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THE ROLE OF PROPERTY IN SECURE SOCIETIES
THE HAGUE, NETHERLANDS
October 19–21, 2016

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Brigham-Kanner Property Rights Prize Winners

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A Publication of the Property Rights Project of

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OCTOBER 19–21, 2016

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OPENING REMARKS: HOW PROPERTY RIGHTS EVEN STOP WARS

HERNANDO DE SOTO*

From the rural farmer in Latin America who is struggling to protect his family and his possessions to the street vendor in Tunisia whose wares are confiscated, the desire for property and property rights is universal. While many scholars take a theoretical approach to property rights, discussing and proposing what *should be*, I have devoted my career to finding out what *is* and use that knowledge to help bring peace, security, and stability. My research has taken me around the world, consulting with governments in an effort to bring stability. Time after time, I have discovered that property—in particular the legal protection of property—has been the key to unlocking the value of people's labor and creating economic, political, and social stability.

As we consider the reality of the global terrorism originating from the Arab world today, it is most often thought of as a religious issue involving radical Islam to be solved by traditional warfare.[1] But I have consulted with seven heads of state in the Middle East, and time and again my research has found that this is not an issue of religion, it is an issue of property.[2]

When Mohamed Bouazizi self-immolated in Tunisia at the end of 2010, he didn't do so because of religion—he did so because of property

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* President, Institute for Liberty and Democracy, Lima, Peru and recipient of the 2016 Brigham-Kanner Property Rights Prize. This article is a summary of Mr. de Soto's remarks presented at the 2016 Brigham-Kanner Property Rights Conference held in The Hague on October 19–21, 2016. As the president of the Institute for Liberty and Democracy, Mr. de Soto has made significant changes to the laws and the economic system of Peru and has influenced similar economic programs in nations around the world. He is the author of several works including *The Mystery of Capital* (2000) and *The Other Path* (1989).

1. *See* Hernando de Soto, *This is How We Can Win the War on Terror*, WORLD ECON. F. (Jan. 15, 2016), https://www.weforum.org/agenda/2016/01/this-is-how-we-can-win-the-war-on-terror/?utm_content=buffer6ec7d&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (noting the West's traditional attempts to fight terrorism and its failure to create and protect property rights in the Middle East).

2. Hernando de Soto, *The Secret to Reviving the Arab Spring's Promise: Property Rights*, DAILY NEWS EGYPT (Apr. 20, 2013), http://www.dailynewsegypt.com/2013/04/20/the-secret-to-reviving-the-arab-springs-promise-property-rights/ (noting that the Arab Spring "was rooted in a desire for . . . a market-based economy").

rights.[3] He was a street vendor whose cart was confiscated by the police, and when the government refused to listen to him, he set himself on fire.[4] That was the beginning of the Arab Spring—millions of people went out into the streets, demonstrating for more freedom and more rights, and four governments fell.[5] In order to understand the true cause of this uprising, I need to take you back to when I first became interested in property rights, in my home country of Peru.

I became involved in property rights in large part because of the Shining Path, the Marxist-Leninist terror organization that had taken control of large portions of Peru.[6] In Peru, a war had been raging between the government and the Shining Path rebels for decades. The size of the active Shining Path army was a constant of about fifteen thousand people[7] that fought in drug-infested territory and produced about 4,600 deaths from 1981–1983.[8] The armed government forces, dedicated to fighting the guerillas, numbered about thirty thousand.[9] Not coincidentally, we have seen a similar war occurring in Colombia. Recently the government of Colombia sought to negotiate with the local rebels in order to end a war that has gone on for more than fifty years.[10] However, the government initially lost the plebiscite for peace with the rebels, which has left the question of lasting peace in Colombia still very much in doubt.[11]

In Peru we had a very similar war, similar in some aspects and different in others. We fought it in a different legal space. The Shining

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3. *Id.* (explaining Mohamed Bouazizi's self-immolation due to merchandise expropriation by the government).

4. *Id.*

5. De Soto, *supra* note 1.

6. *Shining Path: Peruvian Revolutionary Organization*, ENCYCLOPEDIA BRITANNICA (last updated Mar. 6, 2014), https://www.britannica.com/topic/Shining-Path.

7. *Peru: Rebel Group Joining in Colombian Alliance*, STRATFOR (Feb. 7, 2002), https://www.stratfor.com/analysis/peru-rebel-group-joining-colombian-alliance-0.

8. HERNANDO DE SOTO, HOW PERU'S POOR DEFEATED TERRORISM 12 (2016) (Peru) (noting that the Shining Path killed about 4,600 peasant between 1981 and 1983), http://ild.org.pe/images/PDF/2016-11-04_r-WEB%20ILD%20How%20Peru's%20Poor%20Defeated%20terrorism.pdf.

9. *Id.* at 7.

10. Hernando de Soto, *Colombia Between the FARC and the People*, PROJECT SYNDICATE (Nov. 4, 2016), https://www.project-syndicate.org/commentary/peru-shining-path-lessons-for-colombia-by-hernando-de-soto-2016-11.

11. *See Colombia Referendum: Voters Reject FARC Peace Deal*, BBC (Oct. 3, 2016), http://www.bbc.com/news/world-latin-america-37537252.

Path appeared in 1980, and by 1995 it occupied a large portion of the countryside.[12] The leaders of the Shining Path were trained in Beijing and dedicated to helping the rural poor.[13] They achieved significant popularity because they sympathized with the people.[14] The main message of the Shining Path to the rural poor focused on property, initially stressing that the way to get power was to collectivize property under control of central committees.[15]

However, the farmers rebelled against the notion of collective property rights, which began the war.[16] This prompted the government to send in armed forces, and the farmers responded by creating an illegal army with nothing more than homemade weapons.[17] This eventually pushed the Shining Path out of the two main valleys in Peru and into the mountains.[18]

It was at this point that the Shining Path realized that they could control the countryside of Peru only if they became "protectors" of private property.[19] So they began to sell their protection services in exchange for contributions from the rural farmers.[20] And by 1987, they were in control of sixty percent of Peru.[21] The Rand Corporation estimated that, at their rate of growth, they would have taken over Peru by 1992.[22] Their strategy was to control the countryside and encircle the urban areas, eventually clenching down and taking control of the cities as well.[23]

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12. DE SOTO, *supra* note 8, at 8 (noting the Shining Path's success in the countryside), 10–11 (diagram).

13. MATTHEW D. ROTHWELL, TRANSPACIFIC REVOLUTIONARIES: THE CHINESE REVOLUTION IN LATIN AMERICA 23 (2013) (discussing the Beijing training course for Latin American communist groups, including the Shining Path).

14. De Soto, *supra* note 10 (diagram noting that the Shining Path protected impoverished people's rights).

15. DE SOTO, *supra* note 8, at 7 (noting the Shining Path's attempt to collectivize rural land).

16. *Id.*

17. *Id.* at 7, 12.

18. *Id.* at 12.

19. *Id.* at 10 (diagram noting how the Shining Path proposed property reform).

20. Peter Passell, *Economic Scene; Coca Dreams, Cocaine Reality*, N.Y. TIMES (Aug. 14, 1991), http://www.nytimes.com/1991/08/14/business/economic-scene-coca-dreams-cocaine-reality.html.

21. DE SOTO, *supra* note 8, at 12.

22. *Id.* at 13.

23. *Id.* at 12 (describing the Shining Path's strategy of "dominating the countryside completely and then swooping in to take control of the capital").

The government of Peru, led by then-President Alan Garcia, realized the difficulty of the situation: the Shining Path's guerilla tactics made it difficult for the army to distinguish between the armed farmers and the real enemy.[24] President Garcia was particularly concerned that the situation in Peru would become like the American situation in Vietnam, where the government soldiers did not know who to shoot, and so they shot everyone.[25] That would be a disaster of near-unprecedented proportions, and one that the Peruvian government—made up of coastal elites—wanted desperately to avoid. So the Peruvian government sought to ally with and gain the support of the rural forces, which were easily able to identify members of the Shining Path.[26]

I was called in by President Garcia to bridge the gap between the farmers, who live inland and are culturally distinct, and the government and its army, whose members come from the coast of Peru.[27] The government wanted my involvement because its previous attempts to make contact with the rural farmers had been repeatedly opposed by human rights groups from Europe and the United States.[28] At the outset, we learned that these human rights organizations were confusing the situation in Peru with that in Colombia, where the rebels were, essentially, a private army—unlike those fighting in Peru, who were just poor farmers trying to protect their property.[29] Only ten percent of them even had a gun,[30] and they were being killed by the thousands in this war.[31]

As the American philosopher George Santayana famously said, "those who cannot remember the past are condemned to repeat it."[32]

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24. *See id.* at 7.

25. *See id.* at 7–8.

26. *Id.*

27. *Id.* at 10 (diagram noting that President Garcia invited the Institute for Liberty and Democracy to the Cartagena summit).

28. *Id.* at 9.

29. *Id.* (noting the need to convince the international community that Peru's peasant army was informal and an "expression of the Peruvian Industrial Revolution[ ]").

30. *Cf.* Mario Fumerton, Rondas Campesinas *in the Peruvian Civil War: Peasant Self-defence Organisations in Ayacucho*, BULLETIN OF LATIN AM. RES. 470, 487–88 (2001) (noting the government's issuance of shotguns to self-defense groups and the general lack of weaponry in rural districts).

31. DE SOTO, *supra* note 8, at 16.

32. GEORGE SANTAYANA, THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS 284 (1st ed. 1906).

So I studied American history and found parallels to the Peruvian situation in the United States of the eighteenth and nineteenth centuries: Issues such "manifest destiny," the Louisiana Purchase, the gold rush, and rapid westward expansion all informed my understanding of what was occurring in Peru. In many ways, the farmers of rural Peru were like the minutemen of the American colonies. They were not a private army. They were just ordinary, poor citizens fighting to protect themselves and their possessions.[33] And the members of the Shining Path were the Red Coats.[34]

This insight helped me relate the real story occurring on the ground in Peru to the people in power in the United States. After working in Washington, D.C. with the U.S. government and meeting with President George H.W. Bush, his cabinet, and high-level congressional officials, we formed a group of trusted individuals to circulate around Peru, meeting with the different indigenous groups.[35] Although many U.S. government officials wanted to approach this as a drug-enforcement issue, because of their concerns over cocaine production, I persuaded the right officials to treat it not as an issue about illegal drugs but as an issue of property rights.[36]

I enlisted the help of the United Nations, whose secretary-general at the time, Javier Perez de Cuellar, was Peruvian.[37] He understood what we had uncovered in our research—that this was not about the drug trade but instead about recognizing property rights. Because we did not view this as primarily about stopping illegal drugs, we were able to enter into a treaty that, at its core, changed the classifications for the rural farmers in Peru.[38] Instead of calling them criminals, we accepted their roles as minutemen, and we classified them as such.[39] In response to this treaty, Abimael Guzman, the leader of the Shining Path, announced to his followers that I was an agent of Yankee imperialism and the CIA.[40]

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33. DE SOTO, *supra* note 8, at 15.

34. *Id.*

35. *Id.* at 14.

36. *Id.* (noting the U.S. concerns of coca production and drug trafficking).

37. *Id.*

38. *Id.* (describing the "Drug Enforcement and Anti-Subversive Agreement" that acknowledged the new classification of coca farmers).

39. *See id.* at 15.

40. *Id.*

In order to show that our policies would work in converting the rural farmers to the government's side in the fight against the Shining Path, we had to arm them. But that raised the problem of how to arm people whose addresses you do not have—for if the government was going to give them real weapons, the government would expect cooperation.[41] In order to provide the farmers with the right incentive to support the Peruvian government, and to oppose the Shining Path, it became clear that we had to offer them more protection than the Shining Path.[42]

During our research, we learned that the Shining Path was applying important, fundamental property concepts in its activities. It offered the farmers many different sticks in the bundle we call property rights.[43] It offered safety; it offered protection from a series of social consequences; and it offered security to the farmers for their possessions and their families.[44] In order to win the loyalty of these farmers, the government had to offer them more sticks from the bundle of property rights.[45] Ultimately, providing the Peruvian minutemen with governmental protection of their property and a formal system of land titling enabled the government to win the loyalty of the farmers against the Shining Path.[46]

As a result, the war in Peru was not won by military might; it was won by property rights. The presence of the people in the countryside became widespread and permanent, while the Shining Path simply dwindled down to nothing.[47] In the end, Guzman actually had to leave the countryside and go to the city, where he was captured by police.[48] At his capture, he was unarmed and had no bodyguards, because his movement had been defeated two years earlier.[49] By

41. *See id.* (indicating that Legislative Decree 741 legitimized the informal peasant army "under the strict supervision of the Armed Forces").

42. *Id.* at 16 (noting the farmers' access to formal property rights and credit), 21 (recognizing the need to "open and build doors that allow[] millions of Peruvians to move from informality into the economic mainstream").

43. De Soto, *supra* note 10 (noting how the Shining Path protected farmers' rights).

44. *Id.*

45. *Id.* (recognizing the need to sever insurgent groups' control over localities).

