic distress to many farmers in a region bordering California and Oregon.59

4. **Grizzly bears, wolves**—with the protection of the former and reintroduction of the latter, western ranchers have become bitterly opposed to the ESA, which they see as allowing for depredations without adequate compensation.60

Beyond all these examples of economic impact, the ESA has worked more fundamental changes. First, along with the Clean Water Act described in the next section, the ESA has provided the federal government with the authority to wrest local land-use decision-making powers from local and state governments (those powers that belonged to landowners in the pre-**Euclid** days). While nowhere does the ESA explicitly usurp local land use decision-making powers, it has that practical effect. A local government may, for example, decree that Greenacre be used for ecosmart affordable working class housing. But if an endangered or threatened plant or critter is found on Greenacre, the owners may be required to attempt to obtain a federal incidental take permit before building to avoid running afoul of Section 9,61 and if any federal permits or actions are required (say the filling of a wetland or the use of federal low-income housing grant

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moneys), then the federal agencies must comply with Section 7 of the act (which requires extensive preactivity review and possible mitigation). More significantly to local governments, however, are those cases suggesting that a local or state government official who issues a permit that might result in a “take” of a species may be held liable for violating the ESA. Clearly, with the overlay of the ESA, local land use regulation is not what it used to be.

But there has also been a more fundamental shift with respect to the individual property owner. With the enactment and enforcement of the ESA, the federal government now holds a de facto conservation easement, or at least a negative covenant, over private land that contains endangered plants or animals and a potential easement over all other property that might someday be found to contain a species that might someday be listed.

In the circumstance of a private easement, one party acquires an easement over the land of another in a voluntary exchange, with the payment of consideration, and the availability of private enforcement mechanisms enforceable by arbitration or a court. But the imposition of species easements is quite different. There is often little or no notice to the landowner that the federal government has acquired authority over the property. There is certainly no payment of consideration. And, most distressing to a landowner, the easement can be enforced with massive fines or imprisonment. It is no wonder that some landowners have become bitter over the legacy of the ESA.

Whether the ESA has saved any species may depend on what we mean by “saved.” Has the ESA allowed the “recovery” of a meaningful number, or at least a nonzero number, of species? Or has it prevented the slide of species into the abyss of extinction? By the recovery

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63. See, e.g., Strahan v. Coxe, 127 F.3d 155 (1st Cir. 1997) (permitting by state regulators of lobster fishing, which may interfere with endangered whales, could be a take in violation of the Endangered Species Act).
64. Rarely asked, however, is whether the federal government actually possesses such local land-use powers under our constitutional system that considers that government to be one of limited jurisdiction, with only the powers enumerated in the Constitution. Especially with respect to non-commercial intrastate species, arguments have been raised that not even the New Deal era expansion of the Commerce Clause provides the federal government the authority to impose species-based restrictions on land use. So far, however, these challenges to federal authority have been unsuccessful. See, e.g., San Luis & Delta-Mendota Water Authority v. Salazar, 638 F.3d 1163 (9th Cir.), cert. denied, __ U.S. __ (2011) (holding that regulation of intrastate fish did not violate Commerce Clause).
standard, most acknowledge that the ESA hasn’t done much. But the ESA’s defenders posit that it has met the “slide into the abyss” standard—though this is more through supposition than any hard evidence. After all, we don’t have a spare Earth handy to test the efficacy of the ESA against the parallel universe Earth that lacks an ESA.

On whether the ESA does any harm to endangered and threatened species, there have always been whispered but, for obvious reasons, largely unverified tales of landowners who deal with their endangered species “problem” with the “shoot, shovel, and shut-up” trifecta. But there are more plausible, and documented, stories of landowners “preplanning” for the arrival of endangered species by rendering land unfit for nonhuman habitation. Owners of southern pine plantations are thought to be harvesting trees early and before the trees are mature enough to develop cavities that red-cockaded woodpeckers are wont to interpret to be an “open house” invitation. Owners of meadows likely to attract the endangered preble’s meadow-jumping mouse have taken similar actions.

Species protection is a public good, like any other public good. When the cost of anything approaches zero, the demand for that good will trend toward the infinite. With the ESA, not only is the cost to the government of acquiring control over private property close to zero, but there is the added incentive of costs and attorneys’ fees for anyone who successfully sues the federal government over the need to list additional species and set aside critical habitat for those species. With that, entities like the Center for Biological Diversity (“CBD”) and others have embarked on mass-litigation tactics to list hundreds of species and set aside hundreds of thousands of acres of public and private land as critical habitat. Landowners are not happy.

In 2005, Congressman Richard Pombo engineered the passage of the most sweeping reform of the Endangered Species Act (“ESA”) since it was passed in 1973. HR 3824, The Threatened and Endangered Species Recovery Act of 2005, would have required more workable habitat restoration and better peer review science for listings. Most intriguingly, it contained a compensation mechanism that would have

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66. Id. at 17.
rewarded landowners for maintaining endangered species habitats rather than the current practice of punishing landowners with a massive devaluation of their land values. While it passed the House with bipartisan support, it failed in the Republican-controlled Senate. To thank Representative Pombo for his efforts, the environmental community labeled Pombo an “eco-thug” and flooded his district with attack ads and volunteers in order to ensure his defeat at the 2006 election.  

Despite the clout of powerful environmental groups, the escalating and economic regulatory gridlock engendered by groups like CBD may someday be too much for Congress and the American public. It is one thing to take on the logging industry in the Pacific Northwest, or the farmers in central California, or an isolated reservoir here or a major energy pipeline in the West. But as the impacts of the Act ratchet down on more and more landowners, and the affected landowners begin to understand more clearly how the ESA has effectively imposed an uncompensated easement upon their lands, Congress may be forced to fix what’s broken. Until then, however, the ESA will remain a deeply flawed vehicle that has not begun to meet its promise for protecting species on private land.

B. The Clean Water Act—Wetlands Regulation

Another statute of far broader consequence than anticipated is the Clean Water Act’s provisions for the protection of wetlands. The CWA’s stated purpose was to restore the nation’s waters to swimming and drinking standards. Section 404 of the CWA pertains to wetlands. Prior to the CWA, the Corps of Engineers had some control over wetlands—those indisputably adjacent to navigable waters—through the Rivers and Harbors Act of 1899.

Like the ESA, the CWA’s wetlands section has had a dramatic impact and impingement on both state and local governments and private landowners. If a landowner suspects there might be wetlands on a parcel, the landowner may ask the United States Army Corps of

69. See generally ADLER, supra note 55.
70. 33 U.S.C. § 1344, et seq.
Engineers to perform a “wetlands delineation” of the property. Alternatively, the owner may ask the Corps to approve of a delineation performed by a consultant for the landowner. If wetlands are found, the landowner usually must obtain a Section 404 permit prior to undertaking any activities that affect the wetlands. However, if the owner disagrees with the delineation, there is no recourse. For example, assume a local government desires to build a playground on land it does not think contains wetlands. If the Corps considers the property a wetland under its jurisdiction, then the municipality must either apply for a permit at great cost or risk an enforcement action with concomitant fines and even criminal penalties. Most disturbingly, the landowner cannot challenge a wetlands delineation in court.

The toll of Section 404 can weigh even more heavily on individual landowners without the resources to fight back and who become entangled in an enforcement action. For example, if a landowner does not even suspect that a parcel contains wetlands, the owner may innocently neglect to ask for a wetlands delineation before altering the land—such as by grading the land to prepare it for farming or development. This can lead to a surprise enforcement action in the form of an Administrative Compliance Order. Based on “any evidence” which could be as little as a drive-by observation or complaint from a disgruntled neighbor, the EPA could issue a compliance order demanding a restoration—with no avenue of appeal. This, in fact, is the fate of the Sacketts from Priest Lake, Idaho. It is a system of neighbor informing against neighbor.

In 2007, the Sacketts purchased a modest residential lot across the street from Priest Lake, a navigable waterway. Michael Sackett was an experienced local contractor, and knew well the implications of wetlands. He also thought he knew a wetland when he saw one. But alas, identifying a wetland can be notoriously difficult—and subject

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71. Rapanos v. United States, 547 U.S. 715, 721 (2006) (“The average applicant for an individual permit spends 788 days and $271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and $28,915—not counting costs of mitigation or design changes.”).

72. Id. (“These costs cannot be avoided, because the Clean Water Act ‘impose[s] criminal liability,’ as well as steep civil fines, ‘on a broad range of ordinary industrial and commercial activities.’”).

73. Fairbanks N. Star Borough v. United States Army Corps of Eng’rs, 543 F.3d 586 (9th Cir. 2008), cert. denied, ___ U.S. ___ (2009) (wetlands jurisdictional delineation of playground site not appealable under the Administrative Procedures Act because it did not constitute final agency action).
to widely divergent opinions. Shortly after the Sacketts began clearing their lot in order to build their single-family home, they received a compliance order from the EPA. In a nutshell, the order demanded that the Sacketts restore their lot to the status quo ante, plant it with native vegetation, and fence it off for three years. After three years, if the Sacketts still wished to build, they could then apply for a Section 404 permit which the Corps and EPA may or may not grant. Only then could the Sacketts appeal the basic question of whether their land contained any wetlands at all.

The Sacketts consulted wetlands consultants who agreed with the Sacketts that the property was not in fact wetlands. Yet there was nothing they could do. Every day that the Sacketts failed to restore their “wetlands” meant another day of violating the compliance order and a fine of $37,500 per day plus an additional fine of $37,500 per day for violating the underlying statute. The Sacketts are under the sword of Damocles, because the EPA may never bring an enforcement action, or it might bring one tomorrow. Logically, one would think that a couple in the predicament of the Sacketts could challenge the compliance order before a neutral arbitrator, i.e., a federal court. And, for nearly five years, they were told they could not. According to the

74. See, e.g., Rapanos, 547 U.S. 715.
76. This would hardly be the first time the Corps and EPA have made a serious mistake over the identification of wetlands. After spending 18 months in prison for illegally filling wetlands on a small residential lot, Ocie and Carey Mills, a father and son, went back to court over the adequacy of their restoration of their wetlands. This time, however, the court concluded that their property had never been wetlands to begin with. See, e.g., United States v. Mills, 817 F. Supp. 1546 (N.D. Fla. 1992), aff’d, 36 F.3d 1052 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995).
77. Unless they wanted to take the other option of ignoring the order, continuing the filling, and waiting to see if the EPA would bring civil and criminal charges against them—in which case they could bring a defense that the land was not a wetlands. But such a course of action is inadvisable.
78. As of the date of the Sacketts filing their opening brief before the Supreme Court, the accumulated fines totaled over $40 million dollars for violating the order alone. Opening Brief Sackett v. United States EPA, ___ US ___ (2011) (No. 10-1062), 2011 WL 4500687, available at http://www.pacificlegal.org/document.doc?id=567. If violations of the act itself are added in, the fines can be up to $75,000 per day, or over $80 million for the Sacketts’ small lot. The government admitted at oral argument that these fines amount to $75,000 per day of violation. Oral Argument, Sackett v. Environmental Protection Agency (2012) (No. 10-1062), 2012 WL 38639 at 26, 1.15–1.18, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf.
Ninth Circuit, neither the CWA nor the Administrative Procedures Act provides judicial review. The only remedy, according to Ninth Circuit, is to wait until EPA brings an action against the Sacketts for violating the order, or for the Sacketts to restore the putative wetland, wait, and apply for a permit—a permit that may or may not allow the Sacketts to challenge EPA’s finding that there were jurisdictional wetlands on their property.

In a unanimous decision, the Supreme Court reversed. First, the Court held that the ACO was a final agency action because there was no post-ACO process and the ACO had legal effects, such as remedial obligations, civil penalties, and increased difficulties in obtaining permits. Second, any available review was inadequate because the Sacketts cannot initiate review but must risk EPA’s penalties and because judicial review of a permit denial from the Corps would not provide an adequate remedy for the ACO from the EPA. Finally, the Court found that the judicial review of ACOs will not harm EPA’s enforcement powers. While avoidance of judicial review might be more efficient, efficiency is not a sufficient reason for evading judicial review. But the Sacketts are hardly out of the woods. Now they must return to district court and argue, presumably on a very limited record, that their property does not contain wetlands. The trouble is that no one really understands the definition of a wetlands. As Justice Alito pointed out in a concurrence in Sackett, “[r]eal relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act.”

Notably, the Sackett decision does not address the first problem normally addressed by landowners: whether a jurisdictional determination is reviewable. At best, Sackett indicates that the Court was distressed about the hardships engendered by unreviewable agency

80. The Sacketts may apply for an after-the-fact permit only after their property has been restored pursuant to the compliance order. If the permit is approved, they cannot challenge the compliance order. If the permit is denied, they can challenge the wetlands determination, but not the compliance order per se.
82. Id. at 1371.
83. Id. at 1372–73.
84. Id. at 1374.
85. Id. at 1375 (Alito, J., concurring).
actions. But whether Sackett translates into greater reviewability of agency actions beyond Clean Water Act ACOs remains to be seen.86

The point of cases like the Sacketts and the Mills before them is that a fundamental interest in property ownership no longer exists for vast numbers of property owners who are saddled with wetlands, real or imagined, subject to federal jurisdiction or otherwise. The development of any property is fraught with peril so long as a federal agency can swoop and demand compliance with a finding of wetlands without any practical recourse for the affected landowner. And because of the ambiguities in the basic definition of what is a wetland, and with the federal government's expansive reach in defining navigable waterways, the CWA represents another shift in the ownership of property rights away from the individual and toward the federal government. In essence, with Section 404, the federal government has obtained an easement, fully realized or inchoate depending on whether “wetlands” have been identified yet, over a vast acreage of property in the United States.

C. The Clean Air Act

There is enormous pressure on the federal government to “do something” about the specter of anthropogenic global warming. With “greenhouse gasses” having recently been brought under the ambit of the Clean Air Act with an endangerment finding, the potential for further incursions on property rights is palpable. At present, EPA is proposing what it calls a “tailoring rule” wherein it will regulate only emitters of more than 50 tons of greenhouse gases. The rule is an eminently pragmatic response to the absurd potential that EPA could otherwise be forced to impose a permitting regime over every bakery, dry cleaner, office building, and homeowner with a fireplace in the United States. For better or worse, the tailoring rule, however, has no basis in law.

For landowners, one threat looming on the horizon is the impact attempts to regulate greenhouse gasses will have on land development. Already in California, which has passed its own greenhouse gas

87. See supra note 76.
law, AB 32, there are initiatives underway to regulate and restrict residential development under the assumption that people driving to and from their new homes will add to the output of greenhouse gasses. When added to existing land use restrictions, this may constitute yet another uncompensated land use restriction.

III. THE CONSEQUENCES OF GROWING GOVERNMENT OWNERSHIP OF INTERESTS IN LAND

A. Government Interests in Private Property

The federal government owns nearly one-third of the nation’s landmass in fee. When land owned by state and local governments is added, we see that between 40–50% of the nation’s landmass is owned by government. As governments at all levels embark on efforts to acquire additional land for conservation purposes, these percentages are increasing.

With the growing regulatory control over wetlands and endangered species in the United States, the federal government has gained a servitude in the millions of acres that once were not subject to federal regulation. For example, in the United States Fish and Wildlife Service’s most recent report, issued in 2006, total wetland acreage in the United States was estimated to be 107.7 million acres to 110

89. See Patricia E. Salkin, Sustainability and Land Use Planning: Greening State and Local Land Use Plans and Regulations to Address Climate Change Challenges and Preserve Resources for Future Generations, 34 WM. & MARY ENVTL. L. & POL’Y REV. 121 (2009).
million acres, excluding Alaska. With the uncertainty over what is and what is not a wetlands subject to federal jurisdiction, prudent landowners are told that they ought to consult first with the federal government before engaging in earthmoving activities. Even if property contains no wetlands, it could be listed as critical habitat for threatened and endangered species throughout the United States. Even if private property is not designated as critical habitat, it remains unlawful to “take” an endangered species. Because a take can include habitat modification, landowners no longer own an absolute right to utilize their property in a way that could affect a species. To date, no court has found a significant constitutional limit on the growth of federal restrictions on private land development.

B. Conservation Easements

1. Conservation Easements and the Common Law

In addition to control over real property through regulatory fiat, there is a growing use of conservation easements to accomplish the same ends. With a conservation easement, the fee title to land is divided up with the underlying ownership remaining in the original owner and a “conservation easement” is sold or donated (not always voluntarily) to a governmental entity or an NGO. The owner of the conservation easement has the right, in perpetuity, to prevent new development in the newly encumbered parcel. In other words, if the owner of a farm or cow pasture sells or donates a conservation easement on his land, he may never again have the right to improve the property, build on it, or sometimes even convert it to another use if the existing use becomes uneconomic.


93. There are no readily available estimates of the total critical habitat acreage in the United States, although the raw data for individual species can be found at: Critical Habitat, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/gis/data/national/index.html (last visited June 23, 2012).

94. For a history of conservation easements and a discussion of some of the challenges they create, see Julia D. Mahoney, Perpetual Restrictions on Land and the Problem of the Future, 88 VA. L. REV. 739 (2002).
Conservation easements work by splitting an estate in real property into two or more parts and throwing at least one of those parts into the dustbin of history. The purpose behind conservation easements is that they provide a mechanism that will permanently protect land from development. It is a dubious proposition that is contradicted by over seven centuries of legal tradition.

In a typical case, a parcel of land that is presently used for rural agricultural purposes (ranching, farming, or timber harvesting) is subdivided so that its “development rights” are severed from its lower intensity agricultural uses. These development rights are in turn sold, donated, or condemned by a government agency or private land trust (which may in turn sell those rights to the government). The government or land trust now owns a “conservation easement” over the property. The owner of the underlying estate may continue to use the property for agricultural uses, but is proscribed from any additional development of new infrastructure or buildings. In many instances the owner of the conservation easement may also acquire the right to regulate the nature of the agricultural use to maximize the protection of ecological values. A farmer may be prevented from replacing or upgrading farm buildings, a rancher may be ordered to avoid riparian areas or to reduce the density of cattle, or a timber owner may be proscribed from clear cutting or rebuilding access roads.

Conservation easements present a significant challenge to traditional understandings of real property interests because they are new, were not allowed under the common law governing real property, and may detract from the role that property ownership plays in maintaining the independence and liberty of the landowner. What is most antithetical about the relationship between conservation easements and traditional understandings of property law is that these easements contradict the long tradition of the law that has rebuffed attempts of present generations to control the actions of future generations.

Since at least the 13th century, every major attempt to change real property law has resulted in unintended consequences. Every attempt to restrict the ability of future generations to put property to productive use has been eliminated or watered down in relatively short order. There will be unintended consequences of the accelerating trend to create conservation easements on a massive scale. Nobody can presume to know precisely what those consequences will be—but a few
good guesses are in order. We also do not know what future generations will think of conservation system easements, but it would be naive to believe that conservation easements will survive precisely as the creators of these easements now postulate or that future generations will not alter or abandon those easements as necessity requires.

There is an expression in the law that the “dead hand cannot reach beyond the grave to control the living.” Or, as one state Supreme Court put it, “society is better off, if property is controlled by its living members than if controlled by the dead.” What the court meant was that if the members of future generations cannot decide what to do with their property, society and the economy will suffer. But first a little history of the English common law of property is in order.

If there is one short phrase that can best some up the history of the English common law of property, it is a trend toward pragmatic utilitarianism. As we have moved from the feudal estates set up by William the Conqueror after the Battle of Hastings in 1066 to the Industrial Age, the move has always been, in fits and starts and a few temporary back steps, toward the free alienability of land.

After William the Conqueror acquired his real estate holdings in England, he rewarded many of his nobles in the military with estates in land. That is when the feudal system of land tenure is usually considered to have begun in England. William’s supporters, however, did not acquire the land outright. They did not have a right to sell the land or pass it onto their heirs without the King’s permission. They were required to provide certain obligations such as performing specified duties or providing knights, money, or food to the King in exchange for the right of keeping their land.

Over time, the nobles chafed under the absolute control of the King. Political tensions between the nobles and King John escalated into a battle at Runnymede where the King, in the face of superior military power, agreed to the Magna Carta, first adopted in 1215. Among other things, the Magna Carta established that should a nobleman die, his heir had the right to inherit the nobleman’s estate after payment of only a reasonable sum of no more than £100 to the King. In other words, the King could no longer attempt to regain the estate after a nobleman’s death in derogation of the nobleman’s heirs.

96. The Magna Carta, Para. 2 (1215).
Another one of the abiding tensions in the development of the common law has been the desire by some to sell or devise property with strings attached. Most commonly, the owners of large estates wanted to make sure that the property would remain in the family estate in perpetuity and not be dissipated by spendthrift heirs. At the same time, however, the inheritors of that property desired the freedom to do with it what they wished without being ruled by the dead hands of their ancestors. The law has been seesawing on this issue for nearly 800 years. But inexorably, the trend has favored free alienability. The developments include:

- 1225: D’Arundel’s Case: A conveyance to “A and his heirs” permitted A to convey to third parties, despite the interest of the heirs. One of the earliest cases promoting the free alienability of land.
- 1285: Statute de Donis Conditionalibus: Created “entails” or “fee tails” wherein a conveyance to A and his heirs forbade A from selling the property in fee if there were heirs. This lasted for about 200 years.
- 1290: Statute Quia Emptores: Ended the creation of new feudal obligations, and permitted freeman to sell property. Meant to reform feudal estates, this statute unintentionally led to the ultimate end of the feudal system.
- 1583: Spencer’s Case: Provided that covenants could run with the land, but required such covenants to meet strict tests, to prevent such covenants from interfering with free alienability of land.

97. For a long list of statutes and cases exemplifying the back and forth struggle in the common law to create perpetual interests, see Edward H. Rabin, Fundamentals of Modern Real Property Law 213 (Foundation Press 1974). The cases here have been excerpted from Rubin’s list.
99. The Statute of Westminster the Second (De Donis Conditionalibus), 1285, 13 Edw. 1 c. 1 (Eng.). See Rood, supra note 98, at 187–88. Rood notes disparagingly that the result of this statute was “mischief” that “had to be endured” “for nearly two hundred years before a means of evading it was discovered.”
• 1660: Statute of Tenures: Abolished last incidents of feudal land law, allowing tenants to devise lands without obligations of knighthood.102
• 1682: Duke of Norfolk’s Case103: Established limits on the ability to devise property to heirs with conditions and led to Rule Against Perpetuities.104
• 1848: *Tulk v. Moxhay*105: Enforcement of restrictive covenant upheld.
• 1886: Gray’s *Rule Against Perpetuities*: Limits ability of testators to control use of land for a period of time longer than the last life in being plus 21 years.106
• 1948: *Shelley v. Kraemer*: 234 U.S. 1 (1948), United States Supreme Court strikes down racially based restrictive covenants—covenants that were enabled in large degree 100 years earlier in 1848 in *Tulk v. Moxhay*.
• 1980s: Many states adopted laws, sometimes after lobbying by The Nature Conservancy, that liberalized the ability to establish perpetual land trusts and conservation easements.

The purpose behind conservation easements (also known as conservation servitudes, futures, or scenic or open space easements) is to destroy the economic utility of the development rights in the underlying fee. The idea is to put the development rights into the hands of some third party—either the government or a nonprofit—which will preserve the land forever from development. But quite clearly, such easements are of questionable viability in light of the history of almost 800 years’ worth of common law that has inexorably moved toward a system that promotes the economic utility of property through the removal of restraints on alienation. For under the modern law, until very recently, conservation easements would have been struck down by the courts.107

103. 3 Ch. Ca. 1, 22 Eng. Rep. 931 (1682).
105. 2 Ph. 774, 41 Eng. Rep. 1143 (deed required perpetual maintenance of ornamental garden for the benefit of the inhabitants of Leicester Square).
106. JOHN CHIPMAN GRAY, **The Rule Against Perpetuities** (Roland Gray ed., 4th ed. 1942) (1886). For a discussion on the demise of the Rule Against Perpetuities in the United States, see Dukeminier & Krier, *supra* note 100 (noting the rise of perpetual trusts to alleviate the sometimes harshness of the rule and for federal estate tax purposes).
Conservation easements first came into use in a significant way in the 1930s, often with government purchasing easements for highway viewsheds and the like. These easements often proved impractical and difficult to manage. There were also serious questions about the viability of such easements in light of principles of property law.

To deal with this problem, in recent years many states have adopted new laws that specifically allow for conservation system easements. These laws, many modeled after the Uniform Conservation Easement Act, work to separate the fee from the development rights, thereby making it even more difficult for future generations to put land to a use contrary to the intent of owners at the time a conservation system easement is created. These statutes generally have no means for terminating the easement.

Florida, for example, adopted the following: (§ 704.06):

(2) Conservation easements are perpetual, undivided interests in property and may be created or stated in the form of a restriction, easement, covenant, or condition . . .

(4) Conservation easements shall run with the land and be binding on all subsequent owners of the servient estate . . . and shall entitle the holder to enter the land . . . to assure compliance.