46. DE SOTO, *supra* note 8, at 15 (photograph of property committees establishing land titles), 26 (indicating the establishment of mechanisms to allow Peruvian majorities "to move from the informal to the formal sector").

47. *Id.* at 16 (describing the Shining Path as they were "expelled from the countryside").

48. De Soto, *supra* note 10.

49. *Id.*

forming property committees across Peru and using much of the land-titling process that the Shining Path had implemented, we were able to standardize and systematize property rights and win the war.[50]

The same principles are at work in the Middle East. My organization has been called in by seven heads of state in the Middle East, and in each nation, our studies have revealed that the vast majority of property is held without formal title. In Egypt, for example, just eight percent of land is held in formal title, leaving ninety-two percent of landholders with possessionary title only.[51] Yet in many of those nations, groups like the Muslim Brotherhood are providing citizens with their own land titles, just like the Shining Path did with the rural farmers in Peru.[52] We have copies of these documents and have provided them to the governments for whom we are consulting.

So the way to counteract much of the violence that is occurring in the Middle East is through property—creating formal, recognized systems of land ownership which are protected by the government. This gives people better title than groups such as the Muslim Brotherhood can provide, which in turn will win the people's loyalty. We are using technology, such as blockchain, a secure digital and easily updatable database, to do this efficiently; we are also sensitive to other legal protections, such as limited liability organizations that encourage the development of property. But the central way to promote stability and encourage prosperity is for governments to recognize and protect formal title to property, either in an individual or in a group united by cultural heritage or common interests. It is a message that applies as much in Egypt and Peru as it does in the United States.[53]

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50. *See* DE SOTO, *supra* note 8, at 15.

51. De Soto, *supra* note 2 (noting that ninety-two percent of land holdings in Egypt are unrecorded).

52. *Cf. The Call for Economic Liberty in the Arab World Before the H. Comm. on Foreign Aff.*, 113th Cong. 40, 45 (2013) (statement of Hernando de Soto, President, Institute for Liberty & Democracy) (acknowledging the Muslim Brotherhood's role).

53. De Soto, *supra* note 2 (noting that the United States is "missing a chance" to learn from the Arab Spring).

EXCERPTS FROM *THE MYSTERY OF CAPITAL*

HERNANDO DE SOTO*

CHAPTER ONE

The Five Mysteries of Capital

> *The key problem is to find out why that sector of society of the past, which I would not hesitate to call capitalist, should have lived as if in a bell jar, cut off from the rest; why was it not able to expand and conquer the whole of society? . . . [Why was it that] a significant rate of capital formation was possible only in certain sectors and not in the whole market economy of the time?*
>
> —Fernand Braudel, *The Wheels of Commerce*

The hour of capitalism's greatest triumph is its hour of crisis.

The fall of the Berlin Wall ended more than a century of political competition between capitalism and communism. Capitalism stands alone as the only feasible way to rationally organize a modern economy. At this moment in history, no responsible nation has a choice. As a result, with varying degrees of enthusiasm, Third World and former communist nations have balanced their budgets, cut subsidies, welcomed foreign investment, and dropped their tariff barriers.

Their efforts have been repaid with bitter disappointment. From Russia to Venezuela, the past half-decade has been a time of economic suffering, tumbling incomes, anxiety and resentment; of "starving, rioting and looting," in the stinging words of Malaysian Prime Minister Mahathir Mohamad. In a recent editorial, the *New York Times* said: "For much of the world, the marketplace extolled by the West in the afterglow of victory in the Cold War has been supplanted by the cruelty of markets, wariness towards capitalism and dangers of

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* Reprinted from HERNANDO DE SOTO, THE MYSTERY OF CAPITAL (2000), with permission of the author. The excerpts were shared with conference attendees at the 2016 Brigham-Kanner Property Rights Conference held in The Hague on October 19–21, 2016, where the author received the 2016 Brigham-Kanner Property Rights Prize.

instability." The triumph of capitalism only in the West could be a recipe for economic and political disaster.

For Americans enjoying both peace and prosperity, it has been all too easy to ignore the turmoil elsewhere. How can capitalism be in trouble when the Dow Jones Industrial average is climbing higher than Sir Edmund Hillary? Americans look at other nations and see progress, even if it is slow and uneven. Can't you eat a Big Mac in Moscow, rent a Blockbuster video in Shanghai, and reach the Internet in Caracas?

Even in the United States, however, the foreboding cannot be completely stifled. Americans see Colombia poised on the brink of a major civil war between drug-trafficking guerillas and repressive militias; an intractable insurgency in the south of Mexico; an important part of Asia's force-fed economic growth draining away into corruption and chaos. In Latin America, sympathy for free markets is dwindling: Support for privatization has dropped from 46 percent of the population to 36 in May 2000. Most ominously of all, in the former communist nations capitalism has been found wanting, and men associated with old regimes stand poised to resume power. Some Americans sense too that one reason for their decade-long boom is that the more precarious the rest of the world looks, the more attractive American stocks and bonds become as a haven for international money.

In the business community of the West, there is a growing concern that the failure of most of the rest of the world to implement capitalism will eventually drive the rich economies into recession. As millions of investors have painfully learned from the evaporation of their emerging market funds, globalization is a two-way street: If the Third World and former communist nations cannot escape the influence of the West, neither can the West disentangle itself from them. Adverse reactions to capitalism have also been growing stronger within rich countries themselves. The rioting in Seattle at the meeting of the World Trade Organization in December 1999 and a few months later at the IMF/World Bank meeting in Washington, D.C., regardless of the diversity of the grievances, highlighted the anger that spreading capitalism inspires. Many have begun recalling the economic historian Karl Polanyi's warnings that free markets can collide with society and lead to fascism. Japan is struggling through its most prolonged slump since the Great Depression. Western

Europeans vote for politicians who promise them a "third way" that rejects what a French bestseller has labeled *L'horreur économique*.

These whispers of alarm, disturbing though they are, have thus far only prompted American and European leaders to repeat to the rest of the world the same wearisome lectures: Stabilize your currencies, hang tough, ignore the food riots, and wait patiently for the foreign investors to return.

Foreign investment is of course a very good thing. The more of it, the better. Stable currencies are good too, as are free trade and transparent banking practices and the privatization of state-owned industries and every other remedy in the Western pharmacopeia. Yet we continually forget global capitalism has been tried before. In Latin America, for example, reforms directed at creating capitalist systems have been tried at least four times since independence from Spain in the 1820s. Each time, after the initial euphoria, Latin Americans swung back from capitalist and market economy policies. These remedies are clearly not enough. Indeed, they fall so far short as to be almost irrelevant.

When these remedies fail, Westerners all too often respond not by questioning the adequacy of the remedies but by blaming Third World peoples for their lack of entrepreneurial spirit or market orientation. If they have failed to prosper despite all the excellent advice, it is because something is the matter with them: They missed the Protestant Reformation, or they are crippled by the disabling legacy of colonial Europe, or their IQs are too low on the Bell Curve. But the suggestion that it is culture that explains the success of such diverse places as Japan, Switzerland, and California, and culture again that explains the relative poverty of such equally diverse places as China, Estonia, and Baja California, is worse than inhumane; it is unconvincing. The disparity of wealth between the West and rest of the world is far too great to be explained by culture alone. Most people want the fruits of capital—so much so that many, from the children of Sanchez to Khruschev's son, are flocking to Western nations.

The cities of the Third World and the former communist countries are teeming with entrepreneurs. You cannot walk through a Middle Eastern market, hike up to a Latin American village, or climb into a taxicab in Moscow without someone trying to make a deal with

you. The inhabitants of these countries possess talent, enthusiasm, and an astonishing ability to wring a profit out of practically nothing. They can grasp and use modern technology. Otherwise, American businesses would not be struggling to control the unauthorized use of their patents abroad, nor would the U.S. government be striving so desperately to keep modern weapons technology out of the hands of Third World countries. Markets are an ancient and universal tradition: Christ drove the merchants out of the temple 2,000 years ago, and Mexicans were taking their products to market long before Columbus reached America.

But if people in countries making the transition to capitalism are not pitiful beggars, are not helplessly trapped in obsolete ways, and are not the uncritical prisoners of dysfunctional cultures, what is it that prevents capitalism from delivering to them the same wealth it has delivered to the West? Why does capitalism thrive only in the West, as if enclosed in a bell jar?

In this book I intend to demonstrate that the major stumbling block that keeps the rest of the world from benefiting from capitalism is its inability to produce capital. Capital is the force that raises the productivity of labor and creates the wealth of nations. It is the lifeblood of the capitalist system, the foundation of progress, and the one thing that the poor countries of the world cannot seem to produce for themselves, no matter how eagerly their people engage in all the other activities that characterize a capitalist economy.

I will also show, with the help of facts and figures that my research team and I have collected, block by block and farm by farm in Asia, Africa, the Middle East, and Latin America, that most of the poor already possess the assets they need to make a success of capitalism. Even in the poorest countries, the poor save. The value of savings among the poor is, in fact, immense: forty times all the foreign aid received throughout the world since 1945. In Egypt, for instance, the wealth that the poor have accumulated is worth fifty-five times as much as the sum of all direct foreign investment ever recorded there, including the Suez Canal and the Aswan Dam. In Haiti, the poorest nation in Latin America, the total assets of the poor are more than one hundred fifty times greater than all the foreign investment received since Haiti's independence from France in 1804. If the United States were to hike its foreign-aid budget to

the level recommended by the United Nations—0.7 percent of national income—it would take the richest country on earth more than 150 years to transfer to the world's poor resources equal to what they already possess.

But they hold these resources in defective forms: houses built on land whose ownership rights are not adequately recorded, unincorporated businesses with undefined liability, industries located where financiers and investors cannot see them. Because the rights to these possessions are not adequately documented, these assets cannot readily be turned into capital, cannot be traded outside of narrow local circles where people know and trust each other, cannot be used as collateral for a loan, and cannot be used as a share against an investment.

In the West, by contrast, every parcel of land, every building, every piece of equipment, or store of inventories is represented in a property document that is the visible sign of a vast hidden process that connects all these assets to the rest of the economy. Thanks to this representational process, assets can lead an invisible, parallel life alongside their material existence. They can be used as collateral for credit. The single most important source of funds for new businesses in the United States is a mortgage on the entrepreneur's house. These assets can also provide a link to the owner's credit history, an accountable address for the collection of debts and taxes, the basis for the creation of reliable and universal public utilities, and a foundation for the creation of securities (like mortgage-backed bonds) that can then be rediscounted and sold in secondary markets. By this process the West injects life into assets and makes them generate capital.

Third World and former communist nations do not have this representational process. As a result, most of them are undercapitalized, in the same way that a firm is undercapitalized when it issues fewer securities than its income and assets would justify. The enterprises of the poor are very much like corporations that cannot issue shares or bonds to obtain new investment and finance. Without representations, their assets are dead capital.

The poor inhabitants of these nations—five-sixths of humanity—do have things, but they lack the process to represent their property and create capital. They have houses but not titles; crops

but not deeds; businesses but not statutes of incorporation. It is the unavailability of these essential representations that explains why people who have adapted every other Western invention, from the paper clip to the nuclear reactor, have not been able to produce sufficient capital to make their domestic capitalism work.

This is the mystery of capital. Solving it requires understanding why Westerners, by representing assets with titles, are able to see and draw out capital from them. One of the greatest challenges to the human mind is to understand and gain access to those things we know exist but cannot see. Not everything that is real and useful is tangible and visible. Time, for example, is real, but it can only be efficiently managed when it is represented by a clock or a calendar. Throughout history, human beings have invented representational systems—writing, musical notation, double-entry bookkeeping—to grasp with the mind what human hands could never touch. In the same way, the great practitioners of capitalism, from the creators of integrated title systems and corporate stock to Michael Milken, were able to reveal and extract capital where others saw just junk by devising new ways to represent the invisible potential that is locked up in the assets we accumulate.

At this very moment, you are surrounded by waves of Ukrainian, Chinese, and Brazilian television that you cannot see. So, too, are you surrounded by assets that invisibly harbor capital. Just as the waves of Ukrainian television are far too weak for you to sense them directly but can, with the help of a television set, be decoded to be seen and heard, so can capital be extracted and processed from assets. But only the West has the conversion process required to transform the invisible to the visible. It is *this* disparity that explains why Western nations can create capital and the Third World and former communist nations cannot.

The absence of this process in the poorer regions of the world—where two-thirds of humanity lives—is not the consequence of some Western monopolistic conspiracy. It is rather that Westerners take this mechanism so completely for granted that they have lost all awareness of its existence. Although it is huge, nobody sees it, including the Americans, Europeans and Japanese who owe all their wealth to their ability to use it. It is an implicit legal infrastructure hidden deep within their property systems—of which ownership is

but the tip of the iceberg. The rest of the iceberg is an intricate man-made process that can transform assets and labor into capital. This process was not created from a blueprint and is not described in a glossy brochure. Its origins are obscure and its significance buried in the economic subconscious of Western capitalist nations.

How could something so important have slipped our minds? It is not uncommon for us to know *how* to do things without understanding *why* they work. Sailors used magnetic compasses long before there was a satisfactory theory of magnetism. Animal breeders had a working knowledge of genetics long before Gregor Mendel explained genetic principles. Even as the West prospers from abundant capital, do people really understand the origin of capital? If they don't, there always remains the possibility that the West might damage the source of its own strength. Being clear about the source of capital will also prepare the West to protect itself and the rest of the world as soon as the prosperity of the moment yields to the crisis that is sure to come. Then the question that always arises in international crises will be heard again: Whose money will pay to solve these problems?

So far, Western countries have been happy to take their system for producing capital entirely for granted and to leave its history undocumented. That history must be recovered. This book is an effort to reopen the exploration of the source of capital and thus explain how to correct the economic failures of poor countries. These failures have nothing to do with deficiencies in cultural or genetic heritage. Would anyone suggest "cultural" commonalities between Latin Americans and Russians? Yet in the last decade, ever since both regions began to build capitalism without capital, they have shared the same political, social, and economic problems: glaring inequality, underground economies, pervasive mafias, political instability, capital flight, flagrant disregard for the law. These troubles did not originate in the monasteries of the Orthodox Church or along the pathways of the Incas.

But it is not only former communist and Third World countries that have suffered all of these problems. The same was true of the United States in 1783, when President George Washington complained about "banditti . . . skimming and disposing of the cream of the country at the expense of the many." These "banditti" were

squatters and small illegal entrepreneurs occupying lands they did not own. For the next one hundred years, such squatters battled for legal rights to their land and miners warred over their claims because ownership laws differed from town to town and camp to camp. Enforcing property rights created such a quagmire of social unrest and antagonism throughout the young United States that the Chief Justice of the Supreme Court, Joseph Story, wondered in 1820 whether lawyers would ever be able to settle them.

Do squatters, banditti, and flagrant disregard of the law sound familiar? Americans and Europeans have been telling the other countries of the world "You have to be more like us." In fact, they are very much like the United States of a century ago when it too was an undeveloped country. Western politicians once faced the same dramatic challenges that leaders of the developing and former communist countries are facing today. But their successors have lost contact with the days when the pioneers who opened the American West were undercapitalized because they seldom possessed title to the lands they settled and the goods they owned; when Adam Smith did his shopping in black markets and English street urchins plucked pennies cast by laughing tourists into the mud banks of the Thames; when Jean-Baptiste Colbert's technocrats executed 16,000 small entrepreneurs whose only crime was manufacturing and importing cotton cloth in violation of France's industrial codes.

That past is many nations' present. The Western nations have so successfully integrated their poor into their economies that they have lost even the memory of how it was done, how the creation of capital began back when, as the American historian Gordon Wood has written, "something momentous was happening in the society and culture that released the aspirations and energies of common people as never before in American history."[1] The "something momentous" was that Americans and Europeans were on the verge of establishing widespread formal property law and inventing the conversion process in that law that allowed them to create capital. This was the moment when the West crossed the demarcation point that led to successful capitalism—when it ceased being a private club and became a popular culture, when George Washington's

1. Gordon S. Wood, "Inventing American Capitalism," *The New York Review of Books* (June 9, 1994), p. 49.

dreaded "banditti" were transformed into the beloved pioneers that American culture now venerates.

* * *

The paradox is as clear as it is unsettling: capital, the most essential component of Western economic advance, is the one that has received the least attention. Neglect has shrouded it in mystery—in fact, a series of five mysteries.

The Mystery of the Missing Information

Charitable organizations have so emphasized the miseries and helplessness of the world's poor that no one has properly documented their capacity for accumulating assets. Over the past five years, I and a hundred colleagues from six different nations have closed our books and opened our eyes—and gone out into the streets and countrysides of four continents to count how much the poorest sectors of society have saved. The quantity is enormous. But most of it is dead capital.

The Mystery of Capital

This is the key mystery and the centerpiece of this book. Capital is a subject that has fascinated thinkers for the last three centuries: Marx said that you needed to go beyond physics to touch "the hen that lays the golden eggs"; Adam Smith felt you had to create "a sort of waggon-way through the air" to reach that same hen. But no one has told us where the hen hides. What is capital, how is it produced, and how is it related to money?

The Mystery of Political Awareness

If there is so much dead capital in the world, and in the hands of so many poor people, why haven't governments tried to tap into this potential wealth? Simply because the evidence they needed has only become available in the past forty years as billions of people throughout the world have moved from life organized on a small scale to life

on a large scale. This migration to the cities has rapidly divided labor and spawned in poorer countries a huge industrial-commercial revolution—one that, incredibly, has been virtually ignored.

The Missing Lessons of U.S. History

What is going on in the Third World and the former communist countries has happened before, in Europe and North America. Unfortunately, we have been so mesmerized by the failure of so many nations to make the transition to capitalism that we have forgotten how the successful capitalist nations actually did it. For years, I visited technocrats and politicians in advanced nations, from Alaska to Tokyo, but they had no answers. It was a mystery. I finally found the answer in their history books, the most pertinent example being that of U.S. history.

The Mystery of Legal Failure: Why Property Law Does Not Work Outside the West

Since the nineteenth century, nations have been copying the laws of the West to give their citizens the institutional framework to produce wealth. They continue copying such laws today, and, obviously it doesn't work. Most citizens still cannot use the law to convert their savings into capital. Why this is so and what is needed to make the law work remains a mystery.

The solution to each of these mysteries is the subject of a chapter in this book.

* * *

The moment is ripe to solve the problems of why capitalism is triumphant in the West and stalling practically everywhere else. As all plausible alternatives to capitalism have now evaporated, we are finally in a position to study capital, dispassionately and carefully.

CHAPTER THREE

The Mystery of Capital

> *The sense of the world must lie outside the world. In the world everything is as it is and happens as it does happen. In it there is no value—and if there were, it would be of no value.*
>
> *If there is a value which is of value, it must lie outside all happening and being-so. For all happening and being-so is accidental.*
>
> *What makes it non-accidental cannot lie* in *the world, for otherwise this would again be accidental.*
>
> *It must lie outside the world.*
>
> —Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*

Walk down most roads in the Middle East, the former Soviet Union or Latin America, and you will see many things: houses used for shelter, parcels of land being tilled, sowed and harvested, merchandise being bought and sold. Assets in developing and former communist countries primarily serve these immediate physical purposes. In the West, however, the same assets also lead a parallel life as capital outside the physical world. They can be used to put in motion more production by securing the interests of other parties as "collateral" for a mortgage, for example, or by assuring the supply of other forms of credit and public utilities.

Why can't buildings and land elsewhere in the world also lead this parallel life? Why can't the enormous resources we discussed in Chapter 2—$9.3 trillion of dead capital—produce value beyond their "natural" state? My reply is: Dead capital exists because we have forgotten (or perhaps never realized) that converting a physical asset to generate capital—using your house to borrow money to finance an enterprise, for example—requires a very complex process. It is not unlike the process that Einstein taught us whereby a single brick can be made to release a huge amount of energy in the form of an atomic explosion. By analogy, capital is the result of discovering and unleashing potential energy from the trillions of bricks that the poor have accumulated in their buildings.

There is, however, one crucial difference between unleashing energy from a brick and unleashing capital from brick buildings: Although humanity (or at least a large group of scientists) has mastered the process of obtaining energy from matter, we seem to have forgotten the process that allows us to obtain capital from assets. The result is that 80 percent of the world is undercapitalized; people cannot draw economic life from their buildings (or any other asset) to generate capital. Worse, the advanced nations seem unable to teach them. Why assets can be made to produce abundant capital in the West but very little in the rest of the world has become a mystery.

Clues from the Past (from Smith to Marx)

To unravel the mystery of capital, we have to go back to the seminal meaning of the word. In Medieval Latin, "capital" appears to have denoted a head of cattle or other livestock, which have always been important sources of wealth beyond the basic meat they provide. Livestock are low-maintenance possessions; they are mobile and can be moved away from danger; they are also easy to count and measure. But most important, from livestock you can obtain additional wealth, or surplus value, by setting in motion other industries, including milk, hides, wool, meat, and fuel. Livestock also have the useful attribute of being able to reproduce themselves. Thus the term "capital" begins to do two jobs simultaneously, capturing the physical dimension of assets (livestock) as well as their potential to generate surplus value. From the barnyard, it was only a short step to the desks of the inventors of economics, who generally defined "capital" as that part of a country's assets that initiates surplus production and increases productivity.

Great classical economists such as Adam Smith and Karl Marx believed that capital was the engine that powered the market economy. Capital was considered to be the principal part of the economic whole—the preeminent factor (as the capital issues in such phrases as *capital* issues, *capital* punishment, the *capital* city of a country). What they wanted to understand was what capital is and how it is produced and accumulated. Whether you agree with the classical economists or not, or perhaps view them as irrelevant (maybe Smith never understood that the Industrial Revolution was under way; maybe

Marx's labor theory of value has no practical application), there is no doubt that these thinkers built the towering edifices of thought on which we can now stand and try to find out what capital is, what produces it, and why non-Western nations generate so little of it.

For Smith, economic specialization—the division of labor and the subsequent exchange of products in the market—was the source of increasing productivity and therefore "the wealth of nations." What made this specialization and exchange possible was capital, which Smith defined as the stock of assets accumulated for productive purposes. Entrepreneurs could use their accumulated resources to support specialized enterprises until they could exchange their products for the other things they needed. The more capital was accumulated, the more specialization became possible, and the higher society's productivity would be. Marx agreed; for him, the wealth capitalism produces presents itself as an immense pile of commodities.

Smith believed that the phenomenon of capital was a consequence of man's natural progression from a hunting, pastoral, and agricultural society to a commercial one where, through mutual interdependence, specialization and trade, he could increase his productive powers immensely. Capital was to be the magic that would enhance productivity and create surplus value. "The quantity of industry," Smith wrote, "not only increases in every country with the increase of the stock [capital] which employs it, but, in consequence of that increase, the same quantity of industry produces a much greater quantity of work."[1]

Smith emphasized one point that is at the very heart of the mystery we are trying to solve: For accumulated assets to become active capital and put additional production in motion, they must be *fixed and realized in some particular subject* "which lasts for some time at least after that labour is past. It is, as it were, a certain quantity of labour stocked and stored up to be employed, if necessary, upon some other occasion."[2] Smith warned that labor invested in the production of assets would not leave any trace or value if not properly *fixed*.

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1. Adam Smith, *The Wealth of Nations* (London: Everyman's Library, 1977), former Volume 1, p. 242.

2. Ibid., p.295.

What Smith really meant may be the subject of legitimate debate. What I take from him, however, is that capital is not the accumulated stock of assets but the *potential* it holds to deploy new production. This potential is, of course, abstract. It must be processed and fixed into a tangible form before we can release it—just like the potential nuclear energy in Einstein's brick. Without a conversion process—one that draws out and fixes the potential energy contained in the brick—there is no explosion; a brick is just a brick. Creating capital also requires a conversion process.

This notion—that capital is first an abstract concept and must be given a fixed, tangible form to be useful—was familiar to other classical economists. Simonde de Sismondi, the nineteenth-century Swiss economist, wrote that capital was "a permanent value, that multiplies and does not perish . . . Now this value detaches itself from the product that creates it, it becomes a metaphysical and insubstantial quantity always in the possession of whoever produced it, for whom this value could [be fixed in] different forms."[3] The great French economist Jean Baptiste Say believed that "capital is always immaterial by nature since it is not matter which makes capital but the value of that matter, value has nothing corporeal about it."[4] Marx agreed; for him, a table could be made of something material, like wood "but so soon as it steps forth as a commodity, it is changed into something transcendent. It not only stands with its feet on the ground, but, in relation to all other commodities, it stands on its head, and evolves out of its wooden brain grotesque ideas, far more wonderful than table-turning ever was."[5]

This essential meaning of capital has been lost to history. Capital is now confused with money, which is only one of the many forms in which it travels. It is always easier to remember a difficult concept in one of its tangible manifestations than in its essence. The mind wraps itself around "money" more easily than "capital." But it is a mistake to assume that money is what finally fixes capital. As Adam Smith pointed out, money is the "great wheel of circulation," but it

3. Simonde de Sismondi, *Nouveaux principes d'économic politique* (Paris: Calmann-Lévy, 1827), pp. 81–82.

4. Jean Baptiste Say, *Traité d'économie politique* (Paris: Deterville, 1819), Vol. 2, p. 429.

5. Karl Marx, Frederick Engels, *Collected Works,* (New York: International Publishers, 1996), Vol. 35, p. 82.

is *not* capital because value "cannot consist in those metal pieces."[6] In other words, money facilitates transactions, allowing us to buy and sell things, but it is not itself the progenitor of additional production. As Smith insisted, "the gold and silver money, which circulates in any country, may very properly be compared to a highway, which, while it circulates and carries to market all the grass and corn of the country, produces itself not a single pile of either."[7]

Much of the mystery of capital dissipates as soon as you stop thinking of "capital" as a synonym for "money saved and invested." The misapprehension that it is money that fixes capital comes about, I suspect, because modern business expresses the value of capital in terms of money. In fact, it is hard to estimate the total value of a collection of assets of very different types, such as machinery, buildings, and land, without resorting to money. After all, that is why money was invented; it provides a standard index to measure the value of things so that we may exchange dissimilar assets. But as useful as it is, money cannot fix in any way the abstract potential of a particular asset in order to convert it into capital. Third World and former communist nations are infamous for inflating their economies with money—without being able to generate much capital.