In 1979, the California legislature declared that it was “in the public interest of this state to encourage the voluntary conveyance of conservation easements to qualified nonprofit organizations.” To that end, it defined a conservation system easement to mean:

“[C]onservation easement” means any limitation in a deed, will, or other instrument in the form of an easement, restriction, covenant, or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which

108. See Mahoney, supra note 94, at 749–50.
110. Fla. Stat. § 704.06 (emphasis added).
is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.\textsuperscript{112}

As in all the other states codifying conservation easements, in California, a “conservation easement shall be \textit{perpetual} in duration.”\textsuperscript{113} The statute further states that only nonprofits and governmental entities may hold conservation easements. Special provisions are made for the enforcement of such easements.

\textbf{2. The Long-Term Implications of Conservation Easements}

Conservation easements are a relatively new trend in the common law, but they seek to achieve the same thing that large landowners have tried to achieve for centuries: to determine today how an estate of land shall be used for generations. Recognizing the history of the common law of property, what are we to make of this modern attempt to tie land in perpetuity? At this early stage in the history of conservation easements there are many more questions than answers, such as:

\begin{itemize}
  \item What unintended consequences will there be?
  \item Will this lead to the agglomeration of huge estates of conservation easements that will someday be the target of government dissolution, as Henry VIII dissolved the monasteries in the late 1530s?
  \item Will it lead to an ever diminishing supply of land for new home construction, driving up the price of housing and driving an ever increasing percentage of Americans into rental housing?
  \item Will the separation of the development rights from the underlying fee lead to the ultimate economic nonutility of the underlying fee, leading to the widespread abandonment and foreclosure of those lands?
  \item Have the creators of the modern conservation system easement truly created a mechanism that will allow the dead hand to reach beyond the grave? Or will the common law ultimately repeal even this attempt?
\end{itemize}

There may be mechanisms available today to break up existing conservation easements. Traditional trusts are not inviolate. Courts have long used a doctrine known as \textit{cy pres} to alter existing trusts if

\begin{footnotes}
\item[113] Cal. Civ. Code § 815.2(b) (emphasis added).
\end{footnotes}
a court finds that circumstances have changed so much that the in-
ent of the original trustor can no longer be met, or that it is against
public policy.114 Thus, a trust established to provide aid for persons
with smallpox might be transformed to allow the money to be used
to fight other diseases today. Or a trust that prohibits the use of its
scholarship funds for minorities might be modified today as being
against public policy.115 It is conceivable that the changed land owner-
ship patterns and economics of the future decades or centuries will
be enough for a court to break a conservation easement and allow the
development rights to be reunited with the owner of the fee.

If, however, the original grantor of the easement was paid for or
took a tax break for granting the easement, or realized the benefit
of lower property taxes, the termination of the easement will be
complicated. In addition, the likelihood that a court will terminate
a conservation easement just because the fee owner is facing financial
hardship is not a particularly likely scenario in today’s legal climate.
This will depend, however, on a court finding that a conservation ease-
ment is more like a covenant than a traditional easement in land—
courts usually do not reform easements on public policy grounds, but
covenants (such as racial restrictions) are more easily altered. It also
may depend on whether a court takes to heart the legislative intent
in many conservation easement statutes that the easement shall be
“perpetual.” Similarly, the legislative intent here is clearly a rejection
of the common law principle that the law should not hinder land from
being put to beneficial or productive use.

If a conservation easement is created for a specific purpose, such as
the preservation of a particular endangered species or endangered
animal, and the animal becomes extinct, then it is more conceivable
that the easement could be terminated.116 Conservation easements
are a troubling attempt to abrogate almost 800 years of common law
experience. What the next 800 years will bring is anybody’s guess.

114. See, e.g., Roger G. Sisson, Relaxing the Dead Hand’s Grip: Charitable Efficiency and
115. See Frances Howell Rudko, The Cy Pres Doctrine in the United States: From Extreme
116. For a discussion of conservation easements and the doctrine of changed circumstances,
see Jeffrey A. Blackie, Conservation Easements and the Doctrine of Changed Circumstances,
40 HASTINGS L.J. 1187 (1998). See also Gerald Korngold, Solving the Contentious Issues of
Private Conservation Easements: Promoting Flexibility for the Future and Engaging the Public
Since 1215, a pervasive trend in common law began to throw off the control by the King and then other large landowners on the free alienability of land. With the greater control over of the land by ordinary citizens, so too did understandings of freedom grow for the common Englishman.\(^{117}\) Now we are moving in the opposite direction. The right to develop property is increasingly controlled by government through regulation, or outright ownership, or ownership of conservation easements.

The history of land ownership patterns in the United States closely mirrors the history of government power. The age of homesteading of federal property and devolution of land to the states ended, for all practical purposes, in the 1930s, at the same time the federal government began its dramatic New Deal era expansion. In recent years the federal government has gone on an acquisition binge. Land equals power, and one follows the other. The adoption of the Endangered Species Act and wetlands rules under the Clean Water Act are the most dramatic government and power land grabs of this century. On the state and local level, government is likewise acquiring more and more property. The push toward the acquisition of conservation easements will accelerate this trend all the more. What will be the unintended consequences of placing more and more property into the hands of governmental entities?

We must also ask if the diminishment of property rights is good for the environment. With the ESA, there are many examples where the threats to landownership from endangered species have caused negative consequences. Backlash against other onerous land use regulations could have similar effects. History has not been kind to attempts to severely restrict, permanently or otherwise, the free use and alienability of property. While the new environmental ethic might indeed be as permanent as any major new religion, it is impossible to predict with certainty what the future may hold. If the past is any guide to the future, some skepticism over attempts to

\(^{117}\) See Pipes, supra note 3, and Siegan, supra note 3, for broad discussions of the relation between freedom and property. Pipes, especially, suggests that individual landownership correlates to the English tradition of individual liberty as contrasted to the Russian experience where ordinary citizens traditionally had neither property nor freedom.
impose servitudes—whether regulatory or voluntary—over property may be in order.

Moreover, the environment is not static. Lakes turn into meadows, meadows into forests, and forests back into meadows. Rising sea levels and temperatures may alter many ecosystems, just as much as falling sea levels or cooling temperatures might. Invasive species are creating permanent changes in ecosystems across the globe. And yet with statutory prescriptions and the growth of conservation easements, we are attempting to freeze a dynamic environment in perpetuity.

Ultimately, if property and freedom are inexorably intertwined, as several centuries of political philosophy and experience seem to indicate, it might also be worthwhile to ponder what the ultimate consequences for freedom might be caused by the diminishment of property rights in the United States.
PROPERTY AND EMERGING ENVIRONMENTAL ISSUES—
THE OPTIMISTS VS. THE PESSIMISTS

CAROL M. ROSE*

Over the last generation, market-based or property-based mechanisms have been much discussed as a means to deal with environmental problems. A turning point in this discussion came with the United States’ acid rain control legislation of 1990, a cap-and-trade program that has been widely heralded as a model for other kinds of market-based environmental programs.1 While it was not the first environmental legislation of its type—New Zealand instituted a cap-and-trade program in fisheries in the mid-1980s2—the scope and apparent success of the U.S. Acid Rain Program breathed life into suggestions that economists had been making for many years.3 More recently, market-based measures have been proposed for many other environmental resources, including not only other fisheries, but also wetlands, wildlife, grassland and forestry.4 In particular, ideas for controlling greenhouse gases have steadily raised the possibility of property rights and trades in carbon emissions.5

Can property-based or market-based measures cure our environmental ailments? Some say yes, and some say no. In fact, some have been saying yes and others saying no for quite some time now, although they have said yes and no in different ways over time. This Article will recount several of the early cycles of the debate between

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the Optimists and the Pessimists, because even the early discussions laid out some of the important possibilities—and the caveats—for property solutions to currently emerging environmental problems.

I. THE BIG BET

One early version of the argument between the Optimists and the Pessimists took the form of a bet. The bet was between the eminent and very well-known biologist Paul Ehrlich (and some colleagues) on the Pessimists’ side, and on the side of the Optimists, an economist named Julian Simon, who at the time was much less well-known.6 But first, some background: in 1968, Ehrlich published a book called The Population Bomb.7 In this book, he made the gloomy forecast that, because of global population increases, the world was well on its way to running out of food. The book struck a chord with the environmentalist Zeitgeist of the late 1960s, and Ehrlich continued to expand and expound the main claim in other books and articles over the next several years. By the mid 1970s, he was arguing that the world was on the brink of running out of a number of essential resources.8

Meanwhile, Julian Simon was doing a slow burn. He had not believed the running-out thesis of The Population Bomb at the outset, and he could not believe that Ehrlich’s Cassandra voice—joined by others in the “Limits to Growth” camp—continued to sound with so little challenge.9 Simon, an inveterate collector of data, thought that the facts proved the thesis to be all wrong; population increases actually did not accompany greater poverty, but rather greater wealth. We are not running out, Simon asserted. And what is more, Simon was ready to make a bet on it.


Thus came Simon’s challenge. The opening salvo appeared on the pages of the prestigious Science journal in 1980, where Simon marshaled an impressive array of facts to argue that population increases had accompanied increasing rather than diminishing resource availability.\textsuperscript{10} When Ehrlich and others responded that he was outrageously wrong,\textsuperscript{11} Simon replied in the Social Science Quarterly with The Bet, repeated in the pages of his 1981 book, The Ultimate Resource.\textsuperscript{12} In an open offer to the public, he said that he would stake $10,000 on a wager that prices would actually fall, not rise, for any set of minerals or commodities chosen by anyone who dared to take the wager, at any date the wager-taker chose—and he pointed to Ehrlich as one of the people who should “put their money where their mouth is.”\textsuperscript{13}

Ehrlich took the bait, and gladly, too, saying that he wanted to snap up this offer “before other greedy people jump in.”\textsuperscript{14} He and two colleagues agreed with Simon on a basket of commodities, all of which Ehrlich thought were going to rise in price substantially because of increasing scarcity: chromium, copper, nickel, tin, and tungsten. On paper, the three “bought” $2000 worth of each mineral, at the price on September 29, 1980, with the price to be compared to the price (adjusted for inflation) on September 29, 1990. The loser was then to pay the winner for the difference between the two prices—Simon would pay if prices rose, and Ehrlich would pay if prices fell.\textsuperscript{15}

And who won? Simon won, hands down. Every single one of these commodities was cheaper, some by as much as two-thirds. The upshot of the episode was that in October 1990, Paul Ehrlich sent a check to Julian Simon for $576.07.\textsuperscript{16}

How can this result have occurred? How did Simon know that he could bet on that basket of commodities? What Simon was betting

\begin{itemize}
\item \textsuperscript{11} See letters by Paul R. Ehrlich and several others, 210 SCIENCE 1296–1305 (1980), and Simon’s response, \textit{id. at} 1305–08.
\item \textsuperscript{13} \textit{Id. at} 27.
\item \textsuperscript{14} Paul R. Ehrlich, An Economist in Wonderland, 62 SOCIAL SCI. Q. 44, 46 (1981).
\item \textsuperscript{15} \textit{Id. at} 46; \textit{Julian L. Simon, The Ultimate Resource} 2, at 35 (1996).
\item \textsuperscript{16} Regis, \textit{supra} note 6.
\end{itemize}
on was human ingenuity—ingenuity that is sparked by economic incentives.\textsuperscript{17} Take tin, for example: tin prices rise when more people want tin, or want more of it—say, when a new industrial power like China or India or Brazil starts to demand more. Producers start working the margins, turning to locations that are more difficult to mine, or that present higher transportation costs, or that have different kinds of ore. But a more general way to look at the result of higher prices is a little different, and implicitly, this is what Simon was betting on: \textit{higher prices encourage inventiveness}. Engineers find better ways to extract in tricky locations, chemists find new ways to reduce ore, or scientists find something else that will substitute for tin. The upshot is that because of human ingenuity, the costs of commodities like tin do not rise when more people want more of them. Just as likely, they drop.

The check in the mail to Simon, of course, was not the end of the story. Thanks to the bet, Simon himself acquired some notoriety, as did his message. Our natural resources, he said, are not going to run out. The future will bring more, not less. Or, stated more technically, human intellectual capital will substitute for natural capital.\textsuperscript{18}

Can the bet be generalized? Well, to some degree, it probably can be. Although Simon lamented that no one seemed to pay attention, the importance of human capital in total social wealth has impressed a number of authors over the last few decades.\textsuperscript{19} But there is some room left over for the pessimists in all this, at least on the environmental front. Reconsider for a moment the resources involved in the bet: chromium, copper, nickel, tin, tungsten. Simon’s claim applied not only to those minerals, but also expanded to encompass \textit{environmental} resources. Air quality and water quality were among them, and presumably they could expand to include the other usual suspects like erosion, wildlife and wildlife habitat, not to mention greenhouse gases.

So, does the bet about metals really capture those environmental resources? There is at least one big difference between those metals and the usual environmental subjects, and that difference is property.

\begin{itemize}
  \item \textsuperscript{17} Simon, The Ultimate Resource, supra note 12, at 44–45.
  \item \textsuperscript{18} Id. at 211–14.
  \item \textsuperscript{19} See, e.g., Robert Solow, An Almost Practical Step Toward Sustainability, reprinted in 19 Resource Policy 162–72 (Sept. 1993) (describing matters like education and skill as part of total “capital” along with natural resources).
\end{itemize}
Somebody owns chromium, copper, nickel, etc. Moreover, someone owns the land where those metals are mined; someone else owns the product when it is made; someone else owns the substitutes when they are made. Owning those things makes it worthwhile to invest in new technology to extract and produce the metals and substitutes, because the owner gets the benefit of the investment. By the way, someone may own the technology itself, via the patent system—another factor that makes it worthwhile to invest in useful invention.20

But consider environmental goods like air or wildlife or groundwater: Who owns them? And who is going to invest in those resources if there are no property rights in them, and hence no specific payoff for investment? To be sure, someone might invest in unowned environmental resources, and no doubt many do, but they have to share the returns with all the other users—a situation that is likely to lead to underinvestment. The same is true of investing in learning about environmental resources: why learn about something if there is no return for doing so? To be sure, some people do, out of love of learning. This is not a trivial motivation. But unless it is supported by capital investment—usually spurred by hope of return—love of learning can only carry the learner so far.21

The point is that environmental goods are not like tin and tungsten. Environmental goods are commons-es, or at least they have significant commons or collective aspects, as the pessimists know very well. Resources open to general common use have an unfortunate proclivity toward overuse and underinvestment, because individual users neither suffer the full consequences of their overuse nor take the gain from their investment, and one might add, they have little incentive even to learn about environmental goods, for the same reasons.

Simon was aware of this problem, distinguishing owned “resources” from “pollution”—that is to say, pollution of unowned environmental goods—even though he did not dwell on the issue.22 But others have. Perhaps because of its catchy title, the presentation that is probably best known is Garrett Hardin’s “Tragedy of the Commons.”23 To be

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21. Id.
22. SIMON, THE ULTIMATE RESOURCE, supra note 12, at 129.
sure, Hardin, the iconic theoretical pessimist, used a bad example when he picked the medieval commons as an illustration of the commons problem (or more properly designated, the “open access” problem);\textsuperscript{24} the medieval common fields were in fact owned by defined groups, and their productivity lasted a thousand years. But Hardin’s story has more resonance for environmental resources in which there is no owner and no restraint on access, and Hardin did list pollution among the important commons or open access issues—air pollution and water pollution, along with deforestation and wildlife mismanagement.

In retrospect, Ehrlich and his friends should not have bet on tin. They should have bet on coral reefs, or codfish on the George’s Bank, or on the hole in the ozone layer, not to speak of the levels of carbon dioxide in the atmosphere. That is the environmental pessimists’ answer to the Simon’s victory in the great bet: the bet was about the wrong kind of resources. The bet may be a winner for Simon with tungsten, but it would not have been so successful with New England cod. The bet may have been a winner for tin, but not so good for the polar ice caps.

Simon himself argued that the air was getting cleaner too, and he implied that this occurred without the benefit of air pollution regulation, though he was not entirely straightforward on the matter.\textsuperscript{25} But Simon wanted people to look at facts, not theories, and the facts, he said, were that environmental resources have been improving too.\textsuperscript{26} But if so, he did not explain how it happened (if it did), and that is why theory is important: if we don’t know how it happened, we don’t know how to replicate the success. We do know how it happened with tin—property rights would drive investment in tin and substitutes for tin. We do not know with coral reefs, and in fact, coral reefs are not looking so good these days.

A more modest version of Simon’s general view, and one that he apparently agreed with, is that developing areas suffer environmental

\textsuperscript{24} For the distinction between open access and commons, see Elinor Ostrom, Governing the Commons: The Evolution of Institutions for Collective Action 23, 48–49, 222 n.23 (1990).

\textsuperscript{25} Regis, supra note 6 (saying that air quality had improved steadily with no notable difference when legislation had passed). On the other hand, Simon elsewhere did somewhat reluctantly attribute environmental improvement to public pressure for political measures; see Simon, The Ultimate Resource, supra note 12, at 138–42.

\textsuperscript{26} Simon, The Ultimate Resource, supra note 12, at 130–36.
degradation at the outset of the development process, but then im-
prove as they grow wealthier and can devote more resources to the
environment. The environment in this story is a kind of luxury good.27
But even with this modified version of the optimistic story, it would
be enormously helpful to know how and why improvement occurs.
As people become wealthier, do they invest individually in the collec-
tive good of environmental protection, and if so, what induces them to
do so? Do they take collective action—including legislation—to over-
come the commons problems that environmental resources present,
and if so, how do they overcome the collective action problem? In
short, given that environmental goods are still commons-es even as
wealth increases, what does drive environmental improvement?

And so, with the question of how environmental resources have
been salvaged in the past, and more importantly, how they are to be
salvaged in the future, we arrive at the second round of the battle,
beginning with a new set of optimists.

II. FREE MARKET ENVIRONMENTALISM

Depletion of wildlife stocks? Pollution? Inroads on other environ-
mental resources? No problem, says the proponent of Free Market
Environmentalism. We can do everything with private initiatives, in-
cluding preserving environmental resources, if we will just let the
market work.

But of course the market needs something to make it work: it
needs property rights, of course. That is because property rights are
the instruments that induce investment, planning, effort, information
gathering, and of course trade. Why do property rights encour-
ge those activities? They do so because with property rights, the
owner takes the payoff from intelligent and appropriate investment,
and she pays the price for foolish or wasteful behavior. In technical
terms, property rights internalize externalities.28


But wait! Environmental resources are almost by definition resources that do not belong to anyone. They are too big, too diffuse, too fugitive for anyone to put a fence around them. How are property rights going to deal with resources that can't be property?

The answer of Free Market Environmentalism (“FME”) is that we have to rethink the relationship of property to environmental resources. It is not that we can't own environmental goods; it is just that they may call for an expensive kind of property. According to FME, a system of property rights is just like any other good thing. It costs something to have property rights: a fence costs something, a land record system or registration system costs something, a patent system costs even more. But like other scarce goods, systems of property rights respond to demand.

That is the thesis of the well-known economist Harold Demsetz, and his thinking was further elaborated by, among others, two more economists associated with FME, Terry Anderson & P.J. Hill.29 Anderson and Hill used some wonderful examples from the history of the American West, about the evolution of property rights for water, land, and cattle. They started with the early stages of Anglo-European settlement, when there were few settlers in the West and the Great Plains, and little demand for property rights because the settlers really did not need property rights very much. Property rights are important to deal with conflicting claims where things are scarce, but at the outset of the new settlers’ entry, the major resource—grassland—was not scarce, at least by comparison with the low demand for it. There was enough grassland to go around for the few ranchers who ran their stock in those vast spaces; and as for the cattle themselves, there were few confusions over which rancher owned which animal. And besides, the methods for establishing property rights were expensive, especially wooden fences out there on the open range, where trees were few and far between.30 Why bother with property rights when no one is encroaching?

But with time, there were more ranchers and more cattle—and more threats from cattle thieves, the so-called rustlers. With those more intense uses and threats, the demand for property rights increased. Ranchers started with something simple, a common roundup...

30. See Anderson & Hill, supra note 29, at 170–73.
of the cattle, and thus no one could claim to be mixed up about whose steer belonged to whom. Then they moved on to more complicated (and more expensive) versions of property rights: brands on the cattle, then a registration system for the brands, then criminal prosecution of the rustlers. But meanwhile, the increasing cost of property rights also invited technological innovation. For cattlemen, the breakthrough invention was barbed wire in the 1870s: it was instantly deployed on ranches in the West, enabling the cattlemen to separate out all their cattle into individual herds.31

And so, the picture that FME paints about property rights looks much like the one that Simon painted for other kinds of resources: do we need property rights to deal with environmental resources? Yes? OK, they will be expensive. But we will get around to creating them when it is worth it. One example comes from the subject with which we started, that is, tradable environmental rights. In fact, there has been considerable progress in creating property rights related to air quality. We can’t fence in the air, but we can create property rights in pollution. That is to say, we can create a kind of negative property, meaning that one has to pay for pollution, in a charging scheme calibrated to the amount and kind of pollution that one produces. What is more, with a sophisticated version of this kind of property, one can even trade the pollution charges around, so that polluters with higher reduction costs can avoid charges by paying lower-cost preventers to reduce pollution in their stead.

To be sure, it is not cheap to create tradable environmental rights regimes like these in order to control air pollution or water pollution, or even to protect wildlife habitat. Among other things, rights of this sort require monitoring and verification devices, record-keeping systems, and enforcement.32 But as with the invention of barbed wire, the FME story tells us that higher demand induces human ingenuity, and new inventions reduce the costs of the various aspects of these regimes.

And so, in this story, a picture emerges: if we have enough demand for property rights in environmental goods, we will get just that: we will create an environmental property rights regime. As we

31. Id. at 172–75.
32. See, e.g., Tom Tietenberg, The Tradable Permits Approach to Protecting the Commons: What Have We Learned?, in THE DRAMA OF THE COMMONS 197, 212–16 (Elinor Ostrom et al. eds., 2002).
get to that point, we also get more inventiveness: more conservationist methods for using environmental goods, more substitutes for polluting equipment, better pollution control devices, more sophisticated monitoring methods. We will get all those things because the payoffs make it worth the effort. True, an environmental property rights regime may be much more complicated and sophisticated than a fence or even a land record system, but on closer analysis, it is just another ratchet outward on the gears of the evolutionary property rights machine.

Sounds good, right? This is the Optimists’ Answer Part II: environmental property rights are just like any other property rights: they will evolve as we need them and are willing to pay for them.

But now it is the pessimists’ turn. And their answer is this: wait a minute! Something is amiss with this evolutionary story, too.

III. THE RETURN OF THE PESSIMISTS

For the moment, let us put tradable rights in air emissions to one side. We can instead reconsider for a moment Anderson and Hill’s example of the evolution of property rights related to cattle-raising in the Old West. To be sure, the cattlemen did ratchet up the level of property rights protections, but once they got past self-help, all the other teeth on the ratchet—up to but not including fences—were collective goods. And that’s a problem. A lot of people were involved in all these steps toward property creation. Someone had to think up the roundup, and then persuade all the other ranchers to join in. If there were shirkers, someone had to take on the collective responsibility of strong-arming them into joining. A branding system needed a common registry, i.e., another collective good. Enforcement at any level is yet another collective good, but especially enforcement through a criminal justice system, which requires the establishment of governmental structures. In short, no single owner could claim the payoffs from inventing and executing any of these measures that were taken for the common welfare.

So, what induced everyone to do his or her part? The problem is that these management systems were all versions of commons-es, but now at the organizational level. And the question is, why don’t all the participants try to take a free ride on the efforts of others? Notice that if enough of them do take that route, the whole system will fall apart.
To be sure, these collective efforts at the organizational level do work out sometimes, even many times. But it is not enough to point to a success story and say it exemplifies a universal pattern, when we can’t tell what made the collective effort work—or how many other similar efforts fell apart. Yes, the ranchers did invent property rights to manage their cattle. But meanwhile, the sodbusters, farmers who plowed up other parts of the Great Plains, created the Dust Bowl. Which is the real story? One resource economist, Gary Libecap, suggests at least figuratively that maybe it is the Dust Bowl. His writing is full of examples of would-be resource exploiters, especially in the oil business, who would make big gains from cooperating, if only they could come together on the way to divide up the surplus from their collective efforts—but in many instances they can’t, so they don’t.33

Property rights are supposed to overcome collective action problems, in which everyone wants to free-ride and no one wants to invest, or at least no one wants to invest enough to make things work. But the trouble is, a property rights system is another collective, or if you will, another commons.

That is a point that has often been made by eminent property scholar James Krier. The most notable example is in an article that he made in reviewing a book on Free Market Environmentalism. He called it, very aptly, *The Tragedy of the Commons, Part Two*.34 In Krier’s account, the FME claim is that one can overcome environmental commons issues with property rights; but what gets glossed over is that the creation of property rights is a commons effort itself, even if it is a kind of meta-commons. Who wants to call the meetings to set up the regime? Who wants to go to those meetings? Once done, who wants to enforce the system on other participants? True, you can hire police, but who is going to pay them? If the costs are to be shared, who will keep the records and make the calls to make sure that everybody is paying his or her share? Indeed, who is going to watch the police to make sure that they are doing an honest job?35

Krier’s suggestion to the Free Market Environmentalists was that

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33. Gary D. Libecap & James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUD. 589 (2002) (describing instances in which oil resources were wasted because parties could not agree, due to transaction costs, differing information, and inappropriate political intrusions).


35. Id. at 322–23.
they should be more modest. They should look around to see where Free Market Environmentalism works out well, and where it does not, and why.  