The Potential Energy in Assets

What is it that fixes the potential of an asset so that it can put additional production into motion? What detaches value from a simple house and fixes it in a way that allows us to realize it as capital?

We can begin to find an answer by using our energy analogy. Consider a mountain lake. We can think about this lake in its immediate physical context and see some primary uses for it, such as canoeing and fishing. But when we think about this same lake as an engineer would by focusing on its capacity to generate energy as an additional value beyond the lake's natural state as a body of water, we suddenly see the potential created by the lake's elevated position. The challenge for the engineer is finding out how he can create a *process* that allows him to convert and fix this potential into a form that can be used to do additional work. In the case of the elevated

6. Smith, *The Wealth of Nations*, former Volume 1, p. 242.
7. Ibid., p. 286.

lake, that process is contained in a hydroelectric plant that allows the lake water to move rapidly downward with the force of gravity, thereby transforming the placid lake's energy potential into the kinetic energy of tumbling water. This new kinetic energy can then rotate turbines creating mechanical energy that can be used to turn electromagnets that further convert it into electrical energy. As electricity, the potential energy of the placid lake is now fixed in the form necessary to produce controllable current that can be further transmitted through wire conductors to faraway places to deploy new production.

Thus an apparently placid lake can be used to light up your room and power the machinery in a factory. What was required was an external man-made process, which allowed us, first, to identify the potential of the weight of the water to do additional work and second, to convert this potential energy into electricity, which can be used to create surplus value. The additional value we obtain from the lake is not a value of the lake itself (like a precious ore intrinsic to the earth) but rather a value of the man-made process *extrinsic* to the lake. It is this process that allows us to transform the lake from a fishing and canoeing kind of place into an energy-producing kind of place.

Capital, like energy, is also a dormant value. Bringing it to life requires us to go beyond *looking* at our assets as they are to actively *thinking* about them as they could be. It requires a process for fixing an asset's economic potential into a form where it can be used to initiate additional production.

Although the process that converts the potential energy in the water into electricity is well known, the one that gives assets the form required to put in motion more production is not known. In other words, while we know that it is the penstock, turbines, generators, transformers, and wires of the hydroelectric energy system that convert the potential energy of the lake until it is fixed in an accessible form, we do not know where to find the key process that converts the economic potential of a house into capital.

This is because that key process was not deliberately set up to create capital but for the more mundane purpose of protecting property ownership. As the property systems of Western nations grew, they developed, imperceptibly, a variety of mechanisms that

gradually combined into a process that churned out capital as never before. Although we use these mechanisms all the time, we do not realize that they have capital generating functions because they do not wear that label. We view them as parts of the system that protects property, not as interlocking mechanisms for fixing the economic potential of an asset in such a way that it can be converted to capital. What creates capital in the West, in other words, is an implicit process buried in the intricacies of its formal property systems.

The Hidden Conversion Process of the West

This may sound too simple or too complex. But consider whether it is possible for assets to be used productively if they do not belong to something or someone. Where do we confirm the existence of these assets and the transactions that transform them and raise their productivity, if not in the context of a formal property system? Where do we record the relevant economic features of assets, if not in the records and titles that formal property systems provide? Where are the codes of conduct that govern the use and transfer of assets, if not in the framework of formal property systems? It is formal property that provides the process, the forms, and the rules that fix assets in a condition that allows us to realize them as active capital.

In the West, this formal property system begins to process assets into capital by describing and organizing the most economically and socially useful aspects about assets, preserving this information in a recording system—as insertions in a written ledger or a blip on a computer disk—and then embodying them in a title. A set of detailed and precise legal rules governs this entire process. Formal property records and titles thus represent our shared concept of what is economically meaningful about any asset. They capture and organize all the relevant information required to conceptualize the potential value of an asset and so allow us to control it. Property is the realm where we identify and explore assets, combine them, and link them to other assets. The formal property system is capital's hydroelectric plant. This is the place where capital is born.

Any asset whose economic and social aspects are not fixed in a formal property system is extremely hard to move in the market. How can the huge amounts of assets changing hands in a modern

market economy be controlled, if not through a formal property process? Without such a system, any trade of an asset, say a piece of real estate, requires an enormous effort just to determine the basics of the transaction: Does the seller own the real estate and have the right to transfer it? Can he pledge it? Will the new owner be accepted as such by those who enforce property rights? What are the effective means to exclude other claimants? In developing and former communist nations, such questions are difficult to answer. For most goods, there is no place where the answers are reliably fixed. That is why the sale or lease of a house can involve lengthy and cumbersome procedures of approval involving all the neighbors. This is often the only way to verify that the owner actually owns the house and there are no other claims on it. It is also why the exchange of most assets outside the West is restricted to local circles of trading partners.

As we saw in the previous chapter, these countries' principal problem is not the lack of entrepreneurship: The poor have accumulated trillions of dollars of real estate during the last forty years. What the poor lack is easy access to the property mechanisms that could legally fix the economic potential of their assets so that they can be used to produce, secure, or guarantee greater value in the expanded market. In the West, every asset—every piece of land, every house, every chattel—is formally fixed in updated records governed by rules contained in the property system. Every increment in production, every new building, product, or commercially valuable thing is someone's formal property. Even if assets belong to a corporation, real people still own them indirectly, through titles certifying that they own the corporation as "shareholders."

Like electric power, capital will not be generated if the single key facility that produces and fixes it is not in place. Just as a lake needs a hydroelectric plant to produce usable energy, assets need a formal property system to produce significant surplus value. Without formal property to extract their economic potential and convert it into a form that can be easily transported and controlled, the assets of developing and former communist countries are like water in a lake high in the Andes—an untapped stock of potential energy.

Why has the genesis of capital become such a mystery? Why have the rich nations of the world, so quick with their economic advice,

not explained how indispensable formal property is to capital formation? The answer is that the process within the formal property system that breaks down assets into capital is extremely difficult to visualize. It is hidden in thousands of pieces of legislation, statutes, regulations, and institutions that govern the system. Anyone trapped in such a legal morass would be hard-pressed to figure out how the process actually works. The only way to see it is from outside the system—from the extralegal sector—which is where my colleagues and I do most of our work.

For some time now I have been looking at the law from an extralegal point of view, to better understand how it functions and what effects it produces. This is not as crazy as it seems. As the French philosopher Michel Foucault has argued, it may be easier to discover what something means by looking at it from the opposite side of the bridge. "To find out what our society means by sanity," Foucault has written, "perhaps we should investigate what is happening in the field of insanity. And what we mean by legality in the field of illegality."[8] Moreover, property, like energy, is a concept; it cannot be experienced directly. Pure energy has never been seen or touched. And no one can see property. One can only experience energy and property by their effects.

From my viewpoint in the extralegal sector, I have seen that the formal property systems of the West produce six effects that allow their citizens to generate capital. The incapacity elsewhere in the world to deploy capital stems from the fact that most of the people in Third World and former communist countries are cut off from these essential effects.

Property Effect No. 1: Fixing the Economic Potential of Assets

The potential value locked up in a house can be revealed and transformed into active capital in the same way that potential energy is identified in a mountain lake and then transformed into actual energy. In both cases, the transition from one state to another requires a process that transposes the physical object into a man-made representative universe where we can disengage the

8. Herbert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago: Harvester, University of Chicago, 1982), p. 211.

resource from its burdensome material constraints and concentrate on its potential.

Capital is born by representing in writing—in a title, a security, a contract, and in other such records—the most economically and socially useful qualities *about* the asset as opposed to the visually more striking aspects *of* the asset. This is where potential value is first described and registered. The moment you focus your attention on the title of a house, for example, and not the house itself, you have automatically stepped from the material world into the conceptual universe where capital lives. You are reading a representation that focuses your attention on the economic potential of the house by filtering out all the confusing lights and shadows of its physical aspects and its local surroundings. Formal property forces you to think about the house as an economic and social concept. It invites you to go beyond viewing the house as mere shelter—and thus a dead asset—and to see it as live capital.

The proof that property is pure concept comes when a house changes hands; nothing physically changes. Looking at a house will not tell you who owns it. A house that is yours today looks exactly as it did yesterday when it was mine. It looks the same whether I own it, rent it, or sell it to you. Property is not the house itself but an economic concept *about* the house, embodied in a legal representation. This means that a formal property representation is something separate from the asset it represents.

What do formal property representations have that allows them to do additional work? Are they not just simple stand-ins for the assets? No. I repeat: A formal property representation such as a title is not a reproduction *of* the house, like a photograph, but a representation of our concepts *about* the house. Specifically, it represents the nonvisible qualities that have potential for producing value. These are not physical qualities of the house itself but rather economically and socially meaningful qualities we humans have attributed to the house (such as the ability to use it for a variety of purposes that can be secured by liens, mortgages, easements, and other covenants).

In advanced nations, this formal property representation functions as the means to secure the interests of other parties and to create accountability by providing all the information, references, rules, and enforcement mechanisms required to do so. In the West,

for example, most formal property can be easily used as collateral for a loan; as equity exchanged for investment; as an address for collecting debts, rates, and taxes; as a locus point for the identification of individuals for commercial, judicial, or civic purposes; or as a liable terminal for receiving public utility services, such as energy, water, sewage, telephone, or cable services. While houses in advanced nations are acting as shelters or workplaces, their representations are leading a parallel life, carrying out a variety of additional functions to secure the interests of other parties.

Legal property thus gave the West the tools to produce surplus value over and above its physical assets. Property representations enabled people to think about assets not only through physical acquaintance but also through the description of their latent economic and social qualities. Whether anyone intended it or not, the legal property system became the staircase that took these nations from the universe of assets in their natural state to the conceptual universe of capital where assets can be viewed in their full productive potential.

With legal property, the advanced nations of the West had the key to modern development; their citizens now had the means to discover, with great facility and on an ongoing basis, the most potentially productive qualities of their resources. As Aristotle discovered 2,300 years ago, what you can do with things increases infinitely when you focus your thinking on their potential. By learning to fix the economic potential of their assets through property records, Westerners created a fast track to explore the most productive aspects of their possessions. Formal property became the staircase to the conceptual realm where the economic meaning of things can be discovered and where capital is born.

Property Effect No. 2: Integrating Dispersed Information into One System

As we saw in the previous chapter, most people in developing and former communist nations cannot get into the legal property system, such as it is, no matter how hard they try. Because they cannot insert their assets into the legal property system, they end up holding them extralegally. The reason capitalism has triumphed in the West and sputtered in the rest of the world is because most of the assets

in Western nations have been integrated into one formal representational system.

This integration did not happen casually. Over decades in the nineteenth century, politicians, legislators, and judges pulled together the scattered facts and rules that had governed property throughout cities, villages, buildings, and farms and integrated them into one system. This "pulling together" of property representations, a revolutionary moment in the history of developed nations, deposited all the information and rules governing the accumulated wealth of their citizens into one knowledge base. Before that moment, information about assets was far less accessible. Every farm or settlement recorded its assets and the rules governing them in rudimentary ledgers, symbols, or oral testimony. But the information was atomized, dispersed, and not available to any one agent at any given moment. As we know too well today, an abundance of facts is not necessarily an abundance of knowledge. For knowledge to be functional, advanced nations had to integrate into one comprehensive system all their loose and isolated data about property.

Developing and former communist nations have not done this. In all the countries I have studied, I have never found just one legal system but dozens or even hundreds, managed by all sorts of organizations, some legal, others extralegal, ranging from small entrepreneurial groups to housing organizations. Consequently, what people in those countries can do with their property is limited to the imagination of the owners and their acquaintances. In Western countries, where property information is standardized and universally available, what owners can do with their assets benefits from the collective imagination of a larger network of people.

It may surprise the Western reader that most of the world's nations have yet to integrate extralegal property agreements into one formal legal system. For Westerners, there supposedly is only one law—the official one. Yet the West's reliance on integrated property systems is a phenomenon of at most the last two hundred years. In fact, in most Western countries, integrated property systems appeared only about a hundred years ago; Japan's integration happened a little more than fifty years ago. As we shall see in detail later, diverse informal property arrangements were once the norm in every nation. Legal pluralism was the standard in continental Europe until

Roman law was rediscovered in the fourteenth century and governments assembled all currents of law into one coordinated system.

In California just after the gold rush of 1849, there were some eight hundred separate property jurisdictions, each with its own records and individual regulations established by local consensus. Throughout the United States, from California to Florida, claim associations agreed on their own rules and elected their own officers. It took more than one hundred years, well into the late nineteenth century, for the U.S. government to pass special statutes that integrated and formalized U.S. assets. By enacting more than thirty-five preemption and mining statutes, Congress gradually managed to integrate into one system the informal property rules created by millions of immigrants and squatters. The result was an integrated property market that fueled the United States' explosive economic growth thereafter.

The reason it is so hard to follow this history of the integration of widespread property systems is that the process took place over a very long time. Formal property registries began to appear in Germany, for example, in the twelfth century but were not fully integrated until 1896, when the *Grundbuch* system for recording land transactions began operating on a national scale. In Japan, the national campaign to formalize the property of farmers began in the late nineteenth century and ended only in the late 1940s. Switzerland's extraordinary efforts to bring together the disparate systems that protected property and transactions at the turn of the twentieth century are still not well known, even to many Swiss.

As a result of integration, citizens in advanced nations can obtain descriptions of the economic and social qualities of any available asset without having to see the asset itself. They no longer need to travel around the country to visit each and every owner and their neighbors; the formal property system lets them know what assets are available and what opportunities exist to create surplus value. Consequently, an asset's potential has become easier to evaluate and exchange, enhancing the production of capital.

Property Effect No. 3: Making People Accountable

The integration of all property systems under one formal property law shifted the legitimacy of the rights of owners from the politicized

context of local communities to the impersonal context of law. Releasing owners from restrictive local arrangements and bringing them into a more integrated legal system facilitated their accountability.

By transforming people with property interests into accountable individuals, formal property created individuals from masses. People no longer needed to rely on neighborhood relationships or make local arrangements to protect their rights to assets. Freed from primitive economic activities and burdensome parochial constraints, they could explore how to generate surplus value from their own assets. But there was a price to pay: Once inside a formal property system, owners lost their anonymity. By becoming inextricably linked to real estate and businesses that could be easily identified and located, people forfeited the ability to lose themselves in the masses. This option has practically disappeared in the West, while individual accountability has been reinforced. People who do not pay for goods or services they have consumed can be identified, charged interest penalties, fined, embargoed, and have their credit ratings downgraded. Authorities are able to learn about legal infractions and dishonored contracts; they can suspend services, place liens against property, and withdraw some or all of the privileges of legal property.

Respect in Western nations for property and transactions is hardly encoded in their citizens' DNA; it is rather the result of having enforceable formal property systems. Formal property's role in protecting not only ownership but the security of transactions encourages citizens in advanced countries to respect titles, honor contracts, and obey the law. When any citizen fails to act honorably, his breach is recorded in the system, jeopardizing his reputation as a trustworthy party to his neighbors, utilities, banks, telephone companies, insurance firms, and the rest of the network that property ties him to.

Thus the formal property systems of the West have bestowed mixed blessings. While they provided hundreds of millions of citizens with a stake in the capitalist game, what made this stake meaningful was that it could be lost. A great part of the potential value of legal property is derived from the possibility of forfeiture. Consequently, a great deal of its power comes from the accountability it creates, from the constraints it imposes, the rules it spawns, and the sanctions it can apply. In allowing people to see the economic and social potential of assets, formal property changed the

perception in advanced societies of not only the potential rewards of using assets but also the dangers. Legal property invited commitment.

The lack of legal property thus explains why citizens in developing and former communist nations cannot make profitable contracts with strangers, cannot get credit, insurance, or utilities services: They have no property to lose. Because they have no property to lose, they are taken seriously as contracting parties only by their immediate family and neighbors. People with nothing to lose are trapped in the grubby basement of the precapitalist world.

Meanwhile, citizens of advanced nations can contract for practically anything that is reasonable, but the entry price is commitment. And commitment is better understood when backed up by a pledge of property, whether a mortgage, a lien, or any other form of security that protects the other contracting party.

Property Effect No. 4: Making Assets Fungible

One of the most important things a formal property system does is transform assets from a less accessible condition to a more accessible condition, so that they can do additional work. Unlike physical assets, representations are easily combined, divided, mobilized, and used to stimulate business deals. By uncoupling the economic features of an asset from their rigid, physical state, a representation makes the asset "fungible"—able to be fashioned to suit practically any transaction.

By describing all assets in standard categories, an integrated formal property system enables the comparison of two architecturally different buildings constructed for the same purpose. This allows one to discriminate quickly and inexpensively between similarities and differences in assets without having to deal with each asset as if it were unique.

Standard property descriptions in the West are also written to facilitate the combination of assets. Formal property rules require assets to be described and characterized in a way that not only outlines their singularity but also points out their similarity to other assets, thus making potential combinations more obvious. Through the use of standardized records, one can determine (on the basis of zoning restrictions, who the neighbors are and what they are doing,

the square footage of the buildings, whether they can be joined, etc.) how to exploit a particular piece of real estate most profitably, whether as office space, hotel rooms, a bookshop, or racquetball courts and a sauna.

Representations also enable the division of assets without touching them. While an asset such as a factory may be an indivisible unit in the real world, in the conceptual universe of formal property representation it can be subdivided into any number of portions. Citizens of advanced nations are thus able to split most of their assets into shares, each of which can be owned by different persons, with different rights, to carry out different functions. Thanks to formal property, a single factory can be held by countless investors, who can divest themselves of their property without affecting the integrity of the physical asset.

Similarly, in a developed country, the farmer's son who wishes to follow in his father's footsteps can keep the farm by buying out his more commercially minded siblings. Farmers in many developing countries have no such option and must continually subdivide their farms for each generation until the parcels are too small to farm profitably, leaving the descendants with two alternatives: starving or stealing.

Formal property representations can also serve as moveable stand-ins for physical assets, enabling owners and entrepreneurs to simulate hypothetical situations in order to explore other profitable uses of their assets—much as military officers plan their strategy for a battle by moving symbols of their troops and weapons around a map. If you think about it, it is property representations that allow entrepreneurs to simulate business strategies to grow their companies and build capital.

In addition, all standard formal property documents are crafted in such a way as to facilitate the easy measurement of an asset's attributes. If standard descriptions of assets were not readily available, anyone who wanted to buy, rent, or give credit against an asset would have to expend enormous resources comparing and evaluating it against other assets—which also would lack standard descriptions. By providing standards, Western formal property systems have reduced significantly the transaction costs of mobilizing and using assets.

Once assets are in a formal property system, they endow their owners with an enormous advantage in that they can be split up and combined in more ways than an Erector set. Westerners can adapt their assets to any economic circumstance to produce continually higher valued mixtures, while their Third World counterparts remain trapped in the physical world of rigid, nonfungible forms.

Property Effect No. 5: Networking People

By making assets fungible; by attaching owners to assets, assets to addresses, and ownership to enforcement; and by making information on the history of assets and owners easily accessible, formal property systems converted the citizens of the West into a network of individually identifiable and accountable business agents. The formal property process created a whole infrastructure of connecting devices that, like a railway switchyard, allowed the assets (trains) to run safely between people (stations). Formal property's contribution to mankind is not the protection of ownership; squatters, housing organizations, mafias, and even primitive tribes manage to protect their assets quite efficiently. Property's real breakthrough is that it radically improved the flow of communications about assets and their potential. It also enhanced the status of their owners, who became economic agents able to transform assets within a broader network.

This explains how legal property encourages the suppliers of such utilities as electricity and water to invest in production and distribution facilities to service buildings. By legally attaching the buildings where the services will be delivered to their owners, who will be using and paying for the services, a formal property system reduces the risks of theft of services. It also reduces the financial losses from bill collecting among people hard to locate, as well as technical losses from incorrectly estimating the electricity needs of areas where businesses and residents are clandestine and not recorded. Without knowing who has the rights to what, and without an integrated legal system where the ability to enforce obligations has been transferred from extralegal groups to government, utilities would be hard-pressed to deliver services profitably. On what other basis could they identify subscribers, create utility subscription contracts, establish service connections, and ensure access to parcels and buildings? How would

they implement billing systems, meter reading, collection mechanisms, loss control, fraud control, delinquent charging procedures, and enforcement services such as meter shutoffs?

Buildings are always the terminals of public utilities. What transforms them into *accountable* and *responsible* terminals is legal property. Anyone who doubts this need only look at the utility situation outside the West, where technical and financial losses plus theft of services account for 30 to 50 percent of all available utilities.

Western legal property also provides businesses with information about assets and their owners, verifiable addresses, and objective records of property value, all of which lead to credit records. This information and the existence of integrated law make risk more manageable by spreading it through insurance-type devices as well as by pooling property to secure debts.

Few seem to have noticed that the legal property system of an advanced nation is the center of a complex web of connections that equips ordinary citizens to form ties with both the government and the private sector, and so to obtain additional goods and services. Without the tools of formal property, it is hard to see how assets could be used for everything they accomplish in the West. How else could financial organizations identify trustworthy potential borrowers on a massive scale? How could physical objects, like timber in Oregon, secure an industrial investment in Chicago? How could insurance companies find and contract customers who will pay their bills? How could information brokerage or inspection and verification services be provided efficiently and cheaply? How could tax collection work?

It is the property system that draws out the abstract potential from buildings and fixes it in representations that allow us to go beyond passively using the buildings only as shelters. Many title systems in developing nations fail to produce capital because they do not acknowledge that property can go way beyond ownership. These systems function purely as an ownership inventory of deeds and maps standing in for assets, without allowing for the additional mechanisms required to create a network where assets can lead a parallel life as capital. Formal property should not be confused with such massive inventory systems as the English Domesday Book of nine hundred years ago or a luggage check operation in an international

airport. Properly understood and designed, a property system creates a network through which people can assemble their assets into more valuable combinations.

Property Effect No. 6: Protecting Transactions

One important reason why the Western formal property system works like a network is that all the property records (titles, deeds, securities, and contracts that describe the economically significant aspects of assets) are continually tracked and protected as they travel through time and space. Their first stop is the public agencies that are the stewards of an advanced nation's representations. Public record keepers administer the files that contain all the economically useful descriptions of assets, whether land, buildings, chattel, ships, industries, mines, or airplanes. These files will alert anyone eager to use an asset about things that may restrict or enhance its realization, such as encumbrances, easements, leases, arrears, bankruptcies, and mortgages. The agencies also ensure that assets are adequately and accurately represented in appropriate formats that can be updated and easily accessed.

In addition to public record-keeping systems, many other private services have evolved to assist parties in fixing, moving, and tracking representations so that they can easily and securely produce surplus value. These include private entities that record transactions, escrow and closings organizations, abstractors, appraisers, title and fidelity insurance firms, mortgage brokers, trust services, and private custodians of documents. In the United States, title insurance companies further help the mobilization of representations by issuing policies to cover parties for specified risks, ranging from defects on titles to unenforceability on mortgages and unmarketability of title. By law, all these entities have to follow strict operating standards that govern their document-tracking capabilities, physical storage facilities, and staffing.

Although they are established to protect both the security of ownership and that of transactions, it is obvious that Western systems emphasize the latter. Security is principally focused on producing trust in transactions so that people can more easily make their assets lead a parallel life as capital.

In most developing countries, by contrast, the law and official agencies are trapped by early colonial and Roman law, which tilt toward protecting ownership. They have become custodians of the wishes of the dead. This may explain why the creation of capital in Western property happens so easily, and why most of the assets in developing and former communist countries have slipped out of the formal legal system in search of mobility.

The Western emphasis on the security of transactions allows citizens to move large amounts of assets with very few transactions. How else can we explain that in developing and former communist nations people are still taking their pigs to market and trading them one at a time, as they have done for thousands of years, whereas in the West, traders take representations of their rights over pigs to the market? Traders at the Chicago commodities exchange, for example, deal through representations, which give them more information about the pigs they are trading than if they could physically examine each pig. They are able to make deals for huge quantities of pigs with little concern about the security of transactions.

Capital and Money

The six effects of an integrated property process mean that Westerners' houses no longer merely keep the rain and cold out. Endowed with representational existence, these houses can now lead a parallel life, doing *economic* things they could not have done before. A well-integrated legal property system in essence does two things: First, it tremendously reduces the costs of knowing the economic qualities of assets by representing them in a way that our senses can pick up quickly; and second, it facilitates the capacity to agree on how to use assets to create further production and increase the division of labor. The genius of the West was to have created a system that allowed people to grasp with the mind values that human eyes could never see and to manipulate things that hands could never touch.

Centuries ago, scholars speculated that we use the word "capital" (from the Latin for "head") because the head is where we hold the tools with which we create capital. This suggests that the reason capital has always been shrouded in mystery is because, like energy,

it can be discovered and managed only with the mind. The only way to touch capital is if the property system can record its economic aspects on paper and anchor them to a specific location and owner.

Property, then, is not mere paper but a mediating device that captures and stores most of the stuff required to make a market economy run. Property seeds the system by making people accountable and assets fungible, by tracking transactions, and so providing all the mechanisms required for the monetary and banking system to work and for investment to function. The connection between capital and modern money runs through property.

Today it is records of property ownership and transactions that provide monetary authorities with the crucial evidence they need to issue additional legal tender. As cognitive scientists George A. Miller and Philip N. Johnson-Laird wrote back in 1976: "Paper currency owes its origins to the writing of debt notes. [Therefore] money . . . presupposes the institution of property."[9] It is property documentation that fixes the economic characteristics of assets so that they can be used to secure commercial and financial transactions and ultimately provide the justification against which central banks issue money. To create credit and generate investment, what people encumber are not the physical assets themselves, but their property representations—the recorded titles or shares—governed by rules which can be enforced nationwide. Money does not earn money. You need a property right before you can make money. Even if you loan money, the only way you can earn on it is by loaning or investing it against some kind of property document that establishes your rights to principal and interests. To repeat: Money presupposes property.