IV. THE BOTTOM LINE: OPTIMISM OR PESSIMISM ABOUT ENVIRONMENTAL PROPERTY?

When one looks at the matter in the way that Krier suggests, one does see some characteristics that help to make a property regime take hold. Indeed, some of these characteristics are quite well known, because they help to make any kind of common effort function. For some resources, it may help that limited numbers of people are involved in the bargaining or implicit bargaining process over the property arrangement. It helps, too, to have participants with similar information and goals—as with the cattlemen in the Old West. Indeed, larger and more complex property regimes can emerge where the participants share a common culture and a common judgment about what is good behavior and what is bad behavior. The long transcontinental migrations of mid-nineteenth-century North America give some quite startling examples of the migrants’ respect for the property of other migrants, even among people who were in desperate need. But those same migrants often showed little concern for what the native peoples claimed as their own property. This brings us back to a gloss on Krier’s argument: if he is right that establishing a property regime confronts us with a commons problem at the organizational level, then overcoming that problem becomes a social and political problem, and not just a natural evolution from demand and supply. True, people can succeed in creating effective property rights regimes, but social and political factors are going to have an influence, and they may influence the characteristics of the property rights regime as well.

36. Id. at 346–47.
37. Libecap & Smith, supra note 33, at 608.
There is a related point to be made about the evolution of property rights: earlier property rights regimes can get in the way of emerging ones, even though new kinds of property regimes would produce more total wealth. One of the people who has made this argument most forcefully is an economist mentioned earlier, Gary Libecap. Libecap has argued that winners under an earlier property rights regime will not easily agree to a change in regime that would be more productive in total, but that would cut into their particular shares.40 One can see these issues in many places, but one notable location is in the fishing industry, where the “highliners”—the most successful fishers in open access fishing—drag their feet about establishing any limits for the sake of conserving the overall stock levels. They are used to an open-access fishery, and they don’t believe in the Tragedy of the Commons. Libecap argues that the political cost of turning to a new regime—say, a tradable quota system for fishing—may involve making special concessions to these kinds of erstwhile winners.41

Libecap focuses especially on distributional issues: who is going to get the goodies if the property regime changes? But his sometime co-author, resource economist Dean Lueck, also points to contracting costs or transaction costs as a source of stagnation. Lueck has written a good deal on wildlife, and he has observed the way that the costs of contracting can impede landowners from assembling the kinds of large habitat areas that some animals require to feed and breed adequately, especially megafauna like bears and bison.42 Land values for wildlife—e.g., for fishing, hunting, and viewing—may well exceed the value of the lands in question for agriculture or other uses, but with multiple ownership and heterogeneous interests, landowners may face insuperable contracting costs, blocking them from combining their lands and attaining the more valuable large scale that the wildlife require. In short, transactions costs impede land consolidation, and what creates the transactions costs is the prior pattern of smaller-scale ownership.43

41. Id. at 22–23, 73–74, 82–84 (stressing that different skill levels among fishermen lead more successful ones to resist alteration of regime); cf. Katrina Wyman, From Fur to Fish: Reconsidering the Evolution of Private Property, 80 N.Y.U. L. REV. 117, 146–48 (2005) (arguing that heterogeneity might not impede regime change under some circumstances).
43. Id. at 643.
Lueck and Libecap together have recently collaborated on another major contribution to the point that prior property arrangements can impede the introduction of more efficient and valuable ones. In an important study of eastern and western land survey patterns in the United States, they conclude that land is generally more valuable when it is demarcated by reference to a larger universalized rectilinear survey of latitude and longitude, with regular and easily understood special categories; and by comparison, land is generally less valuable when measured by customary claims or measures of metes and bounds, where property lines are designated from localized landmarks. The contrasting methods between these is obvious to anyone who has traveled across the United States by air, and who has seen from above the crazy-quilt land boundaries in the eastern part of the country, as well as the regular square patterns in the more westerly areas. The universalized rectilinear designations make it easier to describe and delineate land parcels, and thus make land transactions much easier—which tends to increase land values. But for the eastern states to change would be well-nigh unthinkable; the older metes and bounds systems is too entrenched, and by this time too much surrounded by prohibitive walls of transactions costs.

In a more abstract version of the Libecap and Lueck study, property law scholars Henry Smith and Tom Merrill have argued that relatively simplified systems of property categories—the “numerus clausus” that limits those categories to a manageable number of comprehensible forms—can enhance the availability of property for trade, and hence for allowing resources to arrive ultimately in the hands of those who value them most. But property regimes often have to displace pre-existing older property regimes, and scholars of less developed countries have noted the difficulties and conflicts that come with moving from complex customary rights structures to more modern rights definitions like those that Smith and Merrill describe.

Similar issues affect the efforts to establish new kinds of property for environmental resources. Merrill has noted the very slow acceptance of tradable rights regimes in the environmental field, however promising these regimes may seem to be. Merrill attributes a considerable proportion of the delay to conflicts over distributional issues among the parties who might be regulated, some of whom see their personal fortunes as better served under older but less globally efficient property systems.\(^47\)

On the other hand, some resource uses do suggest that transitions to more valuable property regimes might be possible, even in the face of major obstacles from distributional issues and transaction costs. Some interesting if very tentative examples come from water rights regimes. In the western parts of the United States, many streams are now more valuable for recreational uses like fishing and boating than they are for agriculture, mining, or other traditional resource exploitation uses. Recreational and scenic uses of rivers require leaving water in the stream, but it has been difficult to accommodate those uses legally. This is because the creation of instream water rights entails significant changes in the older western “appropriative” water rights regimes, where the whole definition of rights has historically required taking water out of the stream.\(^48\) Not only is system-wide change subject to many administrative hurdles, but there are many vested interests in the traditional ways of defining rights. Nevertheless, given major shifts in demand, along with some court orders, and considerable organizational effort by some non-governmental organizations, western states have begun to adjust their water rights systems to accommodate the newer instream uses.\(^49\) Market transactions, legislative, and voluntary actions have all played a role. Equally interesting are the possibilities for trades of water from lower-value agricultural uses to much higher-value municipal uses—possibilities much discussed in academic literature on water rights, although quite


slow in practice. Nevertheless, slow or not, some agricultural-to-
municipal trades have already occurred (after pointed prodding by
the Federal government), particularly between California’s agricul-
tural areas and some of the state’s water-starved cities.

Tradeable environmental rights bring us back to the beginning, and
the great hope for these kinds of very modern property rights in envi-
ronmental fields, including air, water, wildlife, and perhaps at some
point the regulation of greenhouse gases. It should not be totally im-
possible to overcome the obstacles and to arrive at more sophisticated
environmental rights regimes, and to ratchet out property rights to an-
other and very sophisticated level. But changes of this sort will not be
easy either, and they will certainly not be automatic. Newer envi-
ronmental rights regimes may take considerable social, political and
legislative effort, as well as administrative imagination, and very
possibly compensation schemes. Indeed, even the Optimists about
property rights seem to assume some level of legislative activity in
environmental arenas.

One could give many more examples where distributional concerns,
technical difficulties and multiple transactions add to the cost of al-
tering existing property rights systems. But the point is that if we are
to be optimistic about the ability of property rights to deal with envi-
ronmental issues, then we also have to be optimistic about collective
institutions, including political ones. That entails optimism about
people’s inventiveness and openness to compromise in social and po-
litical arenas. Though it is perhaps not sufficiently recognized, those
are qualities that underlie everyday private property ownership and
market activity, and that are essential in creating the property rights
infrastructure in which ownership and markets can thrive. But those
qualities are going to be especially important when it comes to transi-
tions in private property and market regimes for environmental goods.

50. See, e.g., Robert Glennon, Water Scarcity, Marketing, and Privatization, 83 Tex. L.
Rev. 1873, 1884–89 (2005); Barton H. Thompson, Jr., Institutional Perspectives on Water

51. See, e.g., Felicity Barringer, Empty Fields Fill Urban Basins and Farmers’ Pockets,
N.Y. Times, Oct. 24, 2011, at A12 (describing program whereby California farmers can halt
irrigation to transfer water to urban areas).

52. One is Julian Simon, who apparently thought that wealth-related interest in the envi-
ronment would result in legislation and public action. See Simon, The Ultimate Resource,
supra note 12, at 139–42, 241. Dean Lueck, who is sympathetic to FME, regards statutory law
as a part of the evolutionary process in managing wildlife. See Lueck, supra note 42, at 321.
RECONCILING PROPERTY RIGHTS
AND THE ENVIRONMENT: A REVIEW
OF THE CHINESE PROPERTY LAW

LÜ ZHONGMEI*†

ABSTRACT

The Property Law of the People’s Republic of China, adopted in the fifth session of the Tenth National People’s Congress on March 16, 2007, made a useful exploration into integrating environmental protection into property law. The Property Law established the principle of comprehensive decision-making, integrating environment and development, enlarging the definition and scope of property by accepting as new forms of property rights the right to spaces and the right to use resources exclusively owned by the State, defining the obligation to protect public interests when acquiring and exercising property rights, and providing the adjoining owner’s right to environmental protection. These rules are very important for the sustainable development of China. However, the provision of the Property Law regarding the right of use of resources exclusively owned by the State as a usufructuary right failed to distinguish different impacts on the environment through different ways of exploiting resources and also failed to provide better protection for the environment and resources. Therefore, it is necessary to reconcile the environmental law and property law with new methods on the basis of a sound understanding of the economic aspect and the ecological aspect of the environment and resources.

INTRODUCTION

Environmental problems and sustainable development are major issues in the current world. Chinese legislators have to answer the question of how property law should react to such issues. The Property Law of the People's Republic of China (“Property Law”) adopted by the

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fifth session of the Tenth National People’s Congress on March 16, 2007, gave a clear answer: it is advisable to integrate environmental protection considerations into the values and rules of property law by means of integrating environmental protection and development into decision-making under the guidance of sustainable development. However, from the perspective of environmental protection, the Property Law still has some drawbacks to be improved, especially those provisions related to resources. We still need to discuss these issues and find the best solution.

I. GREENING CHINESE PROPERTY LAW

The integration of environment and development in decision-making is regarded as an important means of achieving sustainable development. The essential idea is that environmental goals should be a new factor in the definition of development. We need a way to integrate environment and development. This integrated decision-making emphasizes that environment is not necessarily a secondary factor when the central government makes political decisions. The key to integrating environment and economic factors is at the decision-making level; the main theme of achieving sustainable development is thus to integrate economy with ecology during decision-making. It is necessary to exert the co-effort of many disciplines; the discipline of law is a necessary basic safeguard. Just as the Twenty-First Century Agenda pointed out, the laws and rules of a state are the most important instruments in transforming environmental and development policies into actions. They are not only implemented through command-and-control mechanisms. They are also a framework of economic planning and market tools. In fact, the making and implementing of law should itself be regarded as a decision-making process. According to the requirements on strategies and major actions for sustainable development in the Chinese Twenty-First Century Agenda, making an overall evaluation of the current policies and rules, along with establishing a new system of laws and

2. WAN YICHENG & WAN YAN, LANDMARKS FOR NEW CIVILIZATION—CLASSIC LITERATURES OF HUMAN GREEN MOVEMENT 2 (Jilin People’s Press 2000).
policies, is a major legislative step towards the achievement of sustainable development.³

We admit that solving environmental problems is not a customary task for property law, a field typically dominated by private concerns. The reason to integrate property law into the decision-making process is because of the failure of public law. In a modern society, whether in developed countries such as Great Britain and the United States or in underdeveloped countries such as India and China, public law is the first choice for solving environmental problems. Measures for addressing environmental problems usually have a tone of command and control. The deteriorating environmental condition, however, declares the bankruptcy of public law and demonstrates the necessity of seeking solutions in private law. It is thus natural to solve environmental problems by the co-effort of public and private law. As an essential part of private law, property law should be taken into the integrated decision-making process.

Another reason for taking property law into the integrated decision-making process is the comprehensiveness of environmental problems. Environmental problems in modern society are comprehensive, resulting from all aspects of the social life. Although environmental problems are not mainly caused by the insufficiency of property law, they nevertheless have some relation to property law. Property law, which is steeped in the modern agricultural society, exacerbated environmental problems. We will address this topic in the following aspects.

A. Environment and Resources Are Beyond the Range of Things Regulated by the Property Law

In property law, people are the opposite of things. Persons are the subjects and things are objects. What exactly is a thing? According to general understanding, the following conditions should be met by a thing under property law⁴: a thing should be corporeal, separate,⁵ independent in the sense of economy and law, capable of being controlled, able to meet the needs of people, and both particular and specific.⁶ The object of a property law must be particular and specific,

³. XIA GUANG ET AL., supra note 1, at 6–7.
⁵. QIAN MINGXING, PRINCIPLES OF PROPERTY LAW 27 (Peking University Press 1994).
because if a thing cannot be individually identified, it is not a thing under property law. A specified thing is a thing that can be regarded as a thing separated from other things.

In contrast, environmental resources refer to anything that can be used or potentially used by the people. Environmental resources include those currently being used by mankind, such as minerals, water, and forests. They also include those resources not currently being used, but having the potential for future use, such as icebergs in the Arctic Ocean and snowy mountains on the Antarctic. Although environmental resources can meet our needs, be controlled by people, and are corporeal, they cannot be specified, and so are not things under property law. Generally speaking, therefore, environmental resources are not objects of property law. The ownership and utilization of environmental resources cannot be solved within the framework of environmental law, but can be addressed through the framework of property law.

For this reason, the tragedy of the commons cannot be avoided regarding environmental resources. The failure of property law to regulate environmental resources leads to disorder in the utilization of environmental resources. This is an important cause behind the disruption of environmental resources. Although property law has provisions governing the ownership and utilization of forests and land, such forests and land are simply a part of the environmental resources. Such partial provisions cannot solve the problem as a whole. Furthermore, even such partial provisions are not in line with sustainable development.

B. Neglect the Non-Economic Values of Things

Everybody knows that things not only have economic values but also ecological, aesthetic, and other values. The thing regulated by property law is not the thing as a whole, but only the economic aspect of the thing. As the regulation of things is limited to its economic aspect, the non-economic aspects are neglected, and property law does not give due attention to the conflicts between a thing's different values. The neglect of ecological and other non-economic

8. Id.
values by property law is a source of environmental problems in modern society.

C. Legalize Actions Disrupting the Environment Under Ownership

The rule of ownership is partially responsible for environmental problems. Although the notion of absolute ownership has to some extent loosened in modern society along with the wave of socialized property rights, its content has not been greatly changed. Ownership is still an almost omnipotent right, the owner in fact has an unfettered right to sue and to dispose of his property, including misuse. A person has the right to construct fences along the border of his property, no matter how high the fence may be or how much sunshine it blocks. Actions polluting the environment and disrupting resources may be sheltered under the notion of absolute ownership. This makes property law a shelter for environmental pollution and resource disruption.

In one sense, property law as it developed in modern agricultural society also exacerbated environmental problems. The problems caused by property law should be solved by property law. Therefore, property law must be integrated into the decision-making process.

Of course, as the most typical private law, property law takes the protection of private rights as its principal task. The nature of property law in safeguarding rights and freedoms shall not change, no matter how obvious the trend towards socialization and no matter how serious social problems may be. This does not mean, however, that property law cannot be part of the integrated decision-making process. Property law can be interpreted in light of the current social situation, maintaining flexibility and without changing its inherent nature.

1. Establishment of the Legislative Principles of Decision-Making by Integrating Environment and Development

Legislative guiding principles of the property law have direct impact on provisions of this law. Scientific development and the promotion of harmonious society are both specifically listed as legislative


guiding principles of the Property Law. This indicates that the Property Law takes full consideration of environmental protection and the harmonious development of human beings and nature. The legislators clearly declared that guiding principle include the theories of Deng Xiaoping, the three-representative theory developed by Jiang Zemin, overall implementation of scientific developments, adherence to socialist institutions, meeting the urgent needs of actual social life, coordinating all sorts of interests, and promoting social harmony.¹¹

2. Defining the Property Law and Its Scope of Regulation

The scope of regulation and the types of property rights directly reflect the essence of property law. Article 2(2) of the Property Law provides that “the things under this law include real property and personal property. If a law provides that a right can be regarded as the object of property right, that rule shall be followed.” In the part governing ownership of condominiums, the Property Law considers the ownership of space as a type of property right. In the usufructuary rights provision, the rights to contract land, use construction land, use dwelling land, and use natural resources are all listed as property rights. The Property Law does not follow the traditional definition of a “thing” and goes beyond the scope of corporeal things by including the right to space and the right to use resources as property rights. This embodies the shift from focusing on ownership towards paying more attention to actual use. This also provides a rights basis for the rational utilization of natural resources and for the coordination of property law with other related laws and regulations on natural resources. After the nature of the right to use resources is determined by the Property Law, the right holders have rights under the Property Law. This defines the scope within which governmental authorities can exercise their powers to regulate resources. At the same time, the right holders also have obligations under the Property Law. They must follow requirements imposed by governmental authorities on environmental protection and the realization of environmental public interests.

3. The Obligation of Property Right Holders to Protect Public Interests

Article 7 of the Property Law provides that the acquisition and exercise of property rights shall abide by the law, respect the social moral standards, and should not injure public interests and the legitimate rights and interests of other persons. This provision directly embodies the socialization of property rights and restricts the absoluteness of ownership. In contemporary society, environmental protection is obviously a social and moral requirement and a public interest. The Property Law confirms that the right holders shall have the obligation to protect the environment when they acquire or exercise property rights. It clearly declares its intent to restrict the absoluteness of the ownership interest with this general provision and also provides a legal basis for environmental protection in the exercise of property rights. Without the change of the traditional notion of ownership, and without the restriction of absolute ownership, it is impossible to achieve environmental protection.

4. Establishment of the Neighbor Right

In the chapter on neighbors’ rights, the Property Law, after making provisions about the principles of regulating right holders of property bordering on each other, specifically provides rules on reasonable use, environmental protection, and pollution prevention. These provisions not only specify requirements in the General Provisions that the acquisition and exercise of property rights should respect the public social standards and should not injure public social interests but also incorporate environmental protection in the determination of public social standards and public interests. Without fresh air and sunshine, a house is not a healthy dwelling. It is a basic right of any human being to have fresh air and sunshine, and it is a basic environmental protection obligation for any human being not to litter by discharging solid wastes and other pollutants into the environment. Provisions of the Property Law on the one hand protect the property right holders, and on the other hand provide a legal basis for legislation governing environmental rights and the revision of environment law. Provisions on access to fresh air and sunshine
will greatly promote the recognition and protection of such rights in environmental legislation.

II. PROBLEMS WITH CHINESE PROPERTY LAW

It is a sign of progress that the Property Law made some achievements in reconciling property rights with environment protection, but its provisions on the property rights governing resources still have much room for improvement.

As aforementioned, the Property Law takes into its scope of regulation the right to use natural resources exclusively owned by the State. It also states provisions on property rights concerning natural resources held by collective units and individuals. However, from the perspective of reconciling property rights with the environment, there are still two problems not to be neglected. The first problem is that the Property Law failed to take into its scope of regulation some important natural resources, such as environmental capacity and the weight or limits of ecological and other non-economic values. The second problem is that it is inappropriate to treat all rights to use natural resources as usufructuary rights. Such a provision is against the environmental protection goals and may lead to negative impacts. I will mainly discuss the second problem here.

When drafting the Property Law, scholars proposed different ways to address this problem. Generally speaking, these proposals were of three types. The first type regards the right to use state-owned natural resources as usufructuary rights, the second possession, and the third quasi-property rights. All these proposals recognize the exclusive state ownership of natural resources. The Property Law adopted the first proposal. Although all these proposals are reasonable in one sense, they all have problems if we open our eyes and examine this issue from a natural and ecological perspective according to the principle of sustainable development.

In China, the state ownership of natural resources is based on a declaration in the Constitution. Its basis is the socialist public ownership. However, I do not understand the statement in civil law

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12. Although the socialist public ownership includes both state ownership and collective ownership, natural resources are owned by the State. Accordingly, this article does not discuss collective ownership.
textbooks that the State is the independent, exclusive, and only owner of natural resources, although this is the most accepted statement in all civil textbooks. Is the constitutional ownership based on socialist public ownership an ownership in civil law? First, in terms of the objects, are natural resources things under property law? If so, how to specify such natural resources and make them qualified as objects of the property rights, as the air moves, water flows, forests grow and die, and wild animals migrate? Second, why does the Property Law use the term “permit” instead of “entrustment” or “agency” to describe how the State authorizes other subjects to use natural resources? Why does the Property Law provide that natural resources should be used with compensation instead of providing that the users should pay consideration? Third, from the perspective of safeguard and remedies, why does the law not provide for tort liabilities but directly provide for criminal liability for damages to state-owned natural resources? Is it a loss of the state-owned property when the rivers reach the sea, the fish swims away, the birds fly away, or when the forest and grasslands burn themselves? Can the Property Law answer these questions? If not, what should we do?

A. The Usufructuary Rights Failed to Distinguish Different Ways to Use Natural Resources

Why does the Property Law provide that use of state-owned natural resources is a usufructuary right? The basic logic is that no individuals or organizations own state-owned natural resources because there is only one owner of the state-owned natural resources. It is a principle of property law that there is only one owner for one thing. Therefore, the rights of all other parties in natural resources are not ownership but usufructuary rights, though they can possess, use, make profit with, or dispose of natural resources.13 This may be logical reasoning, but it may lead to many problems in practice. For example, as to the mining right, when the State confers the mining right to a company or an individual, such companies or individuals have the right to mine mineral resources in a specific area. The actual

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result is that the mining companies or individuals do not use what they take out of the land but sell it to others. The buyers will consume (for example, coal) or process (such as iron ores) what they buy. However they consume or process what they buy, they completely change the things they buy and the original things no longer exist. We all know that mineral resources cannot be returned to the original owner once they are taken out of the land. Can we treat this kind of use as the exercise of a usufructuary right? Who exercises such rights and who benefits from such use? Why can the holder of a usufructuary right freely dispose of mining products, even though they do not have the ownership of mineral resources? Are mining products the same as mineral resources? After the expiration of usufructuary rights, how can the right holder return what they used? Is the payment for the use of natural resources the benefit the state gets as the owner?

Here, we just take the mining right as an example. The situation of a logging right, hunting right, fishing right, or water right is similar. In fact, the use of resources can be classified as non-consuming use and consuming use, each having a different impact on the ownership. If the non-consuming use meets the features of a usufructuary right, it is not convincing to treat consuming use as the exercise of a usufructuary right. Furthermore, to treat consuming use as an exercise of a usufructuary right will promote excessive use and waste of resources. This is against the goals of resources conservation and environmental protection. Because the Property Law has some significant problems, this article takes the view that the Property Law makes some declarative provisions but fails to make complete and perfect rules on natural resources.

B. The Right of Possession Cannot Incorporate Environmental Protection Obligations into Property Law

Some scholars proposed that property law should use the right of possession to solve the problem caused by the separation of ownership and use of natural resources. The basic logic of this idea is to

discard the notion of one right for one thing and establish both ownership rights and rights of possession for natural resources. This idea recognizes serious problems in the usufructuary rights regime. We praise its innovativeness but doubt its usefulness. Can possession be an independent right? If so, what conditions should be met to be such a right? What is the relationship between ownership and possession? If possession derives from ownership, what is the difference between possession and other non-ownership rights? If ownership and possession are parallel, what is the content of ownership and what is the content of a possession right? Can a possession right be established on all public goods? Even disregarding the obvious conflict between the notion of possession and other notions of the civil law of the continental law family, if possession is parallel with ownership, it will be detrimental to the conservation of resources, rather than improving it. Many environmental problems are caused by situations where resources are public and multi-functional on the one hand, while not subject to ownership and instead subject to the principle of first capture on the other. For this reason, the possession right goes against the goal of incorporating environmental protection obligations into the civil law.

C. A Quasi-Property Right Is Reasonable, but There Is Still Much to Study

Some scholars propose that China should learn from the notion of accessory (permit) property rights in other continental law countries, especially Germany.\(^{15}\) The basic logic of this proposal is that natural resources should be freely used by the public but that this freedom should be restricted for the benefit of public interests because natural resources are limited and multi-functional. For this reason, the scope and content of such rights should reflect the nature of public law. We call it permit property right because it has the features of private law as well as public law. It is not a typical property right and is not a complete property right in the private law. The notion of permit property right is generally recognized by continental law countries. Compared with other proposals, it is more

\(^{15}\) Sun Xianzhong, Property Rights (Law Press 2001).
appropriate for incorporating public law obligations into civil law rights and meeting the needs of sustainable development. A careful analysis of this proposal indicates that there are still many problems to be solved for this proposal to work under the state ownership of natural resources in China. The establishment of quasi-property takes the permits of public law as a prerequisite, no matter whether in civil code or in special laws on natural resources. Since it is a private right with the features of public law, can the public nature of natural resources be completely achieved with state ownership? What is the nature of the permit? Does it confer a private right? In what role does the state grant this permit? What is permitted? According to the principles of administrative law, a permit does not confer rights but rather imposes requirements on the exercise of rights. Under the condition of state-owned natural resources, which rights of private persons should be regulated and how should this regulation function? In fact, permit is a measure to reconcile the conflict between the economic aspect and ecological aspect of natural resources and serves to reconcile freedom and fairness through the introduction or intervention of public law. Therefore, clarification of the ecological and economic nature of natural resources is a prerequisite for designing property law.