As the eminent German economists Gunnar Heinsohn and Otto Steiger point out, "Money is *never created ex nihilo* from the point of view of property, which must always exist *before* money can come into existence."[10] Recognizing similarities between their work and mine, they brought to my attention an unpublished draft of an article stating "that interest and money cannot be understood without the institution of property."[11] This relationship is obscured, they maintain,

9. George A. Miller and Philip N. Johnson-Laird, *Language and Perception* (Cambridge: Harvard University Press, 1976), p. 578.

10. Gunnar Heinsohn and Otto Steiger, "The Property Theory of Interest and Money," unpublished manuscript, second draft, October 1998, p. 22.

11. Ibid., p. 43.

by the common misapprehension that central banks issue notes and support the ability of commercial banks to make payments. In Heinsohn and Steiger's view, what escapes the naked eye is "that all advances are made in good banking against securities,"[12] or in my terms, legal property paper. They agree with Harold Demsetz that the property rights foundation of capitalism has been taken for granted and note that Joseph Schumpeter already had an inkling that it is property rights that secure the creation of money. As Tom Bethell correctly states in his extraordinary book *The Noblest Triumph,* "the many blessings of a private property system have never been properly analyzed."[13]

Capital, as I argued earlier, is therefore not created by money; it is created by people whose property systems help them to cooperate and think about how they can get the assets they accumulate to deploy additional production. The substantial increase of capital in the West over the last two centuries is the consequence of gradually improving property systems, which allowed economic agents to discover and realize the potential in their assets, and thus to be in a position to produce the noninflationary money with which to finance and generate additional production.

So, we are more than squirrels who store food for winter and engage in deferred consumption. We know, through the sophisticated use of property institutions, how to give the things we accumulate a parallel life. When advanced nations pulled together all the information and rules about their known assets and established property systems that tracked their economic evolution, they gathered into one order the whole institutional process that underpins the creation of capital. If capitalism had a mind, it would be located in the legal property system. But like most things pertaining to the mind, much of "capitalism" today operates at a subconscious level.

Why did the classical economists, who knew capital was abstract and had to be fixed, not make the connection between capital and property? One explanation may be that in Adam Smith's or even Marx's day property systems were still restricted and undeveloped, and their importance difficult to gauge. Perhaps more significantly, the battle for the future of capitalism shifted from the book-lined

12. Ibid., p. 38.

13. Tom Bethell, *The Noblest Triumph* (New York: St. Martin's Press, 1998), p. 9.

studies of theoreticians into a vast web of entrepreneurs, financiers, politicians, and jurists. The attention of the world turned from theories to the real deals being made on the ground, day by day, fiscal year after fiscal year.

Once the vast machine of capitalism was firmly in place and its masters were busy creating wealth, the question of how it all came to be lost its urgency. Like people living in the rich and fertile delta of a long river, the advocates of capitalism had no pressing need to explore upstream for the source of their prosperity. Why bother? With the end of the Cold War, however, capitalism became the only serious option for development. So the rest of the world turned to the West for help and was advised to imitate the conditions of life on the delta: stable currencies, open markets, and private businesses, the objective of so-called macroeconomic and structural adjustment reforms. Everyone forgot that the reason for the delta's rich life lay far upriver, in its unexplored headwaters. Widely accessible legal property systems are the silt from upriver that permits modern capital to flourish.

This is one of the principal reasons macroeconomic reforms are not working. Imitating capitalism at the level of the delta, by importing McDonald's and Blockbuster franchises, is not enough to create wealth. What is needed is capital, and this requires a complex and mighty system of legal property that we have all taken for granted.

Braudel's Bell Jar

Much of the marginalization of the poor in developing and former communist nations comes from their inability to benefit from the six effects that property provides. The challenge these countries face is not whether they should produce or receive more money but whether they can understand the legal institutions and summon the political will necessary to build a property system that is easily accessible to the poor.

The French historian Fernand Braudel found it a great mystery that at its inception, Western capitalism served only a privileged few, just as it does elsewhere in the world today:

> The key problem is to find out why that sector of society of the past, which I would not hesitate to call capitalist, should have lived as if in a bell jar, cut off from the rest; why was it not able to expand and conquer the whole of society? . . . [Why was it that] a significant rate of capital formation was possible only in certain sectors and not in the whole market economy of the time? . . . It would perhaps be teasingly paradoxical to say that whatever else was in short supply, money certainly was not . . . so this was an age where poor land was bought up and magnificent country residences built, great monuments erected and cultural extravagance financed. . . . [How do we] resolve the contradiction . . . between the depressed economic climate and the splendors of Florence under Lorenzo the Magnificent?[14]

I believe the answer to Braudel's question lies in restricted access to formal property, both in the West's past and in developing and former communist countries today. Local and foreign investors do have capital; their assets are more or less integrated, fungible, networked, and protected by formal property systems. But they are only a tiny minority—those who can afford the expert lawyers, insider connections, and patience required to navigate the red tape of their property systems. The great majority of people, who cannot get the fruits of their labor represented by the formal property system, live outside Braudel's bell jar.

The bell jar makes capitalism a private club, open only to a privileged few, and enrages the billions standing outside looking in. This capitalist apartheid will inevitably continue until we all come to terms with the critical flaw in many countries' legal and political systems that prevents the majority from entering the formal property system.

The time is right to inquire why most countries have not been able to create open formal property systems. This is the moment, as Third World and former communist nations are living through their most ambitious attempts to implement capitalist systems, to lift the bell jar.

But before we answer that question, we have to solve the rest of the mystery of why governments have been so slow to realize a bell jar exists.

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14. Fernand Braudel, *The Wheels of Commerce* (New York: Harper and Row, 1982) p. 248.

CHAPTER FOUR

The Mystery of Political Awareness

Hark, hark! the dogs do bark,
The beggars are coming to town;
Some in rags and some in jags,
And some in silken gown.

—English Nursery Rhyme

The breakdown of population patterns and mandatory law has been an unmistakable trend in developing countries for the past forty years and in former communist countries for the past ten. Since Deng Xiaoping's economic reforms began in 1979, 100 million Chinese have left their official homes in search of extralegal jobs. Three million illegal migrants besieging Beijing have created a jumble of sweatshops on the outskirts of the city. Port-au-Prince has grown fifteen times larger; Guayaquil eleven times larger, and Cairo four times larger. The underground now accounts for 50 percent of GDP in Russia and Ukraine and a whopping 62 percent in Georgia. The International Labor Organization reports that since 1990, 85 percent of all new jobs in Latin America and the Caribbean have been created in the extralegal sector. In Zambia, only 10 percent of the workforce is legally employed.

What are these countries doing about this? Quite a lot. They have rolled up their sleeves and gone to work, addressing each of these problems individually. In August 1999, for example, Bangladesh authorities demolished 50,000 shanties in the capital city of Dhaka. Where demolition is impossible, governments have built schools and sidewalks for the millions of squatters invading public and private lands. At the same time, they have supported microfinance programs to assist the sweatshops that are transforming residential areas into industrial zones throughout the world. They have improved the stalls of sidewalk vendors clogging their streets; removed hordes of drifters from their city squares and planted flowers instead; tightened construction and safety codes to prevent buildings collapsing as they did in Turkey during the 1999 earthquake. Governments have tried to force the independent jitneys and shabby

taxis that glut traffic to meet minimum safety standards; they are cracking down on theft and loss of water and electricity and trying to enforce patents and copyrights. They have arrested and killed as many gangsters and drug traffickers as possible (at least the most famous ones) and jailed them (at least for a while); they have tightened security measures to control the influence of extreme political sects among the uprooted and vulnerable multitudes.

Each of these problems has its own academic specialty to study it and its own political program to cope with it. Few seem to realize that what we have here is *one* huge, worldwide industrial revolution: a gigantic movement away from life organized on a small scale to life organized on a large one. For better or for worse, people outside the West are fleeing self-sufficient and isolated societies in an effort to raise their standards of living by becoming interdependent in much larger markets.

What is understood all too rarely is that the Third World and former communist societies are experiencing nearly the same industrial revolution that arrived in the West more than two centuries ago. The difference is that this new revolution is roaring ahead much faster and transforming the lives of many more people. Britain supported just 8 million people when it began its 250-year progression from the farm to the laptop computer. Indonesia is making that same journey in only four decades and carrying a population of more than 200 million. No wonder its institutions have been slow to adapt. But adapt they must. A tide of humanity has moved from isolated communities and households to participate in ever-widening circles of economic and intellectual exchange. It is this tide that has transformed Jakarta, Mexico City, São Paolo, Nairobi, Bombay, Shanghai, and Manila into megacities of 10, 20, 30 million and overwhelmed their political and legal institutions.

The failure of the legal order to keep pace with this astonishing economic and social upheaval has forced the new migrants to invent extralegal substitutes for established law. Whereas all manner of anonymous business transactions are widespread in advanced countries, the migrants in the developing world can deal only with people they know and trust. Such informal, ad hoc business arrangements do not work very well. The wider the market, as Adam Smith pointed out, the more minute the division of labor can be. And as labor grows more specialized, the economy grows more efficient,

and wages and capital values rise. A legal failure that prevents enterprising people from negotiating with strangers defeats the division of labor and fastens would-be entrepreneurs to smaller circles of specialization and low productivity.

Entrepreneurship triumphed in the West because the law integrated everyone under one system of property, giving them the means to cooperate and produce large amounts of surplus value in an expanded market. The advances of the West, right up to today's exponential growth of electronic information and telecommunications technology, could happen only because the property rights systems required to make them work were already in place. Integrated legal property systems destroyed most closed groups while inviting the creation of a larger network where the potential to create capital increased substantially. In this sense, property obeys what is known as Metcalfe's Law (named after Bob Metcalfe, the inventor of the Ethernet Standard that commonly networks personal computers). According to Metcalfe's Law,

> The value of a network—defined as its utility to a population—is roughly proportional to the number of users squared. An example is the telephone network. One telephone is useless: whom do you call? Two telephones are better, but not much. It is only when most of the population has a telephone that the power of the network reaches its full potential to change society.[1]

Like computer networks, which had existed for years before anyone thought to link them, property systems become tremendously powerful when they are interconnected in a larger network. Only then is the potential of a particular property right not limited to the imagination of its owner, his neighbors, or his acquaintances, but subject to a larger network of other imaginations. Only then will people subject themselves to obeying one legal code because they will realize that without that code they will cease to prosper. Only then can government begin to administer development instead of heroically rushing to plug each and every leak. A modern government and a market economy are unviable without an integrated formal property system. Many of the problems of non-Western markets today are due mainly to the fragmentation of their property

1. "Survey the Internet," *Economist*, July 1, 1995, pp. 4–5.

arrangements and the unavailability of standard norms that allow assets and economic agents to interact and governments to rule by law.

When migrants move from developing and former communist countries to advanced nations, well-developed institutions eventually absorb them into a networked property system that helps them produce surplus value. The people who migrate within their own countries are not being accommodated in this way—at least not quickly enough. Poorer countries lack the institutions to integrate the migrants into the formal sector, fix their assets into fungible forms, make their owners accountable agents, and provide them with connecting and leveraging devices which allow them to interface productively and generate capital within a large legal market. So the migrants invent, at the expense of the legal order, a variety of extralegal arrangements to substitute for the laws and institutions they need to cooperate in an expanded market.

Political blindness, therefore, consists of being unaware that the growth of the extralegal sector and the breakdown of the existing legal order are ultimately due to a gigantic movement away from life organized on a small scale towards one organized in a larger context. What national leaders are missing is that people are spontaneously organizing themselves into separate, extralegal groups until government can provide them with one legal property system.

The fundamental problem for non-Western nations is not that people are moving to urban centers, that garbage is piling up, that infrastructure is insufficient, or that the countryside is being abandoned. All of that happened in advanced nations. Nor is the problem simply urban growth. Los Angeles has grown faster than Calcutta in this century, and Tokyo is three times bigger than Delhi. The primary problem is the delay in recognizing that most of the disorder occurring outside the West is the result of a revolutionary movement that is more full of promise than of problems. Once the potential value of the movement is harnessed, many of its problems will be easier to resolve. Developing and former communist nations must choose to either create systems that allow their governments to adapt to the continual changes in the revolutionary division of labor or continue to live in extralegal confusion—and that really isn't much of a choice.

Why has everyone missed the real problem? Because there are two blind spots. First, most of us do not see that the surge in the

world's extralegal populations over the past forty years has generated a new class of entrepreneurs with their own legal arrangements. Government authorities see only a massive influx of people and illegal workers and the threat of disease and crime. So while the housing ministry deals with its own issues and the ministries of health and justice focus on theirs, no one notices that the real cause of the disorder is not population, or urban growth, or even a poor minority, but an outmoded system of legal property.