III. SOME IDEAS ON HOW TO RECONCILE PROPERTY LAW AND ENVIRONMENTAL LAW

My doubts are all based on my questioning of relevant rules. It is in fact my reflection from the perspective of environmental law or the notion of sustainable development. The traditional civil law is insufficient. I think the challenge of property law by environmental problems is because of the conflict between freedom and fairness caused by the economic and ecological values of natural resources. If we cannot find the causes of the conflicts between different values, cannot find ways to coordinate and balance conflicts between values, then we cannot completely solve the problem. Therefore, we must incorporate ecological rationality and overcome the insufficiency of economic rationality on the basis of a thorough review of the economic rationality of the traditional civil law.
A. The Two Aspects of Things

Things under property law mainly refer to things with economic value. Many things fall into the category of natural resources. In one sense, the object of environmental law and property law are identical. However, the same object has different meanings in property law and environmental law. The environment and natural resources have ecological values in environmental law but economic values in property law. The Property Law provides rules on ownership and use of natural resources for the purpose of making use of their economic values. For this reason, environmental function is not under its consideration. However, rights provided in property law will undoubtedly affect environmental values when such rights are exercised. If we hope to reconcile these two values and incorporate the ecological values of things into the scope and regulation of property law, we need to solve the conflict between the economic values and ecological values.

The first value to be considered is that of the thing in its economic form. Generally speaking, we call those environmental elements that are useful to our economic development natural resources. They are things in the form of resources. These things are objects of human labor. Our understanding of natural resources has economic meaning: forests can provide wood, water flow supports navigation, and mineral resources can be mined. In this sense, resources are scarce and useful, which leads to conflicts among different interests. The law should provide rules on ownership to prevent conflicts. Such rules are rules of property law.16

The second value to be discussed is that of the natural resource as an ecological thing. From the perspective of ecology, environmental resources are necessary conditions for the existence and development of human beings. These resources combine with human beings to form the ecological system through the flow of energy, recycling of matter, and transference of information. From the perspective of ecology, forests, water flows, and mineral resources are all necessary components of the biological circle. As ecological things, natural resources form an integrated whole and have self-adjusting capacity. Environmental resources are critical to human beings, so we have to consider this ecological aspect and establish rules to protect it.

Otherwise, the existence of human beings will be directly endangered. This system of rules protecting the integrity and self-adjusting function of natural resources is environmental law.

The two aspects of natural resources as things lead to the variations in values placed on natural resources. Property law and environmental law recognize and provide protection for different parts and values of these resources. Because of the past neglect of the ecological values of environmental resources, property law did not protect the ecological values of environmental resources; environmental law later developed to make up for this deficiency. The classification of ecological and economic values of environmental resources, however, is only in theory because these two values are inseparable in reality. The traditional civil law only cared about economic value, neglecting ecological values. This is one of the direct causes of environmental problems. Although we now have environmental legislation that protects the ecological functions of environmental resources, the achievement of this goal relies on two prerequisites. The first is to recognize the two aspects of environmental resources, while the second is to establish mechanisms to coordinate their conflicts. Therefore, environmental law alone is not enough. There must be a way for environmental and civil law to communicate and coordinate. Property law must recognize the ecological values of environmental resources. Currently, property law has established some channels for the recognition of ecological values and established some rules conducive to protection of ecological values. But these rules are far from perfect. I think China should establish more active rules for recognition and protection of ecological values.

B. Establishment of Environmental Property Rights

The understanding of the economic and ecological aspects of things provides a basis for protection, but we still need to identify a way to break through.

1. Redefining Property Rights

The definition of a legal term is based on the value given by a subject, along with a legal description of its inherent nature. We
currently use values to define legal terms. This value embodies how the object satisfies certain needs of the subjects. The needs of human beings for certain purposes form the value criteria. Among all values, the existence of human beings is the most important.

To classify things into corporeal things, specific things, and controlled things is similar. Things in property law are different from matters in physics because things, as objects of legal relations, must meet the value judgment of subjects and meet certain needs of subjects. According to the basic theories of civil law, the subjects are presumed to be rational economic persons. The maximization of interests is the inner impetus and the maximization of property is the highest goal for a human being. For a human being, the purpose of a right is to advance the acquisition of economic value. Only those things actually controlled by a human being can be possessed and used in one way or another; all other things are not things under property law. In this way, there is only one standard to determine whether something is a thing under property law: whether it can create economic value for human beings. Therefore, although all human beings need air, water, and other things, they are not things under property law because they cannot be controlled and bring direct economic interests to any human being.

The needs of human beings can, however, change over time. Being subjective, value orientations also change over time. When the environment deteriorates, human beings gain a deeper and deeper understanding of the environment and understand that the seeking of purely economic interests will bring destruction to humanity. Now, human beings have not only economic rationality but also ecological rationality. They think that the continuing existence of human beings is the most important goal and that the pursuit of economic benefits should yield to the need to maintain human existence.

Against this background, we can still use values as a way to define legal terms, but we can change the nature of things to make them meet the needs of subjects. This method will, however, bring confusion. The first problem is that we have to explain the values and the definition used. The second problem is that it will be difficult to apply legal norms if we change the criteria for value judgments. The legal norms of the past are based on economic rationality, while the current understanding is based on ecological rationality. These
two premises should not be changed randomly, for then the application of legal norms would have no premise. Furthermore, the existence of property law is itself reasonable., Property law also regulates many other things besides things of environmental value. If we abandon property law because of some deficiencies, property law will lose its function and this will lead to new problems and social disorder.

It is necessary, therefore, to consider a new way to define legal terms. We can define things according their economic or ecological functions. I call this way of defining terms functional definition. As an objective definition, the definitions can be expanded as we gain more understanding of the term to be defined. Different functions can coexist and be separately defined by different laws and can also be integrated.

Following this line of thinking, things have economic and ecological functions and these functions can coexist in one value. Now suppose a person with economic rationality is seeking the maximization of his interests through the possession and control of things. His rationality will tell him that he will not only jeopardize his own interests but will also endanger his living condition and harm himself if he uses his things without limits. Now he must take ecological functions into account. When he considers the ecological function, he has ecological rationality. In this way, ecological consideration can be incorporated into the definition of things.

In fact, this way of defining terms already exists in property law, as exemplified in the rights relating to condominiums. Additionally, more and more countries separate water right from the right to land. This is in fact an embodiment of this way of defining terms. The concept of accessory property rights in Germany is a typical example of integrating economic and ecological functions into property law.

2. Specification of Environmental Resources

Functional definition can provide us a way to have a multi-aspect and multi-dimensional understanding of things, and provide us with conditions to support the integration of ecological functions into property rights. The remaining question is what ecological functions can be integrated into property law. Things in the sense of property law are not things in the sense of physics. According to the interpretation
of German civil law, things are not only corporeal but also capable of being felt and controlled.\textsuperscript{17} Being corporeal means things have forms, either liquid, solid, or gaseous. No matter what form it has, a thing must be capable of being controlled by human beings.\textsuperscript{18} According to these requirements, it is still difficult to integrate environmental resources with ecological functions into property law. How can things without an owner and price can be objects of property law?

Environmental resource is a broad term. We still cannot control its scope and function. However, what is not controllable is the entirety of the environment. We can still control parts of the environment and some of its functions. Just as aforementioned, environmental resources have forms and content. The ecological function is the content, while the physical existence is the form. As to its economic function, the physical existence is both the form and the content. Now the question is whether incorporeal ecological functions or values are capable of being integrated into property law. This depends on whether such functions can be felt, made independent, and be specified.

The first issue is whether they can be felt. Environmental resources are the entirety of the basic conditions for human existence. The environment is a complete ecological system with different functions, structure, and features, such as renewability, recoverability, and recyclability. All values are embedded in these functions. All physical things are only embodiments of such functions, not the values themselves. However, ecological values are indeed capable of being felt. Clean air, fresh water, suitable climate, and beautiful sceneries can be actually enjoyed by the people.

The second issue is the controllability of environmental resources. Objectively, the ecological function as an entirety is not controllable by human beings. Humanity can only control part of it. Human beings have understood some basic laws of ecology and possess ways to find more. To a certain extent, the lack of prices for environmental resources is because they have no owner. Once prices are determined, environmental resources can be allotted through market mechanisms. Therefore, a simple and convenient way to solve the problem of controllability is to set prices for environmental resources and

\textsuperscript{17} SUN XIANZHONG, MODERN GERMAN PROPERTY LAW 2 (Law Press 1997).
\textsuperscript{18} LIANG HUIXING & CHEN HUABIN, PROPERTY LAW 31 (Law Press 2003).
make them exchangeable in the market.\textsuperscript{19} Theoretically speaking, it is feasible to monetize environmental resources. For example, some Japanese scholars determined the prices of forests by calculating the alternative costs to provide functions of water source conservation, prevention of desertification, prevention of soil erosion, provision of entertainment and health care functions, protection of wildlife, and provision of oxygen. There are also many other ways to value ecological functions. It is feasible to integrate ecological functions quantifiable with technical measures.

The above analysis indicates that ecological property rights are in fact a new type of property rights developed by integrating the economic and ecological functions of things by functional definitions. It is essentially the addition of the ecological function of things into the traditional economic functionality. I call it ecological property rights. This type of property right has features different from those of traditional property rights. There are two ways to materialize such ecological property rights, either by interpretation of traditional property rights in light of ecological requirements or by the establishment of new property right systems. The establishment of ecological property rights needs the co-effort of property law and environmental law.

\textsuperscript{19} WANG LIMIN, PROPERTY RIGHTS 36 (China University of Politics and Law 1998).
ON THE LEGISLATION OF ENVIRONMENTAL RIGHTS: RELATIONSHIP BETWEEN ENVIRONMENTAL RIGHTS AND PROPERTY RIGHTS

ZHOU KE & XU YA*†

ABSTRACT

At present, environmental legislation and jurisdiction, as well as the difficulties inherent in protecting the environment, all call for the legal confirmation of environmental rights. However, due to the uncertainty, multi-properties, and antagonism related to environmental rights, future legislation faces a bottleneck. One effective path to solve all aforementioned problems is to make the ownership of environment distinct through a reference to the bundle of rights theory of property, as well as through an imitation of the rights of condominium owners.

I. NECESSITY FOR THE LEGISLATION OF ENVIRONMENTAL RIGHTS

On March 10th, 2011, the chairman of National People’s Congress (“NPC”) Standing Committee, Wu Bangguo, declared in the second plenary meeting of the eleventh NPC’s fourth meeting that the socialist law system with Chinese characters had been established. Seven sections compose this law system, to the exclusion of the environmental law. Consequently, how environmental law is to develop in the future has been a hot topic for the academic discussions.

A. Dislocation of Chinese Environmental Law in the Legal System

In the socialist legal system with Chinese characteristics, environmental law is forced to break down into administrative law and economic law. But in fact, there is little content related to environmental protection in either administrative or economic law provisions. Instead, there are many provisions in civil law relating to environmental protection, including general principles of civil law,

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property law, and tort liability, which involve a large number of specific provisions on environmental protection.\footnote{Property Law of PRC art. 90 (promulgated by the National People’s Congress, Mar. 16, 2007, effective Oct. 1, 2007) LAWINFOCHINA, http://www.lawinfochina.com (last visited Aug. 25, 2012) (stating that “[a] holder of real property may not discard solid wastes or discharge atmospheric pollutants, water pollutants, or such harmful substances as noise, light and magnetic radiation by violating the relevant provisions of the state”); Property Law of PRC art. 120 (promulgated by the National People’s Congress, Mar. 16, 2007, effective Oct. 1, 2007) LAWINFOCHINA, http://www.lawinfochina.com (last visited Aug. 25, 2012) (stating that “[a] usufructuary right holder shall, when exercising its or his right, abide by the provisions on protection, reasonable exploration and utilization of resources as prescribed in the laws. An owner shall not intervene in the exercise of rights by the usufructuary right holder”); Tort Law of PRC art 65 (Promulgated by the Standing Committee of the National People’s Congress, Dec. 26, 2009, effective July 1, 2010) LAWINFOCHINA, http://www.lawinfochina.com (last visited Aug. 25, 2012) (stating that “[w]here any harm is caused by environmental pollution, the polluter shall assume the tort liability”).} From a legislative perspective, environmental law and civil law are linked more closely. But in a socialist legal system, environmental law is attributable to the economic and administrative law departments. As far as the author is concerned, the location of environmental law within the legal system is not accurate. This dislocation is mainly due to China’s tradition of environmental protection and legislation. From the beginning, China’s environmental protection has adopted a planned, top-down approach. It depends more on the government instead of public participation, resulting in citizens who have a weak awareness of environmental rights. Accordingly, environmental legislation, especially pollution prevention and control legislation, has a strong administrative image. For example, the Constitution of the People’s Republic of China (“PRC”), Article 26, stipulates that “The State protects and improves the environment in which people live and the ecological environment. It prevents and controls pollutions and other public hazards.”\footnote{The Legislative Affairs Commission of the Standing Committee of the National People’s Congress, Constitution of the People’s Republic of China 155 (Beijing: People’s Publishing House 2004).} It shows that in China the duties and rights concerning environmental protection are given to the state rather than to the citizens. This is why the legal system places part of environmental law under administrative law. In addition, because China’s environmental legislation was influenced by the former Soviet Union, whose environmental law system only contained the natural reservation part, the main content of natural reservation law is limited to specific development and utilization of natural resources, which are
typically economic activities. This is why many Chinese economic law scholars believe that China’s environmental law could feasibly be incorporated into economic law. Because the adjustment object of environmental law is contained within the adjustment objects of economic law, environmental law should be a branch of economic law.3 It is for this reason that the legal system puts the remaining parts of environmental law into economic law.

Based on the above analysis, it is obvious that the dislocation of environmental law in the legal system will inevitably lead to two incorrect tendencies. First, China’s environmental protection will continue to develop in the single government-led direction. Second, China’s environmental protection will continue to bear a strong planned-economy image. These two tendencies directly and indirectly exacerbate China’s environmental crisis. The limited rationality and limited neutrality of the government will lead to its failure in the field of environmental protection, reflected by its environmental decision-making mistakes, poor supervision and management on environmental issues, rent-seeking, and other opportunism behavior.4 Furthermore, the planned economy will lead to high economic costs of environmental management and the promotion of short-term behaviors of general entities within the market. This explains why, although over time the Chinese government has made environmental commitments and environmental laws, initiated environmental actions, and invested environmental protection funds, the speed of pollution exceeds regulation.5 According to the theory of modern environmental law, public participation and the introduction of market mechanisms are the most effective ways to solve the above problem. Public participation in environmental protection can compensate for the weakness of a single administration. Such supervision to the government’s environmental management can promote a more scientific and democratic outcome, while reducing government mistakes. The premise of effective public participation in environmental


4. Some academics point out that the malfunction of government in the environmental protection may cause difficulty in eradicating the five typical types of opportunistic behavior. See WANG RONG, ECONOMIC ANALYSIS OF CHINESE ENVIRONMENTAL LEGAL SYSTEM 12–23 (Beijing: Law Press 2003).

The market mechanism is the basic form of optimal allocation of resources; it can reduce the cost of government environmental management and protection, and stimulate the passion of stakeholders involved into the market to maximize the efficiency of resource allocation. The market mechanism is a prerequisite to running the system of clear property rights. It is necessary to adopt laws on environmental resources for a complete definition of property rights, and for the environment, so as to pave the way for market transactions involving such rights. This market mechanism would allow environmental externalities, to be more internalized, and to achieve the optimal allocation of environmental resources.

Right constitutes the core of the legal system. Many factors of the legal system are derived from the right, decided by it and affected by it. Right plays a very important role in the legal system. When we explain and understand the legal system from an extensive perspective, the right in the initial position, it’s the most important and central part, it’s the basis and genes of legal rules.6

The dislocation of China’s environmental law in the legal system has caused various environmental crisis responses and requires the establishment and improvement of public participation and market mechanisms. It also requires that the law give citizens a clear and specific understanding of environmental rights, including clear property rights regarding environmental resources.

B. Dilemmas of China’s Environmental Civil Liability

Although the Environmental Protection Law of PRC and the majority of environmental protection have separate edition laws containing provisions of environmental civil liability, strictly speaking, China’s environmental law has no independent civil liability of its own. The civil liability for environmental law is contained in the traditional civil liability system. From this perspective, China’s environmental civil liability is the subject of environmental legal relations that bear the burden under the framework of civil liability,

6. ZHANG WENXIAN, RESEARCH ON CATEGORY OF LEGAL PHILOSOPHY 345 (Beijing: China University of Political Science and Law Press 2001).
following the rules of civil law. Civil liability is usually divided into tort liability and liability for breach of contract. In the field of environmental law, environmental responsibility is triggered by tortious behavior. Therefore, the environmental liability in this article refers to environmental tort liability. Moreover, as natural resources have a significant economic value, and have already been included in adjusting the range of property law, their protection is fully applicable to general tort theory. Because the environment as a whole does not have a significant economic value, it cannot be directly adjusted by traditional civil law, so a special tort theory should be applied to environmental pollution prevention and control. Currently, the thoughts of China’s legislators on environmental pollution prevention and control tort theory focus on the newly adopted Tort Liability Law of PRC. According to Article 65 of this law, “Damages caused by the environmental pollution, the polluter should assume tort liability.” Environmental pollution tort liability consists of damage and the causation, as opposed to traditional civil tort liability, in which the elements of subjective fault and illegal conduct are not included. This dual-element theory of environmental pollution tort liability is a great breakthrough compared to traditional civil tort liability. While it helps citizens protect their environmental rights better, from the perspective of judicial practice, there still remains a big dilemma.

First of all, current environmental tort action in our country does not include the harm relief to the environment itself, which causes difficulties in raising and winning a lawsuit by the public. According to the Tort Liability Law of PRC, Article 2, the civil rights and interests used are restricted to personal and property rights and interests. As per the system interpretation, “harm” in Article 65 only refers to personal damage and property damage. Therefore, rights damaged by “environmental pollution infringement” only include the personal rights and property rights of pollution victims. This means that relief from environmental pollution action only concerns the loss of life, health, or property of the victim caused by the environmental pollution act, and does not include damage to the environment itself. It obviously puts the incidental before the fundamental, as the direct purpose of environmental civil remedy is to maintain

7. Because the civil law of our nation always places natural resources in the category of property law as a prescription towards property, the torts remedy about natural resources in the legal practices does not meet the problems mentioned in this thesis, which only launches discussions about the theoretical problems concerning torts remedy of environmental pollution.
the public right to live in a healthy and good environment, and the indirect purpose is to compensate the public for personal or property damage caused by environmental pollution. Therefore, in judicial practice, the current environmental pollution infringement system is not suitable to institute legal environmental proceedings when environmental pollution has caused environmental deterioration but has not yet caused actual personal or property damage, until scientific evidence (especially expert testimony) could prove that personal or property damage has indeed occurred. But as environmental pollution has delayed development characteristics, potentialities and scientific uncertainties, this kind of damage could appear several years or several decades later, which would not meet the requirements of maintaining the environmental rights of the public, and is unfavorable for the development of environmental protection in our country. Some scholars suggest that the environmental public interest litigation system should be established in order to solve the dilemma of the environmental pollution infringement system mentioned above. Environmental civil public interest litigation includes any organization or person that could initiate legal proceedings in the People’s court against any action that violates or infringes on the public’s environment rights and interests according to the law, and the People’s court will carry out judicial activity according to the civil litigation procedures of the law. However, as per the basic model of norms and systems of civil law concerning “right-relief,” no right means no relief, which also means that if “the damage of the environment itself” does not have the corresponding rights in law, it cannot obtain relief by itself and the polluter need not assume liability for the damage caused to the environment itself. Therefore, the affirmation of the public’s environmental rights by law is a prerequisite to establishing environmental public interest litigation. Of course, the environmental pollution infringement relief emphasized herein shall not exclude relief regarding personal damage and property damage of environmental pollution victims, but will extend relief to include damage of the environment itself.

Secondly, current environmental pollution infringement liability implements the principle of liability without fault, which may pose a potential threat to the property rights of numerous enterprises and influence the economic development of our country accordingly. The principle of fault liability is the basic principle within the principle
of imputation in civil liability. This means the injuring party that shall assume civil liability for its actions but if there is no fault, there is no liability. The “fault” refers to the psychological status of blame that the actor has. It includes two forms: the deliberate and the negligent. As fault liability could prompt the personal act yet not blame the actor for every move, it is favorable for the activity of the enterprise and the revitalization of the economy, and could actively promote the development of modern market economy. However, with the high development of large-scale, hazardous industries and transportation industries in modern times, the accidents and disasters caused by related infringement action have become serious social problems. Besides, these infringement acts have gradually overshadowed the fault liability principle due to the complexity of the injuring party, the unclearness of the causality, and the difficulty in identifying the fault; the objective fault principle and the fault presumption principle emerge only as the times require. Objective fault theory functions to determine whether the actor has fault or not in accordance with certain standard of the conduct instead of the special psychological activity of the actor. This kind of standard of conduct is vividly described as the reasonable care liability that shall be fulfilled by the *bonus pater familias*. If this kind of liability is not fulfilled, it is defined as a fault. Assumption of fault means that if the plaintiff could prove that his or her damage is caused by the defendant, and the defendant could not prove he or she does not have fault, the law will assume that the defendant has the fault and shall undertake civil liability. The basic applicable method involves implementing the burden of proof inversion principle. Although these two principles are more favorable for the protection of the victims, they still take fault as the final grounds of argument for the determination of liability. The public environmental hazard problem in modern times has become unprecedentedly serious since 1960. Although the majority of environmental pollution damages are not caused by the deliberate or negligent actions of the polluter, profits obtained through the management of pollution enterprises are to a certain extent established on the basis of environmental pollution. Therefore, replacing

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fault liability with no fault liability at all has become the universal principle of rules governing environmental pollution liability in many countries, including China. The principle of no-fault liability refers to whether the actor has fault and determines whether he or she will assume the liability for the damage caused by his or her action, as long as the law stipulates the actor shall assume the civil liability. As per no-fault liability, the victim does not need to offer evidence for, or assume any fault on the part of the injuring party, nor shall the injuring party demur for reason of having no fault.

The principle of liability without fault embodies the principle of fairness in civil law from angles of benefit equilibrium within the whole society, including the balance of power of different social groups in the community and compensation for the purpose of a peace-making effect. It reflects the view of equal justice in a modern socialization environment and is evidently marked with the characteristics of sociological jurisprudence. But, to abandon the application of the principle of liability without fault completely, and to apply a no-fault liability principle unconditionally, may bring about overburdened liability for enterprises that promote environmental protection. These enterprises cannot balance benefits between both parties involved and cannot adapt to the current situation of economic development in our country at this point. Especially when environmental pollution infringements involve more than one legal subject, it could probably conceal the subjective malicious fault of the infringers, leading to substantial unfairness, damping down the enthusiasm for production of market subjects, and violating their property rights, if we are to apply the no-fault liability principle completely and indiscriminately. In the first case involving road traffic noise in China, if the developer’s fault in the design of the housing estate is not taken into consideration, and the no-fault liability principle is applied exclusively, the property rights of the highway operating companies shall be infringed. So, when selecting civil liability principles for an environmental damage compensation case, the author claims to apply the no-fault liability principle cautiously and selectively. Namely, when its infliction has subjective fault, the

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fault principle should have preference over the no-fault principle. Provisions of this will meet both the needs of the current levels of economic development and the stages of the rules of law, and be more reasonable and achievable in judicial practice. It reveals that environmental protection should be carried out conditionally, or the protection of property rights may risk paralysis. For the same reason, the creation of environmental rights should not only be able to live up to the public pursuit of the environmental value, but also be based on practical demand in the economic sphere. Otherwise, it will not seem to be that powerful and at the same time, the creation of the environmental rights will seem to lack the precondition. This is the main reason why the environmental rights theory is met with legislative bottlenecks in numerous countries. Therefore, if environmental right is really to become legal right, it must take property rights into account.

II. ENVIRONMENTAL RIGHTS LEGISLATION MEETS A BOTTLENECK

Rights to the environment are “the core question of environmental legislation and enforcement, environmental management and public participation, citizen suit and environmental public interest litigation, and [are] also the center of construction and guarantee of environmental legal system for ecological society and Green Civilization.” Among all the theories of creating environmental rights, environmental rights theory is no doubt the most influential one. Environmental rights theory provided a worldwide basis for the environment crisis and the environmental protection movement produced after World War II. That theory was first put forward by an American scholar based on the theories of “public property” and “public trust.”

11. In order to remedy the information inconformity between the victims and the actors, mistake presumption theory will be adopted to replace the traditional mistake responsibility principle.


13. The theories of collective ownership and public commission put forward by Professor Joseph Sax from the University of Michigan of the United States are very popular. He deems that such environmental elements essential to the existence of humankind as air, sunshine and water should not be viewed as “free property” or the object of ownership. Instead they should be viewed as the “public property” owned by all the citizens within a state and nobody is entitled to occupy, dominate or damage them at will. In order to dominate and protect this “public property” reasonably, the collective owners entrust it to the management of the state. The state as a commissioned agent for the collective owners should be responsible for all the national citizens and should not abuse the commissioned right.
Hereafter, environmental rights were confirmed as basic human rights by lots of international legal documents, the most classic of which is the Stockholm Declaration of 1972, principle 1 which states, “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

From then on, the international community has generally accepted environmental rights as basic human rights, and many countries have tried to confirm this through their constitutions and other domestic laws. But there is no clear and specific regulation of environmental rights in those countries’ legal systems, where such rights are only considered “deserved rights” or “moral rights.” If the legal protection of environmental rights “remain[] only on paper and cannot influence human behavior or be rigorously observed, then the law is merely a myth and not a reality.” So in order for environmental rights legislation to be realized, it must be based on clear and specific subjects, objects, and contents of environmental rights. But these theories have reached no general consensus, and environmental rights legislation continues to bottleneck accordingly.

A. Uncertainties and Generalization of Environmental Rights

The right’s clarity is a precondition to the right’s legislation, so only specific “deserved rights,” with good maneuverability can be legally confirmed, while ambiguous “deserved rights,” cannot.

Firstly, the subject of environmental rights is uncertain. Among domestic legal scholarship, there are “nation, legal person and citizens”

15. From the perspective of existing forms, the rights can be divided into vested rights, legal rights and practical rights. Among them the deserved rights are “the original form of rights, they are the requirements and demands towards rights of the people in specific society under certain life conditions and cultural traditions and they are the rights thought or admitted for people to enjoy.” The legal rights are such rights “prescribed explicitly by the practical law or declared by the legislation guidelines and law principles, and they exist in the form of norms and ideology.” The practical rights are the “rights enjoyed and executed by the subject in practice. The practical rights are the end of rights execution as well as the start of new rights execution.” See ZHANG WENXIAN, JURISPRUDENCE 113 (Beijing: Higher Education Press 2003).
theories,17 “citizens” theories,18 “human” theories,19 and “natural rights” theories20 on the subject of environmental rights. So far, no agreement has been reached in this field. Therefore, environmental rights in theory would have no value without a clear and specific subject. Secondly, the content of environmental rights is uncertain. There have already been great divergences among scholars on the connotation of environmental rights.21 In addition, some scholars

17. The typical representatives of this theory are Cai Shouqiu and Tang Pengmin. See Cai Shouqiu, A Preliminary Study of Environmental Rights, 3 SOCIAL SCIENCES IN CHINA (1982); Tang Pengmin, On Environmental Rights, 1 SEEKER (2002). This theory defines the “nation, legal person and citizens” as the subjects of the environmental right. According to this theory, with the different subjects of environmental right, there are three corresponding kinds of environmental rights, namely the national environmental right, legal person environmental right and citizen’s environmental right. However, this theory does not make a reasonable explanation of the contents of these three kinds of rights, which leads to the inconformity of the nature and content of them as well as the appearance of certain contradictions and conflicts.

18. The typical representatives of this theory are Lv Zhongmei and Chen Quansheng. See Lv Zhongmei, Citizen’s Environmental Rights, 2 CHINESE JOURNAL OF LAW 62 (1995); Chen Quansheng, An Analysis of Environmental Rights, 2 CHINESE LEGAL SCIENCE (1997). This theory holds that the subjects of the environmental right should be citizens including the “modern people as well as the posterity.” However the admission of the posterity as the subject of environmental right will make the self of environmental right become hollow. For example, how to protect the rights of posterity? How can the posterity claim right for the deceased modern people?

19. The typical representative of this theory is Xu Xiangmin. See generally Xu Xiangmin, Environmental Rights: Stages of Development in Human Rights, 4 SOCIAL SCIENCES IN CHINA (2004). Mr. Xu thinks that the subject of environmental right is humankind. Making humankind the subject of right satisfies the objective legitimacy and public article property of the environment as common benefits of humankind. However, in the present international society, it is impossible to find an organization to form, express and execute the ideas of the whole humankind or a general practice of humankind as a specific function of social existence.

20. This theory was initiated by the American scholar and professor Nash and later promoted by Professor P. W. Tyler and Japanese scholar and professor Yamamura Tsunetoshi. See Fan Zhanping, On the Indefinite Nature of the Environment Right, 2 JOURNAL OF ZHENGZHOU UNIVERSITY: PHILOSOPHY AND SOCIAL SCIENCE EDITION (2006). According to this theory, all the natural objects have legal rights, especially those animals with life just like the humankind; they grow up in the natural environment and need also the sunshine, air and fresh water, so they also should be the subjects of the environmental right so as to enjoy such right. However, the admission of the status of natural objects will damage the principle of distinction between the objects and subjects which is the basis of the traditional laws. Meanwhile this theory also meets the same predicament on the remedy just as the theory of viewing the posterity as the subjects. The insuperable difficulties in the technology of law will only do harm to the authority of law.

21. At present, there are two relatively typical theories concerning the environmental right in our country. Professor Lv Zhongmei assumes that the environmental right should include at least: the right to use environment, the right to know the environment, and the right to participate in the environmental issues as well as the right to claim the environment objects.
further make the connotation of environmental rights deductive and generalized. Environmental rights are accordingly becoming all-encompassing rights. However, “if a right includes everything without a defined boundary, this right will be meaningless.”

In fact, it is believed this uncertainty pertaining to environmental rights is rooted in the indefinite conception of the environment. Since environmental right is, in essence, the right of allocating environmental elements, the contents and subjects of environmental rights will not be defined without a clear concept of the environment. Therefore, we should make an in-depth analysis on the concept of environment and the relationship between the environment and its resources. As a relative concept, the definition of the environment varies in academic disciplines. Among them, the definitions given by environmental science and ecology are of great importance for environmental law research, because those branches provide the main scientific bases of environmental protection. Within ecology, “environment” is defined as a biosphere that is the center and the subject of an atmosphere that must have necessary conditions and non-living substances around for it to survive biologically. Alternatively, environmental science defines “environment” as the aggregation of the space surrounding people and the various natural factors that could directly or indirectly affect human life and development. This people-centric environment is also known as the “human environment” and is the study of human activity, with strong properties of social science. Compared with “habitat” from an ecological perspective, “environment” in the law is much closer to the “environment” in environmental science with regards to the substance of regulation. The definition of “environment” in environmental law should be based on its definition in environmental science, because, basically, the environment in environmental law is also human environment.

Among them, the right to use the environment includes, but is not limited to, the sunshine-enjoying right, viewing right, scenery right, serenity right, smoke-resistance right, close-to-water right, park application right, historical environment right, and the nature-enjoyment right. See Ly Zhongmei, New Vision of Environmental Law 125 (Beijing: China University of Political Science and Law Press 2000). Professor Chen Quansheng believes that the environmental rights consists of two respects; one is the right of subjects in the legal environmental relationship to enjoy the proper health and pleasant life environment, the other is the basic rights for the subjects in the legal environmental relationship to make reasonable use of the environmental resources. See Chen Quansheng, An Analysis of Environmental Rights, 2 Chinese Legal Science (1997).

However, the “environment” in environmental law is different from its definition in environmental science due to its research scope and perspectives. First, the concept and scope of environmental law must be specific and clear, so the abstract and general concepts of environmental science (e.g., hydrosphere) cannot be within the scope of legal “environment.” Second, the environment of law must be composed by natural factors that can be affected, adjusted and controlled by human behavior and activities; otherwise, the law cannot protect it. Therefore, not all of the environmental factors that are directly or indirectly related to human survival and development in environmental science are included in the scope of the “environment” in law. Third, the “environment” in law should be an integral concept. This is because under the basic theory of ecology, the environment is “essential for human survival and development conditions, and is a symbiotic ecosystem with energy flow material recirculation and transmission of information. Here environment is ecological resource which should be understood from ecology . . . as the natural resource, it has integrity and self-adjusting ability.”23 This integrity means not only the addition but the integration of dynamic natural factors. From this perspective, the environment is a unity composed of a variety of natural factors “having a certain ecological functions of material and energy flow.”24 Although the legal “environment” is rooted in “human environment” under environmental science, the ecological principles and their interpretation are indispensable to the foundation of human natural science used to solve environmental problems. In summary, it is believed that the concept of “environment” in law can be defined as an entity that is composed of various natural resources or natural factors (including air, water, ocean, land, minerals, forests, grasslands, wildlife, natural heritage, human remains, nature reserves, scenic areas, and urban and rural areas) that affect human survival and development with certain ecological functions in material and energy flow. Such an environment provides the physical infrastructure for human survival and development. In

order to maintain life, humans must have the right to possess or use the environment, and such rights comprise the “deserved rights” of human beings. Due to the ecological integrity of environment, no subject in the exercise of that right can be excluded, regardless of whether other subjects exercise that same right. In terms of inner environmental rights for all citizens, this right is equal to everyone and inviolable.

Another concept closely linked with the environment is that of natural resources. Natural resources (the resources\textsuperscript{25}) are the aggregate of all the material and energy that form the natural world for human use. Clarifying the relationship between the environment and its resources is critical to solving the fundamental, theoretical problems associated with environmental rights. Consequently, an in-depth analysis of basic principles in ecology and environmental science is needed. First, based on the laws of ecology, resources are a static and integral part of the environment. As an entity, the environment is composed of both natural and manmade resources. In other words, resources are the basic factors for the environment. Previous litigators only focused on the usefulness and economic value in developing resources, which were accordingly considered objects of property right, and were separated entirely from the environment. Actually, a natural resource provides the material and energy to humans for their survival and development, as well as broad ecological values including environmental capacity, aesthetic value, and biodiversity. Take forest resources for example: on the one hand, trees and fruits perform different economic functions; on the other hand, they perform the same atmosphere environment function by absorbing carbon dioxide and releasing oxygen. Separating resources from the environment completely can cause the various interests in the same environmental factor to become unbalanced. This relevant legal adjustment leads to conflicting and more serious resource damage, because the environment is an entity dependent on ecological relevancy, system balance, and function coordination. Therefore,

\textsuperscript{25} There are two definitions of resources—a wide one and a narrow one. The widely defined resources include natural resources, human resources, intelligence resources and other kinds of resources, while the narrowly defined resources only mean the natural resources. However in the field of environmental law, the resources are commonly taken as the narrowly defined resources, namely the natural resources, if there is no special footnote. Therefore in this thesis, for the convenience of writing, the distinction between the resources and natural resources will not be specially marked out.
resources can be distinguished from the environment based on their independent economic value. Simultaneously, the resources must be an integral part of the environment based on their ecological value. Second, from an environmental, economic perspective, the value contained in the resources remains part of it in the environment. While on this point, scholars, especially those in traditional civil law, hold a different kind of view; their reason is that environment factors are the public goods, not exclusive ones, and accordingly possess only ecological—not economic—values. To support their views, they frequently take atmospheric environment into account. They say that one must breathe in order to survive but that one cannot prevent others from breathing in order to do so. Therefore, the non-exclusiveness or indivisibility of the atmospheric environment proscribes any creation of property rights. That conclusion, which may be correct in the early stage of human society, has been challenged as the environment becomes increasingly scarce due to modern environmental problems. Strictly speaking, the concept of “environment” here refers to environmental capacity, namely the maximum population size of the pollutant that the environment can contain and purify once contaminated. That the concept of environmental capacity was put forward means that some subjects can obtain the right to emit pollutants, while others cannot, even if they lose a right once possessed; otherwise, the environment may happen to be polluted. Therefore, the scarcity of environmental capacity, and the appropriate distribution of benefits, should become the object of the rights defined by the legislature. In other words, the law should confer the right to a specific subject to decide who gets such benefits. Consequently, the scarcity of the environmental capacity causes it to possess economic value similar to that of natural resources. Then the value of the environment shows the diversity not only of its traditional ecological value but also of its economic value with regards to environmental capacity resources. In summary, in terms of the environment, whether in its material form or in its value form, its resources are included. Resources are often based on individual elements of its basic state, and of its physical and chemical forms, so the protection of resources must focus on “quantity” maintenance. The environment is an ecological concept based on a balance system and a number of complex elements; its fundamental objective is to maintain the balance of the human
ecosystem as well as the stability of other ecological systems. To do so, it is necessary to maintain environmental protection “quality,” and this “quality” is based on the maintenance of the resources’ “quantity,” so the level of utilization of resources must be limited so as to not affect the quality of the environment. This is the scientific basis necessary to create the right system.

In summary, the environment includes resources from both a material perspective and a value perspective. The basic state of resources is based on individual elements, physical and chemical forms, so the protection of resources necessarily focuses on “quantity” to maintain the state. “Environment” is an ecological concept based on the balance of a system and is a synthesis of many elements. Its fundamental goal is to maintain the balance of the human environmental system, while maintaining the stability of the ecosystem. As a result, environmental protection means maintaining the “quality” of the environment, and is based on the resources used to maintain this “quantity”; therefore, the level of resource utilization must be limited, without affecting environmental quality, which is also the scientific basis created by the environmental rights system.

After clearing up the concept of the environment and the relation between the environment and its resources, it is not difficult to point out that the environment has two basic values to human beings: one is the environment’s integral, indivisible, and nonexclusive ecological value that can provide essential needs for human survival; the other is the environment’s partial, divisible, and exclusive economic value, which can meet the developing needs for humanity. So the disposition of creating rights to environment must meet the following three requirements so as to effectively realize the aforementioned values. First, the maintenance of the environment at a certain ecological level must be in the hands of the citizens, allowing each common owner to enjoy the whole environment on an individual basis. Second, the property rights of the environment (and its resources) must be clearly defined so that its economic value can be reflected through a pricing mechanism, turning it into an object that embodies specific legal property rights and that may be utilized. The third places the management rights of environmentally related affairs in the hands of its common owners, thus maintaining the whole environment’s quality at a certain level. Accordingly, the content of the rights to the environment in our country should also cover the following rights. Within the concept of a common environmental
right, in which the right is subject to citizen control, the object is necessarily a domestic environment; otherwise, its specific rights can be respectively confirmed by environmental elements, such as the right to clean air, the right to clean water and lighting right, etc. The latter rights are the exclusive rights of specific subjects partial to an environmental resource. According to China’s current condition of national economic development and environmental protection, the subject of this right is limited to our country, and collectivity, while the object is a natural resource in its environmental capacity, its specific rights include proprietary rights of natural resources and of an environmental capacity. The last right concerns the management of environmental rights and affairs for citizen. The subject of this right is the citizen while the object includes all juristic acts related to the environment and its specific rights including the right to access information, to participate in decision-making, and to access the judiciary in environmental matters, and so on. The theoretical framework of such rights regarding the environment is based on the fundamentals of ecological and environmental science, which enable it to satisfy the current needs of our country’s environmental protection and endure scrutiny both theoretically and practically.

B. Pluralistic Attributes of Environmental Rights

The clearness of a legal property right decides whether this right can obtain legal protection. After the environmental right theory had been proposed, its legal property became the problem that was most frequently discussed by scholars. In its early stages, scholars were more likely to confirm the legal property of environmental rights as a single property. Its representative theories are human right theory, personal right theory, and property right theory. Though the above

26. In the doctrine, environmental rights are fundamental rights of citizens, as the basis for human survival and development. Environmental rights have been affirmed by a series of international documents, in fact, they have become basic human rights of human society. See Lv Zhongmei, The Environmental Rights of Citizens, 2 CHINESE JOURNAL OF LAW (1995).

27. In the doctrine, citizens are subjects to environmental rights. Human environmental rights include personal rights. Because the consequences of violation of environmental rights are often manifested in the damage to the health of citizens, therefore, the environmental rights are rights of personality. See Chen Quansheng, Analysis of Environmental Rights, 2 CHINESE LEGAL SCIENCE (1997).

28. Environmental rights are property rights. The doctrine comes from the Public Trust Doctrine, which is transplanted from common law by United States environmental law. See XU XIANGMIN ET AL., ENVIRONMENTAL RIGHT: BASIC RESEARCH OF ENVIRONMENTAL LAW 28 (Beijing: Peking University Press 2004).
theories are partially reasonable, they only reveal one or several characteristics of environmental rights. The complexity and value of the pluralistic concept of environmental rights is dispositive of the impossibility of a single property, a point gradually accepted by scholars. However, some scholars hold the idea that environmental rights have properties of human rights, private rights, public rights, ecological rights, and legal rights. But some other scholars consider the existence of a theory that incorporates the tendency of traditional cognition and environmental right nature. This is the logic in pursuing a single correct answer, and this “seat by number logisches Denken” closely covers the complexity of environmental rights.

Based on “Comprehensive Logisches Denken,” scholars who endorse this position hold that environmental rights are not only the combination of human rights and common rights, but also the combination of the right to receive and behavior rights according to the property characteristics of environmental rights. It creates a complex right that incorporates due right, customary right, and legal right. Compound right theory shows that scholars have abandoned the logic of pursuing the sole correct answer and now acknowledge the pluralistic attributes of environmental right, which has progressive significance. However, compound right theory just gathers up the threads of related environmental right cognitions, trying to correct the defects of environmental right theory. Obviously, this endeavor is unsuccessful. The main reason is that it simply compiles many specific environmental rights without distinguishing them, thus lacking any basic logical point and creating too many disordered properties to be legally verified.

Based on the earlier analysis, the writer makes the environment and his goal of right subject as his starting point, integrating the three aspects of environmental right and property.

Firstly, environmental rights possess human rights but are not limited to this attribute. Common ownership of the overall environment is an obvious human rights attribute. Each person must rely on a certain natural environment, so that they can survive, breath air, and drink water, which are natural, inseparable, and integral rights of humans. Therefore, environmental rights possess human rights attributes that have been generally accepted by the international...
community.\textsuperscript{31} But if environmental rights are only regarded as human rights, they can only be incorporated into the law based on the provisions previously mentioned. So the laws should verify other specific environmental rights in order to achieve the reification of environmental rights and to provide the means and ways to achieve environmental human rights. Secondly, environmental rights possess properties of both private and public rights. With environmental rights, everyone enjoys an appropriate, healthy, good living environment, and the basic rights associated with the rational use of environmental resources that significant private owners possess. However, the public goods nature of the environment will lead to a tragedy of the commons before coming under the “Public Trust Theory,” in which citizens entrust individual environmental management rights to the country. The country’s environmental administrative power embodies the public right of property within environmental rights. Thirdly, environmental rights possess both substantive and procedural rights. To ensure the integrity of environmental rights, and to avoid its destruction by human activity, it is necessary to place citizen participation in environmental decision-making, and access to justice and other rights, under the premise that environmental laws inform physical environmental rights. The main procedural recognition of environmental rights is more likely to be accepted than complicated, ambiguous substantive rights.

In summary, the diverse value of the environment defines environmental rights legally, as property. According to the traditional thinking in civil law, it is difficult for multiple rights to form a right as provisions in the law. Environmental issues are also not considered traditional property rights, personal rights, and other theoretical rights that can be handled. Therefore, in order to protect the health of citizens, and the right to practice environmental responsibility, we can only refer to the “bundle of rights” theory in order to express and reflect the environment’s diverse properties. Moreover, conflicts and confrontations between rights make it difficult for environmental rights to be legalized.

\textit{C. Confrontations of the Rights}

The multiple attributes of environmental rights will inevitably lead to confrontation within these rights. The “rights confrontation”

\textsuperscript{31} For further explanation, see the first paragraph of Part II earlier in this paper.
or called “rights conflict” here means that different rights pointing to a common object, or claims between each other pointing to each other, will result in the rights not being achieved simultaneously. Because the various rights of the environment point to a common object, to the whole or a part, or to their ecological or economic value, there are restrictions and obstacles to environmental rights, although the rights are applicable to each other. This means that if the rights associated with one subject in the law can be achieved, then at the same time, it is certain that the rights of other law subjects cannot be achieved. In accordance with the second inference of Cohen about the restrictions of private property on personal liberty, that is “the protection of private property diminishes the freedom of non-owners,” correspondingly, environmental property rights of some subjects established “the liberty of property owners, but withdraw the liberty from those who do not own it.” 32 Similarly, there is a conflict between common environmental ownership and exclusive resource ownership. On the one hand, citizens own the whole environment based on the right of existence and have the right to maintain a certain level of environmental quality, which is the “due right” of humans. But when the resource is subjected to overuse, they pollute the environment, and the rights cannot be achieved. On the other hand, the resource subjects, especially enterprises, use the resources for production, creating wealth and promoting economic development of the country. The utilization of rights is meant to be justified and not accusatory, under the premise of not violating environment-related legal provisions. Even so, due to the complexity of the environmental problems, such behavior may result in the infringement on citizens’ personal or property rights. So the citizens will assert claims for damage compensation from the enterprise by applying “the principle of no-fault liability,” while the enterprise will limit the acknowledgment of rights when compensating. In addition, in dealing with environmental rights, there are conflicts among substantive rights and procedural rights, public rights and private rights. Because conflicts of rights in the environmental rights system are popular, subjects cannot establish reasonable expectations for acts and the results of acts, resulting in the collapse of the environmental rights system. To add insult to injury, environmental rights still

cannot enter the vision of legislators, which is intolerable. Therefore, it is necessary to bring the rights into a harmonious and orderly state instead of a state of confrontation. The author believes that the key to achieving this state is to grasp the logical structure of the system of environmental rights, and to define the boundaries of these rights clearly.

Through this analysis, it is not difficult to find the theoretical dilemma of environmental rights entering into legislation. The complexity and diverse values of the environment have led to uncertainties regarding environmental rights’ subjects universally and domestically, thus determining the diverse properties of these rights. Because traditional and single rights cannot sum up the properties of environmental rights, environmental rights should be recognized as a group of rights constituted by different rights. In addition, because the right conflicts with environmental rights, laws have to take full account of the logical relationship between rights while creating them, and form a bundle of rights with a logical structure. As Lv Zhongmei pointed out, “environmental rights are the bundle of rights with human attribute[s], and are a system of rights. Environmental rights are rights of a compound nature, possessing property rights, personal rights, other economic rights and ecological rights. The rights of different natures form a complex bundle of rights.”  

At this point, establishing environmental rights with property law has become a prime choice.

III. SOLUTIONS

How can the legalization of environmental rights be achieved? Peter Stan once pointed out: “The existence of [a] right and the degree of its being protected can only obtain guarantee when the general rules of civil law and criminal law are appealed to.”  

Just as the previous paragraph mentioned, if the bundle of rights principle in property law can be used to establish environmental rights, then the defects of single right may be avoided. The concept of human rights is especially general and impractical whereas the entitlement of property rights and management rights to the citizens

cannot only provoke great enthusiasm in the citizens to protect the environment, but also bring the dexterity of the market mechanism into play in the environmental field.

A. Basic Clues

By means of adoption of the bundle of rights principle in property law, the basic clues for the solution of legalization of environmental rights are, firstly, to define the environmental rights as a set of legal relationships. As mentioned, the environmental right cannot be generalized into a conceptual and united right “type”; on the contrary, it should be expressed as a right system with multiple properties. According to the subjects’ requirements of the environment, this right system can be reflected in three concrete sets of rights. These three sets of environmental rights do not depend on any fixed or abstract type of legal right in traditional law. In theory, they can only be analyzed in relation to concrete forms of rights in order to expose the most fundamental component elements. Therefore, the environmental right is anything but an abstract and general concept; instead, it is usually exemplified in a structure composed of all kinds of concrete categories. In other words, environmental rights do not form a plural noun but are a bundle of rights combination, namely an environmental right which is to be confirmed in the law, that is a somewhat vague bundle of rights that has been broken off from the united concept of environmental rights. Currently, more than one person should commonly own a single environmental element. Under such circumstances, the special and limited right possessed by every common owner of an environmental element becomes the central point. This means the boundaries and structures of this set of rights need to be focused on. Secondly, the law must be certain about the boundaries and structures of internal rights within environmental rights. In modern civil law, the most typical application of the bundle of rights principle is the system for “Owners’ Partitioned Ownership of Building Areas” or “Condominium ownership.”


36. The term condominium ownership of buildings, as one of the vital forms of property ownership in the modern times, has been established in the civil law in many countries and regions. The names of condominium ownership in the different countries and regions are unlike,
defining the structure of this set of environmental rights from a scientific perspective, we may learn to imitate condominium ownership. Owners’ partitioned ownership of building areas means that an owner shall have ownership over exclusive parts of the building, such as a residential house or a house used for business purposes, and shall have common ownership and rights of common management over other common, non-exclusive parts. The system of building ownership distinction is divided into three parts, namely exclusive ownership, collective ownership, and member rights. From the perspective of legal theory, the reason why confirmation of environmental rights in law can refer to the division of building ownership is because both are comparable in object and legal nature.

Firstly, this perspective is complex because the object, joint ownership, can be created through the division of ownership within a united and inseparable building. This building can be divided into several independent parts, horizontally and vertically, depending on the length and breadth and each part, each of which can be used separately and owned separately. Similarly, the object incorporating environmental rights is an indivisible whole in its ecological value, but the resource part of it, with obvious economic value, can be set apart singularly and owned by specific subjects. With the object of right as the logical starting point of rights research, this kind of similarity makes it possible to draft a system of distinct environmental rights by imitating the building ownership.