Most of us are like the six blind men in the presence of an elephant: One grasps the animal's searching trunk and thinks an elephant is a species of snake; another finds its tail and thinks the elephant is a rope; a third is fascinated by the large, sail-like ears; another embraces its leg and concludes that the elephant is a tree. No one views the elephant in its totality, and thus they cannot come up with a strategy for dealing with the very large problem at hand. As we have seen, the poor in developing and former communist countries constitute two-thirds of the world's population—and they have no alternative but to live outside the law. As we also saw, the poor have plenty of things, but their property rights are not defined by any law. The millions of enterprising people who fill 85 percent of all new jobs in Latin America, those 3 million Chinese outside Beijing operating illegal sweatshops, and those Russians who generate half of their nation's GDP are doing so on the basis of extralegal arrangements. More often than not, these grassroots property arrangements openly contradict the official, written law. That is the elephant before us.

I do not believe the appearance of small enclaves of prosperous economic sectors in the midst of large undeveloped or informal sectors marks the dawn of an uneven but nevertheless inevitable transition to capitalist systems. Rather, the existence of prosperous enclaves in a sea of poverty conceals an abysmal retardation in a nation's capacity to create, respect, and make available formal property rights to the majority of its citizens.

The second blind spot is that few recognize that the problems they face are not new. The migration and extralegality plaguing cities in the developing and former communist world closely resemble what the advanced nations of the West went through during their own industrial revolution. They too focused on trying to solve their problems one by one. The lesson of the West is that piecemeal solutions

and stopgap measures to alleviate poverty were not enough. Living standards rose only when governments reformed the law and the property system to facilitate the division of labor. With the ability to increase their productivity through the beneficial effects of integrated property systems, ordinary people were able to specialize in ever-widening markets and to increase capital formation.

Blind Spot I: Life Outside the Bell Jar Today

Why didn't we see this new industrial revolution coming? Back in the 1980s, when my colleagues and I in Peru began our work, most officials assumed that our part of the world was to a great extent controlled by law. Latin America had a long, refined, and well-respected legal tradition. To be sure, there were poor people holding jobs and property outside the law, but this extralegal sector was considered relatively small and thus a "marginal" issue. Advanced nations had their share of poverty, unemployment, and black markets, and we had ours. Dealing with them was a job mainly for the police or the handful of academic sociologists who had devoted their careers to studying homegrown exotica. At best, the poor made good copy for *National Geographic* and the Discovery Channel.

But no one had any exact data. No one even knew how to measure what the poor were actually doing or precisely how much they owned. And so my colleagues and I decided to put away our books and academic journals, not to mention our reams of government statistics and maps, and visit the real experts on this problem: the poor themselves. Once we went into the streets to look around and listen, we began stumbling across surprising facts. For instance: The Peruvian construction industry was in a slump. Building was down, workers were being laid off. Curiously, however, at outlets for construction materials the cash registers were still ringing. In fact, sales of cement were up. *Bags* of cement, that is. After further investigation, we discovered that the poor were buying more cement than ever for their construction projects—houses, buildings, and businesses that were not legally registered or titled and therefore never made it onto the computer screens of the government economists and statisticians. We began to sense a vibrant, independent, officially invisible extralegal economy buzzing in the cities throughout the developing world. In Brazil, for example, the construction

industry reported a mere 0.1 percent growth in 1995; yet cement sales during the first six months of 1996 soared by nearly 20 percent. The reason for the apparent anomaly, according to a Deutsche Morgan Grenfell analysis is that 60 to 70 percent of the region's construction never gets into the records.[2]

The extralegal sector, we realized was hardly a small issue. It was *enormous*.

Growing Cities

The movement towards the cities ballooned in the 1960s for most developing countries, and in the 1980s for China. For various reasons, self-reliant communities abandoned their isolation and began trying to integrate in and around cities. Since the 1980s, millions of Chinese peasants have been illegally clustering around cities to the point where the *Beijing Youth Daily* proclaimed that "the management of the migrant population is out of control."[3]

The phenomenon is also familiar to countries around the Mediterranean. According to Henry Boldrick, after World War II, rural immigrants in Turkey headed towards the cities, building their own dwellings on government land. These spontaneous settlements, known as *gecekondus*, now house at least half of Turkey's urban population. Though some *gecekondus* have been at least partly legalized and consequently have been able to gain some municipal services, the majority are still informal.[4]

In the Philippines, the newspaper *Business World* called on the government "to stem the tide of humanity that is congesting our city to bursting point. . . . You see *barong-barongs* made of concrete and hollow blocks—and you begin to wonder. What is the government doing about the growing problem of homelessness, of squatters in our cities?"[5]

In South Africa, some observers (including myself) believe the extralegal real estate sector is on the verge of its second major expansion. In 1998, *Newsweek* reported that "more and more [South

2. Jeb Blount, "Latin Trade," *News Finance,* January 20, 1997.

3. Tony Emerson and Michael Laris, "Migration," *Newsweek*, December 4 1995.

4. Henry Boldrick, "Reaching Turkey's Spontaneous Settlements," *World Bank Policy,* April–June 1996.

5. "Solving the Squatter Problem," *Business World*, May 10, 1995.

African blacks] are filling the squatter camps and shantytowns that surround every South African city. Under apartheid, racial pass laws confined many blacks to rural areas. Now they travel freely—but hardly in comfort."[6] The *Economist* confirmed the trend: "Though anti-white political violence never really materialized, the end of racial segregation made it easier for poor blacks to wander into rich white areas."[7]

In Egypt, intellectuals and technocrats seem to have been aware of the issue for some time. According to one recent report, between 1947 and 1989 "Egypt's total urban population has . . . increased . . . from 6.2 million to 23.46 million."[8] Figures compiled by Gerard Barthelemy show that the population in the metropolitan area of Port-au-Prince, Haiti, rose from 140,000 in 1950 to 1,550,000 in 1988 and is now approaching 2 million. Barthelemy estimates that about two-thirds of these people live in shantytowns, or what the Haitians call *bidonvilles*.[9]

In Mexico, the private sector has become increasingly conscious of the extralegal phenomenon and actively involved in doing something about it. According to one news report:

> A 1987 study by the Center for Private Sector Economic Studies (CPSEIS) estimated that the extralegal informal sector generated economic activity worth between 28% and 39% of the official Mexican GDP, and a 1993 study . . . put the number of people in the "non-registered informal sector" at 8 million out of a total work force of 23 million. . . . "For every formal business, there are two informal businesses," says Antonio Montiel Guerrero, president of the Mexico City Small Business Chamber of Commerce (CANACOPE), a group representing 167,000 small, registered formal businesses. "In the Federal District (Mexico City) there are about 350,000 small, informal businesses for a total population of roughly 8 million." What that translates into for the whole 20-million-person Mexico City metropolitan area is

6. *Newsweek,* March 23, 1998.

7. *Economist,* June 6, 1998.

8. Manal El-Batran and Ahmed El-Kholei, *Gender and Housing in Egypt* (Cairo: Royal Netherlands Embassy, 1996), p. 24.

9. Gerard Barthelemy, "L'extension des lotissements sauvages à usage populaire en milieu urbain ou Paysans, Villes et Bidonvilles en Haiti: Aperçus et reflexions," June 1996, Port-au-Prince, offprint, June 1996.

> anybody's guess, especially when the unregulated and growing shantytowns are concentrated outside the central core of the city.[10]

Extralegal zones in developing countries are characterized by modest homes cramped together on city perimeters, a myriad of workshops in their midst, armies of vendors hawking their wares on the streets, and countless crisscrossing minibus lines. All seem to have sprung out of nowhere. Steady streams of small crafts workers, tools under their arms, have expanded the range of activities carried out in the city. Ingenious local adaptations add to the production of essential goods and services, dramatically transforming certain areas of manufacturing, retail distribution, building, and transportation. The passive landscapes that once surrounded Third World cities have become the latest extensions of the metropolis, and cities modeled on the European style have yielded to a more noisy, local personality blended with drab imitations of suburban America's commercial strip.

The sheer size of most of these cities creates its own opportunities. New business owners have emerged who, unlike their predecessors, are of very humble origins. Upward mobility has increased. The patterns of consumption and exclusive luxuries of the old urban society have been displaced by other, more widespread ones.

The March to the Cities

Migration is, of course, the key factor in urban growth in most developing and former communist nations. Its causes, however, are hard to pinpoint. Commentators in each country offer various explanations: a war, an agrarian reform program, the lack of agrarian reform, a foreign embargo on international trade, the opening of international trade, terrorism and guerrillas, moral decay, failed capitalism, failed socialism, even bad taste (It is so much prettier in the countryside, why don't they just stay there?).

Lately, however, opinion has been converging around a few general causes. The most visible explanation for the wave in migration throughout the developing world is better roads. The building of roads and bridges and the transformation of unconnected paths into

10. Blount, "Latin Trade.".

proper highways awakened the rural population to the possibility of travel, and they began moving to the cities. New means of communication provided an additional incentive. Radio, in particular, aroused expectations of increased consumption and income. From thousands of miles away came radio broadcasts publicizing the opportunities, amenities, and comforts of urban life. Modernity sounded within reach of anyone with the courage to head down the road after it.

There is also now fairly widespread agreement that agricultural crises in many countries were also decisive factors. The modernization of agriculture and the uncertain market for some traditional crops following World War II triggered massive layoffs of farm laborers on traditional estates and unleashed vast contingents of people prepared to search for new horizons.

There was also the problem of property rights in the countryside. The long, complex process of agrarian reform only compounded—and ultimately exacerbated—the traditional difficulties of acquiring land suitable for farming. Unable to own land or find work in the countryside, many people came to the cities.

Another powerful attraction was the lower infant mortality rate in most principal cities. This gap between infant mortality in the cities and rural areas widened as medical services in the cities began improving after World War II. Better wages were also an important incentive. In Latin America, for example, by 1970, people leaving the countryside to take up semiskilled employment in capital cities could double or triple their monthly income. A salaried job might quadruple their previous income, and professionals or technicians could earn six times as much. Higher pay offset the risk of unemployment: A migrant who had been unemployed for a year could recoup the lost income in two and a half months in the city. Life in the far-off cities not only seemed better; it was better.

Even the growth of national bureaucracies became an incentive for migration. The centralization of power in the hands of government officials meant that most of the government offices competent to provide advice, answer requests, issue permits, or provide jobs were located in the cities. And any migrant seeking a better future for his children knew that the opportunities for education were much better in the cities. To underemployed peasants with little in the way of resources other than their own ingenuity, education was an increasingly valuable and productive investment. Cities contained most of

the secondary school graduates as well as students enrolled in vocational training centers, schools and institutes of higher education, and university applicants and entrants.

Migration, therefore, is hardly an irrational act. It has little to do with "herd instinct." Its it the product of a calculated, rational assessment by rural people of their current situation measured against the opportunities open to them elsewhere. Rightly or wrongly, they believed that migrating to larger markets would benefit them. The move, however, was not an easy one.

Poor People Go Home

Migrants to the cities encountered a hostile world. They soon realized that although urban people had a romantic, even tender image of the farmers and were quick to acknowledge that all citizens had a right to happiness, they preferred that the good farmers pursue their happiness at home. Peasants were not supposed to come looking for modernity. To that end, virtually every country in the developing and former communist world maintained development programs to bring modernity to the countryside.

The greatest hostility toward migrants came from the legal system. At first, the system could easily absorb or ignore them because the small groups who had arrived were hardly likely to upset the status quo. As their numbers grew, however, to the point where they could no longer be ignored, newcomers found themselves barred from legally established social and economic activities. It was tremendously difficult for them to get access to housing, enter formal business, or find a legal job. The legal institutions of most Third World countries had been developed over the years to serve the needs and interests of certain urban groups; dealing with the peasants in rural areas was a separate matter. As long as the peasants stayed put, the implicit legal discrimination was not apparent. Once they settled in the cities, however, they experienced the apartheid of formal law. Suddenly, the bell jar was visible.

Some of the nations of the former Soviet Union also face disarray in their property systems, and at least some elites are recognizing the economic benefits of sorting it out. According to a 1996 report,

> Mechanisms . . . to protect land rights are in their infancy in Russia. . . . In many regions land must be registered with an agency distinct from the one that registers buildings. Moreover, the legal protections that registration provides are unclear. . . . Procedures and customs for protection and use of land rights must be created from scratch. . . . Land is probably Russia's most valuable resource, a resource upon which an entire economy and a democratic society can be based.[11]

We have found that throughout the Third World, extralegal activities burgeon whenever the legal system imposes rules that thwart the expectations of those it excludes. As we saw in Chapter 2, many countries make the obstacles to entering the legal property systems so daunting and expensive that few migrants could ever make their way through the red tape—as many as fourteen years and seventy-seven bureaucratic procedures at thirty-one public and private agencies in Egypt, and nineteen years and 176 bureaucratic steps to legalize the purchase of private land in Haiti.

If there are costs to becoming legal, there are also bound to be costs to remaining outside the law. We found that operating outside the world of legal work and business was surprisingly expensive. In Peru, for example, the cost of operating a business extralegally includes paying 10 to 15 percent of its annual income in bribes and commissions to authorities. Add to such payoffs the costs of avoiding penalties, making transfers outside legal channels, and operating from dispersed locations and without credit, and the life of the extralegal entrepreneur turns out to be far more costly and full of daily hassles than that of the legal businessman.