Secondly, from a multiple property perspective, the distinction made by building ownership involves a set of rights consisting of exclusive rights, collective rights, and member rights. The exclusive parts are occupied, used, profited on, and disposed with by the particular owners alone; the collective parts such as common walls, roofs, doors and windows, stairways, grass land, and hallways are owned collectively by all proprietors; meanwhile all proprietors enjoy management rights in dealing with the common property and the affairs of the whole building. However, the collective ownership of all the

such as “condominium ownership” in the United States (some states), “Wohnungseigentum” in Germany, “owners’ partitioned ownership of building areas” (Real Rights law of the People’s Republic of China contains a special chapter 6 of owners’ partitioned ownership of building areas.), etc. See CHEN HUABIN, RESEARCH ON THE SYSTEM OF THE MODERN DISTINCTION OF BUILDING OWNERSHIP (Beijing: Law Press 1995).

37. Chen Huabin, Talk About the Concept of Distinction of Building Ownership, 7 CONSTRUCTION OF RULE OF LAW 23 (2010).
proprietors is different from the shared ownership, because all the proprietors maintain perpetual collective ownership without division. This is exactly the multiple property distinction characteristic of building ownership. As mentioned in the previous paragraph, environmental rights also have multiple properties, including citizens’ collective ownership of the whole environment, which illustrates human rights through the collective ownership of the state’s natural resources and environmental capacity resources; this also illustrates this type of property as a private right that includes the citizens’ right to manage environmental affairs within property procedure. Besides, just like the distinction of building ownership, the three kinds of rights within the environmental rights cannot simply be added; they must combine with each other into a tight, inseparable whole with a certain structure. To sum up, the distinction of building ownership is extremely beneficial to the legalization of environmental rights. With the inspiration from the concept of distinct building ownership, this article puts forward the idea of achieving the legalization of environmental rights through the distinction of environmental ownership.

B. Establishing the Environmental Districting Ownership

Ownership of distinct environmental property means common ownership and exclusive ownership that owners distribute between the common parts and the exclusive parts of the environment. Membership rights are based on common matters, such as environmental management, protection, and so on. It includes three specific rights: common environmental ownership, exclusive environmental rights, and members’ rights. Through a combination of the foregoing analysis, there are following designs for three kinds of rights.

Firstly, the object of environmental ownership is environment; its subjects are citizens. The content on rights includes rights of use, rights to earnings, and disposition. Obligations include use of ecological environment, sharing of common costs (environmental taxes), and protection and preservation of environmental functions. There is a broad performance power in the environmental servitude, which includes the right to clean air, clean water, and sunlight (the right of ancient lights), as well as the right to ventilation, the right of overlooking and watching the scenery, and the right to be free of
pollutant emissions. Scholars have discussed much of the content of joint ownership in the aforementioned environmental theories, so this article will not give any more unnecessary details though it will discuss the provisions of sharing common costs (environmental tax). From the perspective of environmental economics, the environment has strong positive externalities. Namely, environmental subjects cannot obtain all associated benefits; that is, in order to serve the overall interest of the environment, the subjects must let other subjects obtain ecological benefits, but they could not place claims on the other subjects for reimbursement. Therefore in order to meet citizen requirements for ecological benefits, such incentives can only be realized through reliance on the government, and the financial burden of the government is very heavy. So in joint ownership, obligations to share costs must be required to determine provisions and to reduce government burden.

Secondly, currently, the objects in question are mainly natural resources and environmental capacity resources for exclusive environmental rights. The standard for the confirmation depends on its value, namely its independent economic value and its independent usage of the environment. The possibility for such distinction has been mentioned in the section on the relationship of environment & resources. The subject of the right is limited to the state and the collective group, and the important resources for the basis of confirmation are mainly acquired from the positive externalities of resources, rather than from the understanding of socialist public ownership and collective ownership, complying with a Marxist philosophical conception of our ideology across the Constitution and property law. Due to a lack of any incentive, if resources are distributed to private subjects, then their economic value will be more important to the private parties than their environmental value, and pollution will be maximized. Because a confirmation of public ownership of resources is necessary, even in Western countries with a private-system basis, resources that have positive externalities are all recognized as public properties. The contents of exclusive rights include occupying, using, and handling of resources, and provide that the benefits of the owners will not be violated and that the overall environmental safety will not be damaged. But it is necessary to point

38. Private parties cannot overprofit for sake of the overall environment.
out that public ownership is usually a virtue and that the real users are the real subjects indeed, and that such utilization is effectuated through an “apply-register-confirm” formality. The environmental capacity is usually allocated like gratuitous sewage, but such a method cannot reflect the economic value of resources as well as their allocation. So we shall establish a complete system through contracts, bidding, and auctions for environmental property as soon as it is possible to create a real “public legal person” environmental patent system in our country.

Thirdly, the basis of membership rights is the common relationship established by all districting owners who share in the production and live together in one environment. A safe and healthy environment is the basic requirement for their performing common rights. So all districting owners form a community, managing the environment as their means, and cover the management of the environment and environment-related acts (including pollution, improper handling and misuse). In order to maintain the safety and health of environment, the membership rights shall include: a right to environment knowledge and rights to strategy participation and requests. Correspondently, the obligations are: accepting the management and complying with management stipulations.39 The membership rights can be realized through self-management, namely through self-sufficiency by the citizens. But the majority of people are not concerned with the environment, and it is not realistic that such decisions will be made by every citizen, so the people can commission state representatives to make decisions on the environment for them. In this sense, state environmental administration has a reasonable method for such management. Although based on membership rights, citizens nevertheless have a right of access to information, supervision, and participation in decision-making of “management stipulations.” When the environment is damaged the state will give relief to them. So the confirmation of membership is not only connected to common ownership and the exclusive right to make the environment an organic whole, but it also provides a clear basis for an appealing environmental law.

39. “Management stipulations” in construction classification means that owners, for the mutual benefits of a good environment have established the written regulations on the building, bases and the attached facilities, usage and the differing the relationship between owners, while the regulations in environment classification refer to the relevant laws and standards.
From the perspective of environmental right, an integrated environment law is concentrated on its right to construct obligations, so that the ownership of the environment has distinct property rights that shall be confirmed or granted at law. Whether and how it shall be incorporated into the Constitution and if it will prove consistent with current laws, remains to be seen, so incorporation into the Constitution will require the condition of maturity.
ENVIRONMENTAL PROTECTION AND THE RULE OF LAW IN CHINA’S ENERGY SECTOR

LIBIN ZHANG*†

OVERVIEW

The future of China’s energy industry will include market-oriented reforms. Property rights are a fundamental right in a market economy, and the protection of property rights is a cornerstone of a market economy. The definition and protection of the energy industry’s property rights include the precondition that any enterprise, including various State-owned enterprises (“SOEs”), the three major State-owned oil companies, as well as privately owned and foreign-invested enterprises, can enter the energy industry. The definition and protection of the industry’s property rights also includes the necessary condition that the energy industry initiates market-oriented reforms. With China’s energy sectors’ gradual evolution from the traditional model of State-run monopolies to that of a limited open-market model, the definition and protection of property rights in China’s energy sectors naturally have become an important part of the country’s relationship between energy and the law. At the same time, gradually creating a legal environment comprised of a constitution, laws, administrative regulations, local regulations and judicial remedies would be the key for China’s successful economic reforms. This point also applies to the energy industry’s market-oriented reforms.

However, we also need to realize that at present, any nation’s, be it a nation governed by the rule of law or a nation that is transitioning towards the rule of law, property rights are also subject to various restrictions under the law. One kind of restriction is based on environmental laws and borne out of externalities that are a result of enterprises that pollute the environment. For any enterprise, moral self-restraint alone is insufficient in preventing said enterprises from

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† Website translations were provided by this author.
polluting. Moreover, when the law does not require enterprises to take responsibility for their actions, then any enterprise can act in its own self-interest in order to maximize its profits by freely ignoring or abandoning implementing measures that would prevent environmental pollution.

Nature has granted mankind a variety of natural resources; however, mankind, by means of wealth creation, has exploited these natural resources to the point that many corners of the earth have now experienced disastrous consequences. Like everything, though, natural resource exploitation has positive and negative aspects. Objectively speaking, natural resource development and exploration comes with a variety of hazards. Mankind’s unrestrained pursuit of wealth has and will lead to confusion, disputes, wars, and resource depletion. Also, the predatory exploration of natural resources will turn the gifts and welfare gained from nature into mankind’s own curse. Environmental protection law and the limitations that it imposes on property rights result from the abuse of property rights that could lead to the destruction of environmental resources. It is widely known that China’s environmental condition is deteriorating. The air, water, and soil are all severely polluted, the nation’s ecosystem has been damaged, and the ever-increasing pollution levels threaten our quality of life, our health. We are also leaving the next generation with very few natural resources. Therefore our society will become, in and of itself, a major source of turbulence. In terms of government, there is a responsibility at every level to pass legislation that will enhance the nation’s regulatory regime by transforming environmental pollution externalities into the responsibility of the enterprises that create these emissions. Moreover, there is no alternative.

Of course, in establishing such a mechanism, the appropriate regulatory issues should also be taken into account in order to avoid enterprises bearing excessive environmental liability costs, which could cause China’s economy to stagnate. How to balance the needs of economic development and also environmental protection requires an approach that considers these two policy approaches with equal importance. To successfully address this matter, the Chinese government not only needs courage but also wisdom. To some extent, decreasing the high speed of gross domestic product (“GDP”) growth and forcing enterprises to bear some external costs is a much better
route to change our nation’s “extensive increase model,” to improve our living conditions and to protect our nation’s natural resources. This conclusion also applies to China’s present energy industry and its values and concerns regarding economic development and environmental protection.

China is still in a transition period that is defined by its shift from a planned economy to a market economy. Meanwhile, China’s judicial system and its process for managing environmental pollution still cannot function effectively. Also, there are many problems that still exist for many administrative departments; these problems include: noncompliance with and lax enforcement of the law, as well as rent-seeking, which result in unfair competition in the marketplace as well as other irregularities. In the absence of effective remedies, victims of environmental pollution are left with few or no measures that will protect their legal rights.

Currently, State-planning mechanisms and monopolies still exist in China’s energy industry, specifically in some sectors such as upstream, midstream, and downstream oil and gas. Therefore, under this kind of planned economy model, the nation and society bear the cost of these circumstances and the consequent problems surrounding environmental externalities, which are still quite serious. That is why, in general, when looking at GDP, China’s energy consumption per unit of GDP production is much higher than in Western market economies; the phenomenon of high-energy consumption and low output still exists. Moreover, the misuse of natural resources and environmental damage is still very common.

I. ECONOMIC ANALYSIS OF ENVIRONMENTAL PROTECTION

According to economic theory, in market economies or in those economies transitioning towards a market-based orientation, each market player, be it a SOE, private, or foreign enterprise, will naturally pursue profit maximization as its primary objective. If there is no mandatory legislation or a pricing mechanism transforming the destruction of public environmental resources into the intrinsic costs of production, each market player in most situations tends to pass on the costs of environmental damage to society. This makes up the economics of externalities. A Cambridge economist, Alfred
Marshall, first proposed the concept of externalities and later his student, Arthur Cecil Pigou further improved upon the theory of externalities with his famous work titled, *Welfare Economics*.

It can be said that environmental problems are a classic example of external diseconomies of production. Environmental resources are typically publicly shared commodities, whether it is an environmental resource used in manufacturing or for other means, their consumption is non-competitive and non-exclusive. This makes the ownership of environmental resources more difficult to clarify than other property rights. Regarding the use of environmental resources, the marginal private and social costs differ for single economic entities. In manufacturing, manufacturers directly bear the marginal private cost, which also includes raw material and labor costs, etc. However, they do not assume the marginal costs of air pollution that are caused by sulfur dioxide gas emissions, for example. When manufacturers determine appropriate levels of output, they will only consider private costs. However, from a social perspective, manufacturers’ business costs not only include production costs but also costs that arise from damages caused by pollution, namely marginal social costs, and should be equal to the total of marginal private costs and pollution costs combined.\(^1\)

China’s coal mining industry is best able to illustrate the nation’s market externalities. When compared to other parts of China’s energy industry, China’s coal sector was the first to experience market-oriented reforms, but the coal sector’s externalities are still quite serious: China’s coal mining enterprises are in part responsible for the damage done to the nation’s soil and water resources and are also mainly responsible for the nation’s serious air pollution problems. In 1994, China’s coal industry was fully liberalized, and now the price of coal is on the rise. Nevertheless, high coal prices only contribute to the coal companies’ high profits. It is also of note that with the lack of legislation that effectively limits the cost created by externalities, enterprises generally do not have any economic motivation to invest money in environmental protection. Even if an enterprise, such as a coal mining corporation, wanted to invest in solutions to some of China’s current environmental problems, the

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cumulative ecological and environmental problems caused by the long-term development of coal resources would result in massive ecological restoration and construction costs that one enterprise alone could not afford to pay.

Currently, China’s coal production costs do not include ecological management costs, while developed nations generally incorporate ecological management costs of coal mining areas into the production costs so as to ensure a stable and reliable source of funding for ecological management.\(^2\) Up until now, China’s central and local governments have failed to establish a mechanism that would compel enterprises to pay for the ecological damage caused by coal mining activities. However, if there is no change in the pricing mechanisms and legislative provisions for these coal mining enterprises, then the externalities will become increasingly severe, which would undoubtedly contribute to the further degradation of China’s environment. Moreover, researchers believe that establishing a sound coal development and environmental cost accounting system that factors both environmental and ecological costs into coal enterprises’ operating costs would really compel coal enterprises to internalize environmental externalities for which they are responsible.\(^3\)

According to the interpretation of the theory of externalities and its application to the environment, we can consider how to establish the rule of law in environmental protection by basing it on economic analysis of law. According to economists, the theory of externalities states that there are three paths that comprise the economic solution to ameliorate problems related to environmental pollution: first, direct State intervention. As early as the 1920s, Pigou addressed environmental problems caused by environmental externalities and argues that without government intervention, the market will not automatically fill this regulatory gap. Therefore, this provides a sound theoretical basis for the government to institute a collection of “command-control” policy instruments in order to protect the environment. Moreover, from a sustainable development perspective, State intervention is necessary. Unlike macroeconomic regulation and

\(^2\) Li Wei, Chen Longgan & Zhao JianLin, *China’s Coal Mining Industry: Environmental Damage and Its Countermeasures*, 140 COAL MAGAZINE, No. 140.

\(^3\) Song Shijie, *Environmental Exploration & Coal Mining Regions: An Ecological Analysis of Environmental Damage and Control Measures*, 3 COAL PROCESSING AND COMPREHENSIVE UTILIZATION, No. 3 (2007).
control, State intervention and directly regulated microeconomic measures resolve market failures. Therefore, in order to effectively control the quality of the environment, environmental pollution regulations that prohibit, and restrict, as well as permit systems and standards certification systems must be implemented. For example, China's current system of environment protection laws has an established permit system. Under this system, the environmental impact of various planning, development, and construction projects, sewage design, and business activities must all first be reported to the competent authorities; only after obtaining a permit can they commence operations. There are many types of permits, including: emissions permits, oceanic dumping permits, mining permits, construction permits, construction and operating permits for nuclear facilities, chemical management and transfer of hazardous materials permits, etc.

The second economic solution for environmental pollution is taxation (i.e., neo-classical “Pigovian Tax”). The basic idea is to use the State’s policy to solve the problems caused by externalities, that is, taxing polluting industries to reconcile the difference between the marginal private and social costs. Moreover, Pigou advocated the adoption of a government-led mechanism by which externalities would be internalized by the polluting corporations so as to solve the problem of market failure resulting from environmental resource allocation. William Baumol, who succeeded and also built upon Pigou’s views, believed that in order for enterprises to internalize emissions externalities, a corporate emissions tax must be enacted. Additionally, so as to achieve a “Pareto optimum,” the established tax rate must depend on marginal damage caused by emissions; moreover, there should be no distinction between marginal revenue and costs of polluting companies.

China’s legal framework has already established a pollution levy system that regulates waste gas, waste water and waste residue. This type of collection system includes pollutants according to variety, quantity, and concentration; furthermore, this system levies fines against polluters and also those polluters that exceed established emissions standards. According to the interpretation of

5. Id.
Chinese legislators, the main purpose of this system is to enable legislative authorities to regulate the relationship between economic development and environmental protection through the act of levying fines. This system can also facilitate enterprises to improve their technology and to strengthen their pollution-reducing abilities. Clearly, Chinese regulators have not conducted in-depth research on externalities from a perspective that considers the economic analysis of law. Also, these regulators have no clearly defined method for compelling companies to internalize the externalities so as to effectively curb pollution. In contrast, our neighboring country, Japan, has done a far better job than China in this regard: this author recently traveled to Japan on business and developed a deep admiration for Japan’s positive results that have come about because of their steadfast commitment to environmental protection. According to local residents, Japanese corporations bear a relatively high social cost; this concept has been essential to the nation’s success in achieving its admirable environmental protection goals.

Finally, the third economic solution for environmental pollution is the protection of property rights. In 1960, Ronald Coase in *The Problem of Social Cost* challenged the traditional view on externalities, taxes and subsidies. Coase believed that a particular activity associated with the existence of externalities does not necessarily require the government to intervene with taxes or subsidies. As long as property rights are clearly defined and transaction costs are zero, then the affected parties are able to implement the Pareto optimal results, and the nature of this result is independent of the initial property rights arrangements. Coase represents a new school of thought, which proposes a policy that addresses externalities and also the problems of market failure by using market-based mechanisms. As such, government intervention would not be necessary. An emission permits trading system is the application of said property rights theory with respect to resolving environmental pollution problems. Through establishing an emissions trading system, the government can establish a mandatory cap on emissions for a particular region, then emission rights will be given in the form of corporate or individual permits which are allowed to be used and traded; meanwhile, the market decides the price.6

6. *Id.*
The model of using property rights as means to resolve environmental pollution problems is a regulatory mechanism with a certain degree of flexibility that exists under the rigid emissions standards that the government sets to control aggregate pollution levels. Therefore, enterprises can enter the emissions market and purchase one kind of right, namely the right to pollute the environment. If, after a corporation pollutes, its benefits gained are greater than payment of the costs of certain environmental pollution (including living and societal costs), then this method can maximize the efficiency of resources allocation. That is, we do not need to emphasize the absolute value of the environment, and we can target specific cases and use negotiation and judicial relief to make polluters and other related parties obtain an optimum allocation of resources. Chinese corporations participate in the Kyoto Protocol’s clean development mechanism by trading emission reduction certificates sold to foreign companies; this is an example of using property rights to solve environmental emissions problems.

Currently, China has yet to complete its process of reformation: the nation’s market economy is far from established; the phenomenon of ambiguous property rights is also very common; and deeply rooted economic reform is difficult to achieve. Therefore, China urgently needs to pass legislation and implement effective enforcement in order to establish a framework with clear property rights. Moreover, a new phenomenon has recently emerged in China’s economy: “Guojin, mintui,” which shall be translated as “State capital rises while private capital falls.” (Another translation of “Guojin, mintui” is “dominance of the State in the economy.”) Moreover, this phrase more accurately describes the current regulatory atmosphere, which favors State-owned enterprises with governmental incentive policies and access to a variety of quality resources in order to make them bigger and stronger while privately owned enterprises exist in an increasingly unfavorable environment. In China’s energy sector, there are still some units, such as large State-owned enterprises, that have no clear division of function between the government bureaus and the actual enterprises. Such large State-owned enterprises, including China’s major energy companies, because of their sheer size and scale, have the potential to damage the environment to an extent that is considered greater and far more dangerous than many other Chinese enterprises.
More seriously, the government failed to perform its public duty to protect the environment. There are State-owned and provincial-owned enterprises that receive support from all levels of government; as such, some instances of damage to and misuse of environmental resources are a result of decisions made at every level of government. Under other circumstances, the government did not participate in the enterprise’s managerial decision-making and were plausibly unaware of said enterprises’ pollution activities. However, many practical solutions that hold polluters accountable for abusing environmental resources often favor State-owned enterprises, thus allowing them to evade serious repercussions.

What’s more, as the Chinese law on “public interest” is not clearly defined, many government officials mistakenly think that the development of the local economy is the greatest public interest; therefore, environmental protection is neglected and there is no regard given to people’s living conditions and its subsequent damage and pollution. Instead, high-sounding reason for all-out economic growth is used to support further environmental destruction.

Of course, the aforementioned solutions can be used as a hybrid of regulatory instruments to solve these problems. For example, in regard to environmental issues, some suggest that an environmental standard emissions tax, an emission permit trading system, and other policy instruments should be implemented. A hybrid approach is suggested because the instruments are flawed and are limited in their efficacy; only implementing one of these policies would not effectively resolve the larger collection of problems. Thus, various policy instruments need to be combined so as to improve the inherent quality and external conditions for environmental policies. In fact, most nations include a hybrid of policy instruments in its environmental legislation. China is also following this trend in that the nation’s legislators have opted to implement a hybrid legislative approach which relies mainly on the first and second economic solutions mentioned above.

II. ENVIRONMENTAL PROTECTION AND THE RULE OF LAW

In order to use the three economic solutions to achieve environmental protection targets, the market economy alone could not work
very well; legal measures should therefore be applied and implemented. Since the beginning of “Opening Up and Reform” in 1979, China has begun to draft and implement environmental protection legislation. According to Professor Wang Canfa’s introduction of China’s environmental law, in 1979 China developed the trial version of the nation’s Environmental Law. From then on, China’s environmental legislation began to develop. Compared with other legislative development in other sectors, China’s environmental legislation has developed the fastest over the past thirty years. In fact, it can be said that China’s environmental legislation is now quite comprehensive in its ability to address the country’s environmental problems. In particular, China’s Property Law also places great importance on resource conservation. Furthermore, the Property Law provides that air, solid-state waste, and noise pollution are all examples that violate citizens’ property rights. The new Tort Law has also established civil liability provisions for environmental pollution.

Professor Wang Canfa believes that it is still difficult for China’s environmental protection laws to effectively curb the current decline in the quality of China’s environmental condition. Also, the law does not serve its designated role; the results of implementing China’s environmental protection law are now less than satisfactory. Therefore, it is necessary to ask: though China has established a relatively comprehensive legal system for environmental protection, why has the environment not fundamentally improved? And why are there still many regions where conditions are still worsening? In this regard, the author would like to put forth the following analysis regarding the causes that have lead to this solution and then offer a few suggestions for future improvement.

A. Legislation: Shortcomings, Ambiguities, and Lenient Penalties

Currently, one criticism that many make about China’s environmental protection laws is that this collection of laws is lacking a number of necessary legal provisions; there is also the criticism that
existing laws are not effectively implemented and that legal non-
compliance is a very serious issue. Take oceanic pollution as an ex-
ample; the recent ConocoPhillips oil spill within China’s maritime
border underscores the deficiencies present in China’s environmen-
tal protection laws. Now, it is apparent that the legislation used to
determine compensation amounts for damage done to China’s ma-
rine ecosystem needs to be updated. This is because the relevant
State ministries can only devise penalties for the responsible par-
ties based on part of the Marine Environment Protection Law, which
covers oceanic water quality. However, the oil spill did more than
affect water quality; it also affected marine life, including commer-
cial fisheries, as well as the health of coastal residents living near
the spill. Thus, it is evident that relying solely on China’s current
Marine Environment Protection Law to determine penalties for caus-
ing ecological damage is problematic. In contrast, the United States
has a relatively sound set of applicable laws for adjudicating oil spills.
After the British Petroleum (“BP”) oil spill in the Gulf of Mexico, the
U.S. Department of Justice initiated an investigation, which deter-
mimed that BP may have possibly violated several laws, including
the Clean Water Act, Endangered Species Act, as well as others. This
investigation and its opinion demonstrate the provision of compre-
hensive, thorough, and compliant legal support for the victims and
affected region.  

It is well known that coal is China’s primary source of energy, but
environmental protection enforcement in this industry is highly un-
satisfactory. To some extent, the status of environmental protection
in the coal industry is one of the main reasons why the nation’s en-
vironment is facing destruction and degradation. Researchers who
have examined the causes of China’s environmental decline point
out that the nation’s coal mining regions lack a complete and effec-
tive set of laws that can protect the environment in these areas.
Thus, the existing set of laws is unable to meet the practical needs
of these troubled regions; China has long lacked systemic environ-
mental management laws and regulations for coal mining areas. At
the national legislative level, the Mineral Resources Law and Envi-
ronmental Protection Law only provide environmental protection

9. ConocoPhillips Oil Spill: The Whole Story; China’s Laws on Marine Oil Spills Are too
requirements in principle; specific management systems and regulations are clearly missing from these aforementioned laws. Also, these two laws provide very simple environmental obligations of the mining right owners in connection with exploration and exploitation of mineral resources, and are short of effective environmental protection provisions.10

Under Chinese environmental law, penalties, such as tax and other liabilities, for polluting entities are too lenient and are also insufficient for effectively solving externalities. Moreover, these penalties cannot fill the gap between marginal private and social costs that results from pollution. Therefore, Chinese legislators should enact stringent liability provisions under the country’s environmental law. This legislative action would give teeth to the country’s environmental legal framework by including higher taxes and harsher penalties for polluting entities. The general public view is that with respect to an oil spill which severely scars the oceanic region; the time and money being poured into the clean-up and recovery efforts will far exceed the maximum penalty that can be levied under the Marine Environment Protection Law, which is currently capped at RMB 200,000 yuan. Given the significant size of revenue and profits earned by national oil companies and international oil companies engaged in offshore oil development, the size of this penalty is clearly insignificant and also insufficient to deter enterprises from engaging in negligent behaviors that could result in future oil spills. As such, China should consider amending the existing law so that the penalties are higher and also take into account externalities; this action ensures that the larger society does not have to bear the social costs created by an individual enterprise’s pollution.

B. Law Enforcement: Unsatisfactory Results, Rent-Seeking, and Unequal Applications of the Law

Another major criticism of China’s environmental protection laws is ineffective implementation. Even if the country’s legislators develop sound environmental laws and regulations with punitive teeth, these laws will only be as useful as the paper on which they

10. Wei, Longgan & Jianlin, supra note 2.
are written unless they are effectively implemented. At present, improper interference is the primary impediment to effectively enforcing China’s environmental laws; improper interference can best be described as government corruption, bribery, judicial corruption, and unequal applications of the law. A rational form of law enforcement should hold everyone accountable to the law. Regardless of who pollutes, be it a State-owned enterprise or an enterprise with powerful supporters, everyone should be equal before the law; this is a fundamental principle of the rule of law. Otherwise, the law will become a tool of unfair competition. Furthermore, there are some local environmental protection bureaus that use environment protection penalties as means for generating income; this is entirely contrary to the spirit of the rule of law. As a result, it makes those being regulated lose respect and trust for the laws by which they are supposed to abide.

Within China’s energy industry, there are currently a number of major accidents that remain unresolved and that leave its victims and the public without a reasonable explanation. This is often the case because China’s large State-owned enterprises are behind these accidents, and many do not dare confront them over these issues. According to media reports, after the 2010 PetroChina 7-16 explosion occurred, the company bore no responsibility, nor did it give the public an account of what had happened. Moreover, the authorities did not penalize those who were responsible for the incident; such practices are worrisome. After the 7-16 incident, PetroChina further instigated the public’s dissatisfaction with the situation by not only failing to hold anyone responsible for the accident, but it also held a rescue and relief awards ceremony. During the ceremony, nine work units and 197 people were awarded the titles of “Advanced collectives and individuals,” respectively. Professor Lin Boqiang, the Director of the China Energy and Economy Research Center at Xiamen University, argues that PetroChina’s accidents happen in the same place again and again; there is a dire need for accountability and an explanation.11

C. Judicial Relief: Increase in Litigation Costs, a Lack of Procedural Requirements, and a Shortage of Professional Legal Talents

Traditionally, government authorities use administrative means to solve problems that are precipitated by environmental pollution. However, these kinds of administrative measures are quite limited in their efficacy and are subject to various constraints that are affected by personal, procedural, and political factors. In a market economy, the judicial process is considered a more equitable, effective and reliable solution for environmental problems. Professor Wang Canfa pointed out that in the past, people would tend to emphasize administrative measures and place less stress on judicial means; that is, the laws and statutes could not be enforced by the courts, and people would therefore feel that laws were of no use. In recent years, environment-related court cases have increased at an annual rate of 25%, and some cities, including Kunming, Guiyang, Wuxi and Shenyang, have already established environmental courts. Additionally, some National People’s Congress representatives have recommended that the Supreme Court issue a notice, which permits various places to establish environmental courts; these environmental courts will be established so as to allow more environment-related court cases to be initiated. The courts’ application of the law to cases will boost the authority and legitimacy of the country’s environmental law.12

At present, China’s environmental litigation cases commonly have many problems. Among these problems is the fact that the courts sometimes refuse to docket this type of cases, and with respect to those cases which are successfully docketed in courts, plaintiff victims only win about 30 percent of such docketed cases. According to reports, on August 16, 2011, the State Oceanic Administration officially announced plans to initiate public interest litigation against ConocoPhillips after the oil spill in Bohai Bay. However, current domestic ecological public interest litigation has always had a difficult time with evidence and enforcement as well as other issues; therefore any definitive outcome still remains a distant prospect.13

In order to improve China’s environmental condition, the nation could consider establishing a nationwide special environmental court as well as fair and reasonable procedural rules regarding environmental litigation, evidence, and damage appraisal. This special court could also provide victims of environmental pollution with the opportunity to initiate civil action, particularly in the form of litigation, against polluting enterprises; thereby, victims would have the opportunity to obtain adequate and effective remedies, such as damages or injunctions. Moreover, this new court institution and set of procedures would allow victims and related public interest groups (including those that emphasize environmental protection) the opportunity to initiate administrative litigation against government departments for omissions or irregularities in government-developed regulations or practices. Compared with other methods, there is nothing more effective than victims of environmental pollution exposing polluting enterprises and defending their rights to do so. Their effect will be a thousand times better than that of the environmental regulatory authorities because these authorities are limited in manpower, resources, and subjective awareness. This is the only way that environmental justice can be asserted so that acts of pollution and environmental damage are condemned and punished. Furthermore, if those involved in disputes or issues regarding environmental pollution can effectively use legal channels to solve those problems precipitated by environmental pollution, then they will have foregone violent means to defend their legitimate rights. A benefit of using legal means to resolve environmental disputes is that it prevents such disputes from unnecessarily evolving into violent frays that draw the attention of the entire community.

In addition, China should also cultivate a large number of judges and lawyers who are well versed in environmental litigation so as to ensure that the judicial process functions effectively. After all, even the best systems and laws require talented people to operate them. Unfortunately, China still lacks experts and senior legal personnel who are well versed in environmental law. With the increasing number of environmental litigation cases, societal demands for senior legal experts in the field of environmental protection will also begin to increase. According to reports, the North Sea (Beihai) Branch of the State Oceanic Administration has announced that, in the wake
of the ConocoPhillips oil spill, it is seeking to employ a legal service team drawn from the whole country. This team will prepare a lawsuit that seeks reparations for ecological marine damage that resulted from the oil spill. The Beihai Branch said that it will invite domestic and maritime legal experts to form an expert evaluation group which is mainly responsible for conducting a preliminary examination of all the applicants and then selecting at least five teams to participate in the formal interview. For teams who participate in the second interview, the Beihai Branch will implement a systematic process in order to select the best candidates including one principal team and three or four assistant teams to provide the legal services in this case.

When evaluating the judicial system’s effectiveness and its adjudication of environmental litigation, one must consider whether the victims of pollution receive adequate relief in a timely manner. In accordance with the provisions of General Principles of Civil Law Article 134, there are a total of ten civil liability remedies, among which, there are five that can be applied to environmental tort relief: cessation of infringements, removal of nuisance, elimination of dangers, restitution, and compensation for damages and losses. As such, we can take the cessation of infringements, removal of nuisance and elimination of dangers as types of remedies similar to common law injunctions. The infringed parties to environmental tort cases often include a large number of victims and such cases commonly carry high costs. Therefore, China’s courts mainly grant compensatory remedies in the aforementioned cases. The reason is that the broad application of the injunction will deal a devastating blow to China’s modern industrial base. Thus, courts generally only exercise an injunction for relief efforts on those polluting enterprises that will be minimally impacted or that have production activities of little value. Among environmental disputes in China, most remedies involve monetary compensation.

In reality, China’s environmental disputes have been on the rise in recent years. Although most of these disputes are resolved through administrative procedures, the current trend still indicates that there is an increasing number of cases being heard by basic-level district
courts. However, the compensatory amounts that parties received are on the decline. When the courts insufficiently compensate the victims for their losses, judicial relief then fails to serve its original purpose. Moreover, if the courts are useless in resolving externalities, then this equals encouraging the behavior of polluting enterprises. It is also unfair for those law-abiding enterprises that assume more external costs than others; therefore, when considering the saying, “bad money drives out good money,” it is no surprise that many enterprises opt to shirk their share of social costs that are precipitated by pollution.

In China’s civil infringement cases, the claimant generally bears the burden of evidence. As is often the case, polluting enterprises withhold information regarding their emission-related activities, while pollution victims only possess information regarding damages inflicted upon them. Thus this asymmetric information inevitably results in the shifting of the burden of evidence in pollution cases. Namely, in relation to the generation of pollution behaviors and the causation in pollution cases, the plaintiffs generally do not have to bear the burden of evidence. According to China’s judicial interpretation “Provisions of the Supreme People’s Court on Evidence in Civil Procedures,” Article IV, Section 3, “in any compensation claim relating to damage caused by environmental pollution, the party alleged to be responsible for such pollution shall be responsible for producing evidence to prove the existence of any exemption from liability as provided by law or that no causal relationship exists as between his conduct and any damage suffered.” The judicial interpretation did not specify the circumstances in which “shifting the burden of evidence” applies. In reality, the implementation of judicial practice has its deviations. For example, in the Hechi arsenic pollution case, the plaintiffs were asked to prove that there was a causal relationship between the infringement and the results of pollution, which was different from the holding in the Black Fungus case. Therefore, objectively speaking, the practice of different courts has created great uncertainty for environmental litigation.

In reality, the polluting enterprise is often a large entity with a government-related background while, in contrast, the plaintiffs in environmental litigation are often very weak. For many of these “little people,” it is often difficult, if not impossible, for them to bear
the high cost of initiating litigation, which includes filing fees, lawyer fees, fees for the appraisal of damages, and enforcement fees. However, if the judge rules in favor of the plaintiff, it may not only benefit the plaintiff individually, but also other individuals and communities that may have been affected by the defendant’s polluting behavior. Based on the theory of externalities, the aforementioned fees are in fact the social costs, which are based upon personal and public interests for environmental protection. Therefore, it must be said that it is unreasonable for the “little people” to bear the costs of environmental protection, even if only in part, as many cannot afford to do so. Furthermore, if the plaintiff and the defendant each must bear the cost of litigation, then many plaintiffs would be discouraged from initiating civil action. In this regard, China should consider establishing a State or privately sponsored legal aid center that provides pro-bono legal services for victims of environmental pollution. China may also consider making legal provisions by which losing defendants are compelled to bear their opponent’s legal costs. This is bound to encourage the victims of environmental pollution to pick up their legal weapons, and, by lawful means and procedures, assert their right against polluting enterprises.

III. A SYSTEM FOR DISCLOSING ENVIRONMENTAL INFORMATION: ENSURING THAT POLLUTERS HAVE NOWHERE TO HIDE

Environmental management information instruments are considered a new approach for environmental management and are called a “third wave” in the history of mankind in controlling and fighting against environmental pollution. The primary measure for implementing this environmental information system is to publicize relevant information about environmental practices through various media outlets. Furthermore, through communal and public discussion, it is possible to place pressure on those entities that have questionable or destructive environmental practices. Through these media outlets, it is possible to achieve future environmental protection and preservation goals. Actually, the three aforementioned solutions for resolving environmental pollution and the results of implementing and using each are inseparable from environmental information

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15. Wenhui, supra note 1.
disclosure. If the government does not, in a timely manner, fully grasp the nation’s environmental information, then the government’s model of command and control regulation will lose its informational base for making crucial decisions. A lack of information will also lead to authorities implementing incorrect decisions or policies that deviate in varying degrees. In order to levy an “environmental tax,” there must not be a lack of information; otherwise it will be difficult for authorities to quantify the externalities’ full extent. For example, without comprehensive knowledge, it will be impossible to determine the difference between private and social costs, and thus, it will be impossible to effectively determine an adequate environment tax amount. Moreover, if it is impossible to determine an environmental tax, then it can also be said that externalities cannot ultimately be controlled. In regard to regulatory instruments that monitor property rights, environmental information is the operational foundation for an emissions trading system.

As can be seen from environmental information sources, all incidents of environmental pollution face serious problems of information asymmetry. Generally speaking, environmental information’s sources, including information regarding environmental pollution, come from the polluters themselves. Polluters are well aware of pollutant generation, treatment, and disposal, but they also have reason to conceal their pollution activities. Environmental information disclosure requirements not only inform the public about polluting enterprises’ situations, but it also gives the public the opportunity to take on a supervisory role. The more information that the public knows about polluting enterprises, the more pressure the polluters will feel to overcome a negative public image and to also reduce their emissions footprint by using pollution-free technology, and so on. Such a policy can greatly improve pollution and control efficiency under information asymmetry.16

Of course, the government should assume responsibility for environmental information disclosure. First, the government should adopt legislation that requires all enterprises to disclose information relating to the environment, and particularly those enterprises that will produce various forms of pollution; the disclosures should be specific and fully disclosed in a timely manner. Secondly, the

16. Id.
government, as the owner of State-owned enterprises, should instruct State-owned enterprises that might engage in pollution activities to strictly comply with statutory obligations to disclose environmental information. State-owned enterprises must not be an exception to this regulation. The government and polluting enterprises should be responsible to the people and society for major environmental accidents. Therefore, information on these accidents should be disclosed to the public in a complete and timely manner so as to avoid causing social and political crises. In fact, there are many cases that have already occurred and are worth our deep reflection. For example, on December 23, 2003, a serious blowout occurred in Kai County, Chongqing Municipality at PetroChina’s Northeast Sichuan Gas Field. A highly toxic hydrogen sulfide blowout released gases with 40 MPa of pressure into the air for over 18 hours, thus resulting in the deaths of 234 people. According to those present, after the blowout, the drilling crew notified as many residents as possible to leave the area, but they did not have enough time to alert the local government. Consequently, local authorities did not have enough time to notify everyone to evacuate the area.

Oriental Outlook, from many aspects, discovered that after the accident happened, there was a notification chain that commenced from the drilling crew up to the Chongqing Municipal government and then back down again to the Gaoqiao town government, which presides over the location where the accident occurred. This flawed communication chain created a situation in which the authorities closest to the disaster were the last to know. Clearly, if the drilling crew had been able to go directly to the town authorities after the blowout occurred, then more people could have evacuated earlier, thus minimizing the number of casualties.

According to the reporter, PetroChina developed Article 15 of the company’s environmental management procedures, which states that in the event of an accident or other unexpected events that have caused or may cause significant pollution, it is necessary to take immediate and effective measures to address the problem. Additionally,

17. Pu Baoyi, Zhu Yu & Zhang Xudong, Expert Analysis and the Truth About the Blowout in Kai County, Chongqing, 8 Questions for PetroChina, ORIENTAL OUTLOOK WEEKLY (Jan. 5, 2004).
18. Id.
19. Id.
Article 15 states that it is necessary to provide timely information about potentially contaminated work units and residential areas to local and regional environmental protection departments as well as cooperate with any consequent investigations. However, facts in this case prove that Article 15 was not effectively implemented after the accident occurred.20

It should be pointed out that, in regard to environmental information, the government should be responsible for the following duties: first, the government should pass legislation that obliges polluters to perform their statutory obligation to disclose all necessary information. Second, environmental information for which enterprises bear no responsibility to publicly disclose, such as air, water, and soil quality reports, is the government’s duty to obtain and then disclose to the public. It is also the government’s duty to obtain this information through the use of public funds and to disclose such information in a timely manner. Finally, the government should develop appropriate measures that are based on environmental information in its possession to prevent future environmental accidents. In order to evaluate the work of government officials in the area of environmental information, China should include new performance standards that evaluate the quality of an official’s work regarding environmental safety and the proper disclosure of environmental information.

IV. GOVERNMENT AUTHORITIES SHOULD ASSUME THE RESPONSIBILITIES OF PROTECTING THE ENVIRONMENT AND GUARDING PUBLIC INTERESTS

The government has obligations to implement the three abovementioned economic solutions, which are based on the theory of externalities, to address the problems of environmental pollution. This is because the government is the guardian of public interests, which includes the public use of and access to environmental resources. Clearly, a precondition for effectively implementing the three aforementioned economic solutions is that the government can faithfully perform its duties representing the public’s interest. How well a country protects its environment first depends on that country’s government. Another reason for the government’s mandate to

20. Id.
fulfill its inescapable responsibility is that environmental legislation, effective law enforcement, and judicial aspects need the government to play a major role. As for businesses and individuals that are regulated by the law, the main role of their environmental protection work is to remain in compliance with the government, the law and statutory regulations. In the event that the government remains passive or inactive, we cannot expect those enterprises that want to improve China’s environmental conditions or those individuals in environmental protection to have much effect.

The government's command-and-control regulatory solution, (such as the permit system), levying taxes solution (such as levying sewage charges), and the emissions trading system provide spaces in which corruption and the trade of power for money can occur. If those government officials who are responsible for environmental monitoring abuse their position’s power through accepting bribes, or there are other interfering factors, such as political or economic factors, then they cannot properly exercise their supervisory duties. Under such circumstances, the aforementioned regulatory solutions and the design and implementation of the nation’s environmental regulations will fail or will be rendered ineffective. In addition, the nation’s environment could face further degradation at the hands of unchecked polluting enterprises.

Currently, China’s environmental law enforcement has some problems. The first problem is the environmental administration’s inaction or insufficient enforcement of the law has resulted in a conspicuous absence of environmental regulation. This absence is primarily because many polluting enterprises have received the green light for projects while the responsible powers turn a blind eye to these enterprises’ polluting activities. In order to protect these companies’ stock listings and ability to attract foreign investment, the responsible authorities do not dare initiate investigations against them. The second problem is irregular law enforcement. Not only does environmental law enforcement lack any procedural adherence, but it also emphasizes penalties while neglecting to protect the people’s legitimate rights and interests. The third problem involves abuse of power for personal gains. In this case, there are many enterprises that engage in graft in order to obtain favorable enforcement of the law; favorable enforcement includes shielding illegal enterprises
and assisting violators in evading legal penalties.\textsuperscript{21} What’s more, most of these phenomena occur in local environmental protection bureaus; the reason for this is that the above situation is related to the environmental regulatory system’s institutional design. Under the current system, local environmental protection bureaus are part of the local governments. This can create an obstacle for the local environmental protection bureaus as projects that are supported by the local governments do not wait for the environment protection bureau’s approval to commence work. This disregard for the environmental protection bureaus’ authority makes it difficult for such bureaus to manage projects of this kind.\textsuperscript{22}

China should establish a monitoring mechanism for environmental law enforcement agencies that could include measures such as empowering local people’s congresses to hold government officials accountable for their work on environmental protection. Under the aforementioned mechanism, if it is discovered that a government official may have passively participated in supporting polluting enterprises or engaged in malfeasance, then it would be permissible to initiate an administrative suit pursuant to the PRC Administrative Litigation Law against the official for the alleged infringement. Moreover, this entire process would be open to the public and various media outlets so as to encourage a public dialogue regarding environmental law enforcement. Given previous instances of malfeasance amongst the authorities, it can be seen that there is a clear need to develop a supervisory apparatus for government officials. In fact, some researchers have pointed out that the government officials, as the enforcement agents of public and political affairs, often have opportunistic tendencies and also engage in rent-seeking behavior. As such, the greater society should strengthen its efforts to supervise government agents so that the government directly addresses and resolves environmental problems.\textsuperscript{23}

To a large extent, China’s environmental law enforcement efforts have been insufficient because China’s environmental protection

\textsuperscript{21} Zhao Lijun & Cheng Lan, \textit{Current Problems in Environmental Law Enforcement and Countermeasures}, 30 \textit{ENVIRONMENTAL SCIENCE AND MANAGEMENT}, No. 3 (June 2005).


\textsuperscript{23} Sun Huili & Jiang Huafeng, \textit{An Institutional Economic Analysis of Environmental Issues}, \textit{ECOLOGICAL ECONOMY}, No. 7 (2007).
bureaus have not been given adequate powers; this delegation of limited powers is a direct result of the system’s design. Researchers point out that although Chinese law provides for a unified environmental protection authority with supervisory and managerial functions, it does not clearly define those functions or how they should be employed. In reality, it is difficult for the environmental protection bureau to play a supervisory role for two reasons: first, it functions within the same administrative level as other bureaus and agencies, and second, it has not explicitly been given unified supervisory powers. It is, therefore, difficult to assume a supervisory role over other bureaus or agencies since other bureaus and agencies will not tolerate such regulatory interference. Overall, this situation is very unfavorable for pollution control.  

Since China’s environmental regulatory functions are scattered amongst different government authorities, environmental supervisory responsibilities are currently not focused under one powerful regulatory authority. The recent ConocoPhillips oil spill case underscores the shortcomings of this regulatory framework. The oil spill case indicates that China’s regulatory functions for marine environment pollution are entirely too fragmented; ideally, these functions should be consolidated under a strong regulatory authority. Looking at China’s marine regulatory mechanism from a horizontal perspective, we see a panorama of the “nine dragons regulating the water,” featuring marine, fisheries, environmental protection, maritime transportation, customs, borders, and other various bureaus and agencies. From a vertical perspective, each province’s oceanic management is fragmented, as it is only responsible for managing the waters adjacent to its respective province. The existence of this system weakens comprehensive marine management functions as well as unified and efficient scientific coordination; moreover, this system makes it difficult to create a unified, effective and scientific management system.

China’s coal industry also lacks a strong and powerful eco-environmental management mechanism. Right now, management in respect to coal industry enterprises and the environment surrounding coal mines involves the Ministry of Environmental Protection,

24. Xiu, supra note 22.
Ministry of Land and Resources, Ministry of Water Resources and the State Forestry Administration, but these authorities each have a different emphasis on environment management. As such, they only focus on their own authority and function; this makes it difficult for the above-mentioned authorities to come together as a unified force to regulate the environment of coal mining areas. Some bureaus dispersedly use the collected funds and do not spend the allocated funds exclusively on the protection of the environment affected by coal mining. The author suggests that China should restructure its environmental regulatory authorities, free them from intervention and control from other bureaus and agencies and local governments at all levels, as well as empower them, and increase their manpower and expenditure funds for environmental regulatory authorities at all levels so as to strengthen their supervision intensity.

V. GOVERNMENT AND ENTERPRISE NEED TO RENEW THEIR THINKING, AND PURSUE SUSTAINABLE ECONOMIC DEVELOPMENT

Chinese government officials at all levels should renew their thinking and not just chase indicators of economic development while neglecting the protection of environmental resources. As the guardians of public interest, environmental regulatory authorities should adhere to the principle of environmental priority. The priority of the environmental regulatory authorities is environment protection. Based on the theory of externalities, every enterprise will put its economic interest first, and, lacking mandatory stipulation of the law, will neglect social costs and, generally speaking, will not actively increase investment in environment protection. So to speak, environmental regulatory authorities are the last line of defense or perhaps the only line of defense in the prevention or reduction of the costs of externalities.

Simultaneously, we should avoid any extreme view that prioritizes environment protection above all else. The principle of environmental priority does not mean that environment protection is decisive or prevails over economic development in any circumstance. Analysis of these two abstract notions of value in a specific factual

circumstance is needed to put forward a meaningful balancing solution that is based on a specific problem. For example, coal is our nation’s primary resource, and as a non-renewable resource, the extended activity of development and utilization of coal might incur various environmental problems which conflict with the notion of sustainable development. Therefore, in the process of developing and constructing coal mines, we should thoroughly research the possible destructive manner and degree of coal mining to the environment and devise protective measures, control negative factors, maintain ecological balance and minimize the negative impact of human activity on the environment.

From now on, how to balance economic development and environment protection will be a tough question that central and local leaders at all levels must face. To completely ignore environment protection and give a green light to polluting enterprises is an unfeasible economic development mode and will come to an end sooner or later. On the other hand, if the enforcement of environment protection is too stringent, thus stipulating excessively strict and economically unfeasible environment protection standards and requirements, it will suffocate the local economy. When balancing the economic development of the energy industry with the notion of environmental protection, the government needs to make sure that the cost of environment protection is affordable and economically viable. The moderate nature of environment protection requires us not to completely stall economic development because of environment protection, unless policy needs dictate that development in a select inland area must be suspended or terminated. Therefore, we need to avoid the excessive application of the environment protection law, and keep in mind the balance between property rights and environment protection restrictions.

In summary, for regulators, the priority is to find that perfect balance point at which environment protection and economic sustainability can progress together. Admittedly, to discover this balance point is not easy and actually many governments of developed countries are still struggling on this issue. The externality theory of microeconomics is a viable tool for us to reach the solution. Based on this theory, the costs incurred for complying with environmental regulations, which are to be imposed by the environmental authorities,
should be sufficient to offset the gap between the private marginal costs of the polluting enterprise and the social marginal costs in connection with the relevant polluting act. Therefore, via quantitative economic tools, this balance point may be easier to achieve.

When considering the relationship between economic development and environmental protection, some people hold a “develop first, manage later” point of view. This perspective is borne out of China’s early efforts to construct a socialist market: the government could afford to completely forgo environmental protection measures in order to foster economic development. This perspective further posits that environmental considerations could be addressed after the Chinese economy reached a certain level of development; however, this author begs to differ. First, a long and persistent barrage of externalities will only create an increasingly large burden for China’s posterity. The notion of “develop first, manage later” will easily lead to predatory exploitation of resources, resource depletion, and major environmental disasters, thus causing severe economic and social crises. Second, delaying environmental protection and treatment will lead to increased costs of environmental management. As such, the resulting costs of delaying environmental management will be much higher than the costs that arise from immediately managing pollution when it occurs. At the same time, allowing polluting enterprises to escape liability is also blatantly unfair since it leaves the burden to the next generation; we have no right to do this to our nation’s future. However, if this viewpoint persists, then our generation will infamously reside in the annals of history for the deleterious legacy that it created.

At present, the mantra “develop first, manage later,” still seems quite popular. If this persists, then China’s soil, air, and water quality will continue to be polluted; meanwhile, the environment of our and future generations would be much worse. As previously mentioned, this undesirable trend will likely result in social and political unrest. One particular example involves a host of cities in coal-rich Shanxi province that currently rely on coal to fuel growth. However, with the inevitable depletion of coal resources in the province, these cities will be faced with the daunting task of transformation or risk falling into decline. For long-term development in Shanxi, the province’s abundant coal resources will become a tragic
curse upon local residents and their well-being if environmental externalities remain unresolved.

When reflecting upon the past thirty years of reform and development, it can be said that economic growth was fueled at the expense of the environment. While China’s economic growth has attracted worldwide attention for many years, this growth and attention has come at a great cost, the majority of which is arguably environmentally related. These environmental costs originate, in part, from China’s numerable enterprises that enjoy a significant competitive cost advantage. While these enterprises might not be compelled to pay for the inherent social costs that they incur, these costs still persist and are instead imposed on the larger society. When we look out our window or walk through our front door, we, with heavy hearts, gaze upon an environment that has endured severe and persistent pollution. It will be every current and future citizen’s burden to foot the bill for the costs that we have incurred these past thirty years.

There is still hope for China’s future: government leaders are now keenly aware of the nation’s environmental problems. As such, China’s economic policy has changed, green GDP is now being promoted, and the notion of a sustainable and recycling-oriented economy is gaining strength. Admittedly, China still has much arduous and difficult work to do in order to effectively implement concrete laws, regulations, and projects. Furthermore, our generation is destined to pay a certain price for the environmental damage that has already been caused. For the future, it is still unclear whether our children will be able to live in a clean and beautiful environment. The result depends on our current actions and decisions; none of us are exempt from this burden that has been set before us.
DIFFERENTIAL TREATMENTS OF INVESTMENTS IN THE CONTRACTUAL RIGHT TO LAND MANAGEMENT

WENJUN WANG* & SHUXIN ZHU**†

ABSTRACT

In practice, there are two basic ways to invest in the contractual right to the contractual land management for equity interest. The first involves the dynamic equity system, which complies with the “voluntary joint investment with the land contract and operation right on a voluntary basis to engage in cooperation agriculture production,” provided under the Law on Land Contract in Rural Areas. The other is to invest such a right as the contribution for the establishment of a company or a cooperative. Current legislation prohibits the investment of a contractual right to land management for the establishment of a company. Making the investment for equity interest is an important way to circulate the right to land management contractually and could bring real benefits to peasants. Under the premise of governing and guiding relevant activities, it would be advisable to loosen the restrictions on such investments and to distinguish the different ways of equity investment, i.e., to fully promote the first way and actively develop the second. Based on the differences between a company and a cooperative, it would be better to promote the investment with the right to contractual land management under cooperative equities.

INTRODUCTION

The right to contractual land management has been recognized as the most important real right for the peasants. With the development of the society, the appeal of achieving the investment function of lands has becoming increasingly intense. The right to contractual land management being circulated by investing is the hot spot issue. According to Real Right Law of the People’s Republic of China (referred to as “Real Right Law”) and Law of the People’s Republic of

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China on Land Contract in Rural Areas (referred to as “Law on Land Contract in Rural Areas”), the right to contractual land management may be circulated by subcontracting, leasing, exchanging, transferring or other means. It is generally considered that investing is also one of the means. However, the current legislation says nothing about the principles, conditions and procedures of investing, which creates operational difficulties in the practice. This harms not only the land management, but also the protection of the peasants’ rights and interests. In view of this, it is necessary to have further discussions about investments in the right to contractual land management.

In addition, land contracts should take the form of a household contract, or the rural land can be contracted by other means. The legal rules for the latter are looser, which do not lead to disputes. Hence, this essay focuses on the household contract only.

I. THE CURRENT SITUATION OF INVESTMENTS IN THE RIGHT TO CONTRACTUAL LAND MANAGEMENT

A. The Popularization Status of Implementation of the Investments in the Right to Contractual Land Management

The research group led by Professor Xiaojun Chen from Zhongnan University of Economics and Law carried out a field survey in 2007. It covered ten representative provinces in China, such as Jiangsu, Shandong, and Guangdong. The results showed that only 8.5 percent of the peasant households interviewed in ten provinces acknowledged that the rights to contractual land management could be pooled as shares to engage in cooperative agricultural production. The regional differences were remarkable. In the Guangdong province, 64.09 percent of the peasant households were aware of the existence of this means of circulation in their villages, and this figure was much lower in other provinces. However, the survey also indicated that the peasant households from the Sichuan, Guizhou, and Yunnan Provinces had positive responses to it.  

B. The Existence of Forms of Investments in the Right to Contractual Land Management

In practice, the existing forms of investments in the right to contractual land management in each area have respective differences and may be divided into approximately two types.

In the dynamic equity system, the contractor may arrange agricultural production according to the requests of a third party (usually the third party will also provide certain technical support) and it will be the third party’s responsibility for the product’s sale. An intensive and large-scale land management can be achieved in this way. The situation in the Hubei and Shandong provinces is similar to the dynamic equity system. The typical representative is Xiangfan in the Hubei province. The report by the research group led by Xiaojun Chen in 2002 showed that this county alone set up six dynamic equity enterprises, 7100 acres of the network industrial base, and established 1760 peasant households as shareholders. In Shengkang Town, a limited liability company named Jintudi has converted 2000 acres of land to the use of ginger cultivation by signing seed supply and product sales contracts with the peasant households. The administrators in Shengkang Town hold 25.17 million company stocks and the municipal government owns shares for more than 50 million. So far, there are twelve companies in Xiangfan operated in this way. Together, these companies draw 7.5 million investments from native residents and 2.9 million from the municipal government fund.

Naturally, one characteristic of the dynamic equity system is that the third party is not engaged in the agricultural production, nor does it use land directly. The third party acts as an intermediary agency, whereas the peasants still retain the right to contractual land management. Therefore, strictly speaking, the dynamic equity system may not be considered as a means of circulation. However, organizing the peasant household by signing product supply and sales contracts is a practical and feasible way for the third party to achieve intensive and large-scale management.

2. See Xiaojun Chen et al., A Study on Rural Land Legal System 23 (Beijing: China University of Political Science and Law Press 2003).
3. Id. at 177.
Under the cooperative operation system, contractors may jointly pool their rights to contractual land management as shares to form a cooperative organization and to engage in cooperative agricultural production. The dividends are paid out based on investments in the right to contractual land management. The rights and obligations set by the original contract remain unchanged. This means of circulation is mainly distributed in some districts that enjoyed a high level of economic development, such as the Jiansu, Guangdong, and Zhejiang provinces. Because of the differences in nature among the cooperative operation systems, they can be further divided into two forms: companies and cooperatives.

The cooperative in Xingang Town, located in Changshu in the Jiangsu province, is a successful example of a land cooperative. According to the report by the research group led by Xiaojun Chen in 2002, the cooperative in Xingang Town took the village as a unit to form the cooperative. The land in use not only included the construction land but also the agricultural land. The villagers who invested in the right to contractual land management had an equal membership right compared with the members invested in the funding, technology, and market information. The cooperative took each household as a unit, and each acre of the contractual land was converted into one share. Stock rights could be inherited or donated within the 30-year statute of limitations, or transferred with the approval of the cooperative and village committee. Every member was permitted to buy or sell stock voluntarily, but the withdrawal of land had to be done under a unified plan. The main sources of the cooperative’s income were land management and land leasing. The dividends were paid out with a minimum standard of 360 yuan per share each year. A unified registration system for stock rights had been established in Xingang Town and the villagers could buy stocks voluntarily.5 In addition, Wenling in the Zhejiang province has become an experimental site since 1997. A field survey by the research group led by Professor Guanliang Ding from Zhejiang University showed that this kind of cooperative also existed in several villages in the Zhejiang province. These cooperatives’ constitutions explicitly stipulated that “share[s] may not be transferred, mortgaged, leased, purchased or sold, and inherited.”6

5. See CHEN ET AL., supra note 2, at 93.
6. See GUANLIANG DING & RIHUI TONG, LEGISLATION RESEARCHES ON THE CIRCULATION
The economic organization in the Baiyun district, located in the Guangdong province exemplifies the company method. Theoretically, collective members enjoy stock rights, but the situation here is more complicated. First, membership is not acquired by investment but by nativity. The stock share is possibly small before the stockholder reaches a certain age. Second, membership is not limited to peasants. Third, peasants may lose their membership when they change the location of their registered residence. Fourth, stock rights generally cannot be transferred, inherited, or mortgaged; there is no change in stock rights when the contracted land is subcontracted or leased.7

Because of the extensive regional differences in agricultural production conditions, the means of land investment should be allowed to diversify depending on location. The dynamic equity system is employed when there exists a third-party enterprise that can effectively organize peasants for unified cultivation and production and provide a stable, long term sales channel for the peasants’ best interests. On the other hand, the cooperative operation system can be a wise choice in developed regions where agricultural production is not the main source of the local peasants’ income and their level of dependency on the land is low. Peasants may obtain a relatively high price of the stock when they invest in the right to contractual land management because of the scarcity of land in such areas.

II. THE LEGITIMACY ANALYSIS OF THE CURRENT SITUATIONS OF LAND INVESTMENTS

A. Interpretation of the Original Legislative Purpose

According to Article 128 of Real Right Law, the holder of the contractual right to the management of land has the right, in accordance with the provisions in the Law on Land Contract in Rural Areas, to circulate his right. Article 42 of Law on Land Contract in Rural Areas indicates that, for the purpose of developing the agricultural economy, contractors may, at their own free will, jointly pool their rights to contractual land management as shares in order to promote cooperative

7. See CHEN ET AL., supra note 2, at 115–16.
agricultural production. The law sanctions investing in the right to contractual land management. As mentioned above, there are a great many differences among the different types of investments in the right to contractual land management in practice. Is each of them legitimate in practice?

In the legal interpretation of Real Right Law, the Legal Committee of the National People’s Congress has pointed out,

If the peasants invest to establish the company, they may be exposed to the risk of losing the contracted land when the company goes bankruptcy [sic], which may causes negative effects on the peasants’ living. It should be permitted if peasant households may, of their own free will, jointly pool their rights to land contractual management as shares to engage in cooperative agricultural production. The investments in the right to land contractual management have the following boundary: First, the circulation should be among the contractors. It is prohibited to quantify the right to land contractual management into shares to invest in or establish agricultural production company. Second, peasant households may jointly pool their rights to land contractual management as shares to engage in cooperative agricultural production, and get paid in proportion to their shareholding. It is not a commercial investment.8

As the legal committee is in charge of studying and drafting Real Right Law, this statement may reflect the original legislative intent to some extent. Therefore, it is reasonable to say that the current law only allows the pooled investments in rights to contractual land management to engage in cooperative agricultural production without establishing the company.

B. The Legitimacy Analysis of the Dynamic Equity System

In view of the above, we can now examine the existing types of investments in the right to contractual land management. As mentioned above, in the dynamic equity system, the third-party enterprise effectively organizes the peasants for unified cultivation and production, while the peasants still retain the right to contractual land management. Therefore, this type of investment fully conforms to the

relevant stipulations and legislative principles of Real Right Law and Law on Land Contract in Rural Areas. “The announcement of Central Committee of the CCP on the circulation of the right to land contractual management” also stipulated that “[t]he commercial enterprises’ investments in agriculture production should focus on services and the development of land in rural areas as barren mountains, gullies, hills and beaches. In order to realize agricultural industrialization, the company should encourage the peasants to cultivate instead of replacing them.” Obviously, the national policy makers hold a positive and affirmative attitude toward this type of investment. Hopefully the agricultural enterprises will serve peasants and agricultural production in a better way under these legal rules and guidance.

C. The Legitimacy Analysis of the Cooperative Operation System

The next step is to examine the legitimacy of the cooperative operation system. According to the analysis above, the current law prohibits peasant households from investing their rights in contractual land management to establish a company. However in practice, the contractors may form a cooperative organization. Is forming a cooperative organization permitted by Law on Land Contract in Rural Areas? According to Articles 2, 4, 5 and 44 of Law of the People’s Republic of China on Specialized Farmers Cooperatives, specialized farmers cooperatives have the legal status of a person to enjoy the right to possess, use, and dispose of their property and should be liable for their debts with the aforementioned property. In other words, the peasant no longer retains the right to contractual land management when he invests it in the cooperative, and has a right in its stock instead. When a specialized farmer cooperative goes bankrupt, the right to contractual land management will be considered a liability asset, meaning that the peasants may lose their right to the land. This obviously departs from the original intention of Real Right Law and Law on Land Contract in Rural Areas. According to Article 35 in Law on Land Contract in Rural Areas and “the Managements of the Circulation of the Right to Land Contractual Management,” for the purpose of developing the agricultural economy, the contractors may, of their own free will, jointly pool their rights to contractual land management as shares to engage in cooperative agricultural production; when the rural land is contracted by other means, the contractors may divide
the rights to contractual land management into shares and invest them to form a company or cooperative. This regulation treats the cooperative as a parallel to the company, while such statements are not mentioned in household contracts. One might say that the legislators consider the cooperative as analogous to the company; contractors cannot invest their rights to contractual land management to found a cooperative, if households have already contracted the land.

However, according to the declaration of Real Right Law (draft) authored by Wang Zhaoguo, vice chairmen of the National People’s Congress Standing Committee, the right to contractual land management obtained through a household contract may, according to the Law on Land Contract in Rural Areas, be circulated by subcontracting, leasing, exchanging, transferring, or by other means. The intention of this article is to maintain the current law and present policies concerning the land in rural areas. It also leaves room for modification of relevant policies.9 The Central Committee encourages establishing more experimental sites in order to fully realize the commercial function of the right to contractual land management. For example, “The opinions from the State Council concerning the reform and the development in rural areas in Chongqing” stipulated that the right to contractual land management obtained through a household contract may, according to the law, be circulated by subcontracting, leasing, exchanging, transferring, and investing in a joint stock cooperative or other means on a voluntary basis and with compensation. Formalizing investments in the right to contractual land management among contractors, and developing experimental projects of specialized farmers cooperatives, are also included in this regulation.

In addition, the local legislation has also carried on certain attempts in this. For instance, Article 13, paragraph 4 of “The regulation of the specialized farmer cooperative in Zhejiang Province” stipulated that “the members of the specialized farmers cooperative can invest in currency as well as physical capital, technology and the right to contractual land management.” A similar regulation has been noted in the first paragraph of Article 9, of the “The implementation of ‘Law of the People’s Republic of China on Specialized Farmers Cooperatives’

in Liaoning Province,” stating that members of specialized farmer cooperatives can invest in currency, and other non-monetary assets, such as physical capital, technology, and the right to contractual land management, as long as their monetary value can be assessed. Furthermore, the monetary value shall be subject to the consent of no less than two-thirds of the members of the specialized farmers cooperative.

III. DIFFERENTIAL TREATMENT TO THE MEANS OF INVESTMENTS IN THE RIGHT TO CONTRACTUAL LAND MANAGEMENT

It can be concluded from the discussion above that the current situation of investments in the right to contractual land management is not consistent with the original legislative intent in certain respects. Because there is still room for modifications and adjustments in law, and the relevant polices in Real Right Law, to further the discussion from a legislative perspective is the essential objective of this essay. The combined effects of several factors, including the judgment of facts, consideration of future uncertainties and their cognitive structures, decide a nation’s momentum. Obviously, the scholar’s legislative suggestions have to be carried out under full consideration of the above factors.

To peasants, both the insurance function and the property function are embodied in the right to contractual land management. The insurance function is of great importance at the present stage. Peasants can engage in cultivation for a living as long as they own the right to contractual land management, which has become a basic guarantee for employment. Because endowment insurance is almost entirely unavailable in rural areas, contracted land has become the vital guarantee for the elderly. On the other hand, the right to contractual land management is also a property right. Typically, restrictions on land transactions lead to a decrease in efficiency. However, some scholars point out that this insurance function may have a positive effect on efficiency. One basic function of social security is to avoid devastating attacks on productivity during a time of emergency. Obviously, productivity protection can improve efficiency. Compared with peasants who do not have contracted land, peasants who own such rights

are more likely to get a job in urban areas. Although the peasant may lose his job, he can still return to his hometown and cultivate his own land. In other words, the insurance function of land encourages peasants to be willingly engaged in high-risk jobs and high-paying jobs, thus improving economic efficiency.\footnote{See Yang Yao, \textit{The System of Farmland in China: An Analytical Framework}, 2 \textit{Social Science in China}, 58 (2000).} Because of this, it has been suggested that the loosening of all restrictions would be irrational due to the serious and irreversible consequences that peasants might face. If peasants are permitted to invest in their rights to contractual land management to found a company, they will be directly exposed to their commercial risks. The peasants will lose their right to contractual land management if the company goes bankrupt. From a national standpoint, stable, long-term production relationships undoubtedly benefit agriculture development and societal harmony.

However, the level of dependency on the land is decreasing. Statistics show that from 2003 to 2007, non-agricultural income has increased by 90%, and by 4.7% in proportion to the total annual income. Non-agricultural income has become the main source of the increase.\footnote{See Wenshan Rao, \textit{An Analysis on the Income Level of the Peasants in China}, 13 \textit{Knowledge Economy} 37 (2009).} The field survey conducted by the research group led by Professor Xiaojun Chen illustrated that peasants have a strong aspiration to gain benefits from the circulation. The successful attempts made in different areas have proved the feasibility of this means of circulation. Therefore, from a legislative prospective, restrictions on investments in the right to contractual land management should gradually be loosened to maintain the insurance function and to achieve a property function. There must be differential treatment with regards to the means of investments in the right to contractual land management.

\textbf{A. Strongly Promoting the Dynamic Equity System}

As mentioned above, this type fully conforms to the relevant stipulations and legislative principles of Real Right Law and the Law on Land Contract in Rural Areas, in which the contractors may, of their own free will, jointly pool their rights to contractual land management as shares to engage in an agricultural cooperative. More importantly, peasants still retain the right to contractual land management, so
both the insurance and property functions can be achieved. This would be a proper option for a peasant whose income is mainly from cultivation, but who has longed for a higher income from its circulation.

Moreover, the dynamic equity system has led to good outcomes in practice. Third-party enterprises are always capable of providing advanced agricultural technologies and abundant financial support, and accommodating stable commodity demands. They can act as a market guide and financial expert to peasants. For example, the Ginger Industry Development Co. Ltd. established in Zijin County in the Hubei province has signed contracts for the cultivation and purchase of ginger with 796 peasant households. They also signed two other supply contracts with two processing manufactures, converting extensive management to intensive and large-scale land management.13 From a legal and practical perspective, we believe that this means of circulation should be strongly promoted at the present stage.

However, this intensive and large-scale agricultural management relies on the organization and operation of third-party enterprises. Therefore, it is necessary to formulate rules to govern the behaviors of third-party enterprises. A qualification examination system should be established based on conditions specific to the different areas, standardized sample contracts should be applied, and the rights and liabilities of third-party enterprises should be specified. The local government should set up an independent consultation department to provide services to peasants and to third-party enterprises. This is the only way peasants’ benefits can be effectively protected.

**B. Advocating Investing to Found the Cooperative**

According to the above analysis, investments to establish the company or the cooperative depart from the original intention of Real Right Law and Law on Land Contract in Rural Areas. However, from a long-term perspective, this system has irreplaceable functions. First, as a permanently existing legal entity, the company or the cooperative can organize peasants effectively and achieve concentrated, large-scale land management; second, under the modern structure of the company or cooperative, peasants can share commercial risk with other members. These advantages have been proven in practice. One

13. See CHEN ET AL., supra note 2, at 177.
convincing example is the cooperative established in Shanglin Village in the Jiangsu province. Since 2006, 180 peasant households in this village have invested their rights to contractual land management in the cooperative at a price of 5000 yuan per acre, compared to the 250 yuan per acre under a traditional cultivation system. Now peasant households can receive a 600 yuan per acre bonus each year. Some peasants even choose to engage in the production as the hired labor, earning an additional 25 yuan per day.14

The social security system has been gradually improved with the increase of peasant income. With such a background, advocating investing to found cooperatives would bring peasants more choices regarding the use of land. This would be an invaluable way to develop agricultural production and to narrow the gap between urban and rural areas. However, due to the lack of a legal basis, the procedures and rules of this system remain unclear As a result, an analysis and selection is of importance at this time.

There are two types of organizations: the company and the cooperative. Although both constitute an independent legal entity, there are some distinct differences between a company and a cooperative. First, their property right systems are different. The structure of a company is based on a joining of capital, while the cooperative involves the joining of members. Therefore, shareholders in a company are forbidden to withdraw their investments and can only transfer their shares. Contrastingly, members of a cooperative can withdraw their investments but are unable to transfer their shares and memberships to others. In addition, bonus allocation within a company is determined in proportion to investments made, while cooperative bonuses are distributed based on the volume of transactions within the cooperative.

The ways that members are able to exercise their rights are different as well. Shareholders exercise their voting rights according to the proportion of their investments, while the members’ voting rights are distributed equally in a cooperative. As indicated in the Law of the People’s Republic of China on Specialized Farmers Cooperatives, a cooperative constitution can award one additional vote to members with a large investment or trading volume. However, the effects of this additional vote are trivial and unlikely to change the characteristics of democratic management.

14. See Meng et al., supra note 10, at 15.
Based on the above differences, it is convincing that the cooperative is more adaptable to the current situation in rural areas. Its advantages can be summarized in three points. First, peasants can join in or retreat from a cooperative under the principles set forth by Law on Specialized Farmers Cooperatives. Adopting the cooperative mechanism would provide more flexibility for peasants to exploit their land. There will be a conflict with the resumption of contractual land if we choose the company method instead.

Second, Company Law permits shareholders to transfer shares, while this is forbidden in the Law on Specialized Farmers Cooperatives. The transfer of shares may result in an irreversible separation of peasants and their right to contractual land management. However, according to the Real Right Law and the Law on Land Contract, in order to transfer the rights to contractual land management, the party who is giving out the contract must give consent. Again, this is a legal dilemma.

Third, the cooperative is an internal, non-profit organization. Aside from the accumulation fund, all profits should be allocated to members within the cooperative. The accumulation fund is required to be quantified according to the trading volume, and registered to members’ accounts. When membership terminates, peasants will get their investment returned along with the accumulation fund registered under their name.

C. Selection According to Specific Local Conditions

Investing in the right to contractual land management for the establishment of a company or a cooperative usually occurs in developed regions. This is because the purpose of investments is to concentrate separated land and improve the rate of efficiency in using land. This requires two premises: that the peasants are capable of maintaining a livelihood after circulating their contractual land, and that a large-scale operation, with adequate funds and technology, is developed. These two conditions are hard to meet in undeveloped areas.15

The primary purpose of circulating the right to contractual land management is to promote development and productivity and to increase peasants’ income. The means adopted to achieve this end

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15. See Meng et al., supra note 10, at 15.
should be adjusted according to the local economic condition. Under a dynamic equity system, peasants still retain the right to contractual land management; therefore, they can avoid the risk of losing the land. Defects such as lack of funding or technology can be compensated for by a third-party enterprise. Therefore, this type should be promoted nationwide. Investing in the right to contractual land management for the establishment of a company or a cooperative should be restricted in particular areas with high levels of economic development. Moreover, local legislatures should draft certain local rules and regulations accordingly.

IV. LEGISLATIVE SUGGESTIONS FOR THE PROCEDURE OF INVESTING IN THE RIGHT TO CONTRACTUAL LAND MANAGEMENT

To solve the existing problems in practice and to protect the peasants’ legal benefits, investment procedures must be developed. The situation can be improved in several aspects.

A. Setting up Different Procedures According to Different Types of Investments

According to the provisions in Law on Land Contract, consent is required only when contractors intend to transfer one’s right to contractual land management. Under a dynamic equity interest system, peasants still retain this right, so they should sign a written contract with the party who is giving out the contract. With regards to land right investments establishing a company or a cooperative, however, it should be permitted by the party who is giving the contract because of the change of right owners.

B. Review of the Status of the Household Assets

Presently, the insurance function of contracted land is still prominent. Therefore, the status of household assets should be reviewed before households invest their rights to contractual land management in a cooperative. Peasants whose agricultural income takes up a majority proportion should be strictly limited. This would be the most feasible way to protect the peasants’ benefits and stabilize agricultural production while adhering to current legislative purposes.
C. Formalization of the Bankruptcy System for Specialized Farmers Cooperative

The regulations about how to deal with the right to contractual land management when the cooperative goes bankrupt should be legislated. Article 41 and Article 48 of the Law on Specialized Farmers Cooperative provide rules for liquidation, but these rules are not specific enough for the different types. The right to contractual land management has a living security function, which distinguishes it from other forms of investment. As a result, it requires special provisions. Some academics suggest allowing contractors to repurchase their land for a reasonable price. The collective economic organization of a village can repurchase the rights to contractual land management if contractors are incapable of doing so. The repurchase price can be used to repay debts. In this way, original contractors’ benefits would be protected, and a situation in which non-members of the collective economic organization could receive rights—a situation prohibited by law—would not happen.16

16. See Jie Wen & Xiandong Li, Legally Thinking about the Farmers Professional Cooperative Based on Providing Land Rights to Contracted Management, 4 LAW SCIENCE MAGAZINE 54 (2010).