Perhaps the most significant cost was caused by the absence of institutions that create incentives for people to seize economic and social opportunities to specialize within the marketplace. We found that people who could not operate within the law also could not hold property efficiently or enforce contracts through the courts; nor could they reduce uncertainty through limited liability systems and insurance policies or create stock companies to attract additional capital and share risk. Being unable to raise money for investment, they could not achieve economies of scale or protect their innovations through royalties and patents.

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11. Leonard J. Rolfes, Jr., "The Struggle for Private Land Rights in Russia," *Economic Reform Today*, No. 1, 1996.

Blocked from entering the bell jar, the poor could never get close to the legal property mechanisms necessary to generate capital. The disastrous economic effects of this legal apartheid are most strikingly visible in the lack of formal property rights over real estate. In every country we researched, we found that some 80 percent of land parcels were not protected by up-to-date records or held by legally accountable owners. Any exchange of such extralegal property was therefore restricted to closed circles of trading partners, keeping the assets of extralegal owners outside the expanded market.

Extralegal asset owners are thus denied access to the credit that would allow them to expand their operations—an essential step towards starting or growing a business in advanced countries. In the United States, for example, up to 70 percent of the credit new businesses receive comes from using formal titles as collateral for mortgages. Extralegality also means that the incentives for investment provided by legal security are missing.

Cut off from the legal system, the migrants' only guarantee of prosperity lay in their own hands. They had to compete not only against other people but against the system as well. If the legal systems of their own countries were not going to welcome them, they had no alternative but to set up their own extralegal systems. These extralegal systems, in my opinion, constitute the most important rebellion against the status quo in the history of developing countries since their independence, and in the countries of the former Soviet bloc since the collapse of communism.

Growing Extralegality

The populations of most major Third World cities have increased at least fourfold in the past four decades. By 2015, over fifty cities in developing countries will have 5 million or more people,[12] with most living and working extralegally. The extralegal sector is omnipresent in the developing and former communist countries. New activities have emerged and gradually replaced traditional ones. Walk down most streets and you are bound to bump into extralegal shops, currency exchange, transport, and other services. Even many of the books for sale have been printed extralegally.

12. Official journal of the *National Geographic Society* (Millennium in Maps), No. 4., October 1998.

Entire neighborhoods have been acquired, developed, and built on the fringes of, or in direct opposition to, government regulations by extralegal settlements and businesses. For every one hundred homes built in Peru, only about thirty have legal title; seventy have been built extralegally. Throughout Latin America, we found, at least six out of eight buildings were in the undercapitalized sector and 80 percent of all real estate was held *outside* the law. According to most estimates, the extralegal sectors in the developing world account for 50 percent to 75 percent of all working people and are responsible for one-fifth to more than two-thirds of the total economic output of the Third World.

Consider Brazil: Thirty years ago, more than two-thirds of housing construction was for rent; today rentals constitute scarcely 3 percent of Brazil's construction. Most of that market has moved to the informal parts of Brazilian cities—the *favelas*. According to Donald Stewart,

> People are not conscious of the volume of economic activity that exists in a favela. These informal economies were born of the entrepreneurial spirit of peasants from the North East of Brazil who were attracted by urban centers. They operate outside the highly regulated formal economy and function according to supply and demand. In spite of the apparent lack of resources, this informal economy functions efficiently. In the favelas there are no rent controls, rents are paid in US dollars and renters who do not pay are rapidly evicted. The profitability of investment is good and as a result there is an abundance of supply of housing.[13]

The *Wall Street Journal* reported in 1997 that according to the group Friends of the Land, only 10 percent of land occupied in the Brazilian Amazon jungle is covered by property titles.[14] In other countries, extralegality is on the rise.

Unlike the situation in advanced nations, where the "underclass" represents a small minority living on the margin of society, in some countries extralegality has always been the mainstream. For example, in most countries we have surveyed, the value of extralegal real estate alone is many times greater than total savings and time

13. Donald Stewart, *AIPE*, December 1997.

14. Matt Moffett, "The Amazon Jungle Had an Eager Buyer, but Was It for Sale?" *The Wall Street Journal,* January 30, 1997.

deposits in commercial banks, the value of companies registered in local stock exchanges, all foreign direct investment, and all public enterprises privatized and to be privatized all put together. This should not, on reflection, be surprising. Real estate accounts for some 50 percent of the national wealth of advanced nations; in developing countries, the figure is closer to three-quarters. Extralegal settlements are often the only avenue for investment in developing and former communist countries and therefore represent an important part of the savings and capital formation process. Moreover, the growing contribution of cities to GNP suggests that a great deal of potential capital and technological know-how is being accumulated mainly in urban areas.

The Extralegals Have Come to Stay

This explosion of extralegal activity in the Third World, the massive squatting in rural areas, and the sprawling illegal cities—Peru's *pueblos jóvenes*, Brazil's *favelas*, Venezuela's *ranchos*, Mexico's *barrios marginales*, and the *bidonvilles* of the ex-French colonies as well as the shantytowns of the former British ones—are much more than a surge of population, or poverty, or even illegality. These waves of extralegals crashing up against the bell jars of legal privilege could very well be the most important factor forcing authorities to welcome the industrial and commercial revolution that is upon them.

Most governments in most nations are in no condition to compete with extralegal power. In strictly physical terms, extralegal ventures have already overtaken government efforts to provide housing for migrants and the poor. In Peru until the end of the 1980s, for example, government investment in low-income housing hovered around 2 percent of the housing investment in the extralegal sector. Including middle-class housing raised the government share to only 10 percent of total informal investments. In Haiti in 1995, the value of extralegal real estate was nearly ten times greater than all the holdings of the Haitian government.

This extralegal sector is a gray area that has a long frontier with the legal world, a place where individuals take refuge when the cost of obeying the law outweighs the benefit. The migrants became

extralegals to survive: They stepped outside the law because they were not allowed inside. In order to live, trade, manufacture, transport, or even consume, the cities' new inhabitants had to do so extralegally.

The extralegal arrangements they cobbled together are explicit obligations between certain members of society to provide security for their property and activities. They represent combinations of rules selectively borrowed from the official legal system, ad hoc improvisations, and customs brought from their places of origin or locally devised, and they are held together by a social contract supported by the community as a whole and enforced by authorities the community has selected. The disadvantage to extralegal arrangements is that they are not integrated into the formal property system and as a result are not fungible and adaptable to most transactions; they are not connected into the financial and investment circuit; and their members are not accountable to authorities outside their own social contract.

These arrangements are run by a large variety of organizations, including urban development associations, farming conventions, small merchant associations, small business organizations, microentrepreneurial communities, transport federations, miners' claim clubs, agrarian reform beneficiaries, private housing cooperatives, settlement organizations, residential boards, communal committees, beneficiary committees in state-built housing, native communities, small farmers' associations, and village organizations. These organizations also run building extensions on desert land, building extensions on agricultural land, special arrangements for historic parts of the cities, subdivisions of public housing, settlements with private contracts, settlements with public contracts, appropriations through subleasing with owner's consent, state housing with incomplete titling, illegal tenancy contracts declared before a notary and not recorded, settlement contracts recorded but not declared before a notary, settlements recognized by "national peace processes," relocated settlers, and settlements recorded with suppliers of basic services or tax authorities but not recorded with the official property custodians.

Extralegality is rarely antisocial in intent. The "crimes" extralegals commit are designed to achieve such ordinary goals as building a house, providing a service, or developing a business. Far from being the cause of disarray, this system of extralegal law is the only

way settlers have to regulate their lives and transactions. As a result, nothing could be more socially relevant to the way the poor live and work. Although their "laws" may be outside formal law, they are, by and large, the only laws with which these people are comfortable. This is the social contract by which they live and work.

The extralegal settlements the migrants inhabit may look like slums, but they are quite different from the inner-city slums of advanced nations. The latter consist of once-decent buildings falling apart from neglect and poverty. In the developing world, the basic shelters of the poor are likely to be improved, built up, and progressively gentrified. Whereas the houses of the poor in advanced nations lose value over time, the buildings in the poor settlements of the developing world become more valuable, evolving within decades into the equivalent of working-class communities in the West.

Above all, the extralegal settlers, contrary to their lawless image, share the desire of civil society to lead peaceful, productive lives. As Simon Fass wrote in the eloquent conclusion of his book about the economy of Haiti,

> These ordinary people are extraordinary in only one respect. Their incomes are very low, so low that one serious error of judgment or one unfortunate act of providence can often threaten survival of a household as a corporate entity, and sometimes also threaten survival of its members as corporeal entities. What is extraordinary is not so much the poverty itself, but rather the ability of these people to survive in spite of it. . . . Nothing they do in this process is anything but a productive contribution to survival and growth, and the simple items they obtain have concrete functions as factor inputs to the production process.[15]

As the economic activities with which they are associated have grown and diversified, these extralegal organizations have also begun to assume the role of government. To varying degrees, they have become responsible for the provision of such basic infrastructure as roads, water supply, sewage systems, electricity, the construction of markets, the provision of transport services, and even the administration of justice and the maintenance of order.

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15. Simon Fass, *Political Economy in Haiti: The Drama of Survival* (New Brunswick, N.J.: Transaction Publishers, 1988), pp. xxiv–xxv.

In the face of the extralegals' advance, governments have retreated. But they are inclined to consider each concession temporary "until the crisis has passed." In reality, however, this strategy is only a way of delaying the inevitable defeat. In some cases, governments have created exceptions for some extralegal enterprises, legal enclaves as it were, where originally illegal enterprises can operate without persecution—but without integrating them so that they enjoy the protection and benefits of the entire legal system. These arrangements avoid open confrontation and as such can be considered a sort of transitory legal peace treaty. In Egypt, for example, experts are already talking about "semi-formal housing":

> Such housing not only increases the housing stock within the country and provides relatively cheap housing but also provides a large proportion of the urban population with an asset in which they can invest. This kind of housing does have some degree of illegality. The housing structures are not developed through established, regulated procedures and those who construct them do not use the recognized institutions of housing. They are usually constructed on agricultural areas which were illegally sub-divided into small plots by the private developers. . . .
>
> The government is usually involved in the process of land acquisition within semi-informal housing. In the semi-formal housing areas where the research was undertaken, it was government bodies that initiated their development and this encouraged private developers to sub-divide the land illegally into small plots at a later stage. Land use was changed from agricultural to residential use through a covert role from the government. The inhabitants within such areas usually acquire their land through an informal process of sub-division and informal land commercialization. Hager El Mawatayah, Exbet Abou Soliman, and Ezbet Nadi El Sid are the best examples of such areas in the city of Alexandria.[16]

Even in the most unlikely places, there is evidence that governments are recognizing that their legal institutions have not adapted to today's economic conditions. In 1992, Reuters News Service

16. Ahmed M. Soliman, "Legitimizing Informal Housing: Accommodating Low-Income Groups in Alexandria, Egypt," *Environment and Urbanization*, Vol. 8, No. 1 (April 1996), pp. 190–191.

reported that Libyan leader Mu'ammar Gadhafi had incinerated Libya's land titles. "All records and documents in the old land register, which showed that a land belonged to this or that tribe, have been burned," Colonel Gadhafi reportedly informed a meeting of his justice ministry. "They were burned because they were based on exploitation, forgery, and looting."[17]

In some countries, the extralegal sector is now at the very root of the social system. The people of Touba, Senegal, who can be seen hawking their wares on the sidewalks of New York and other big U.S. cities, are often part of a sophisticated Islamic-African sect that funnels millions of dollars of profits back to their home city. *Newsweek* describes Touba as

> a state within a state, largely exempt from Senegal's laws, . . . [and] the country's fastest growing city. Entire villages have relocated here, setting up tin shacks among the walled villas of the rich. . . . The duty free city is the hub of Senegal's transportation and real estate empires, the booming informal sector, and the peanut trade, the nation's main source of foreign exchange.[18]

In other parts of the world, extralegals' concerns about losing their property can ignite open conflict. A case in point is Indonesia whose problems have been much in the news in recent years. As far back as six years ago, the *Economist* was warning:

> Poor people are edgy about losing their property because urbanization and industrialization are creating demand for land, in a country in which land ownership is an extremely murky business. Only 7% of the land on the Indonesian archipelago has a clear owner.
>
> Inevitably, there is a large trade in both genuine and forged certificates. People trying to buy parcels of land sometimes find numerous apparent owners. And banks are very wary of accepting land as collateral for loans.[19]

Elsewhere extralegality is closely associated with misery: "In Bombay . . . two-thirds of the city's 10 million residents live in either

17. Reuters, *Financial Review,* May 11, 1992, p. 45.
18. Mavery Zarembo, *Newsweek,* July 7, 1997.
19. *Economist,* March 5, 1994.

one-room shacks or on the pavement."[20] Yet extralegals in other countries are moving up the economic ladder. According to the Technical Evaluations Organization of Peru (Cuerpo Técnico de Tasaciones del Perú), the value of land in the formal sector of Lima averages some US$50 per square meter, whereas in the area of Gamarra, where a great deal of Peru's informal manufacturing sector resides, the value per square meter can go as high as US$3,000. In Aviación, another extralegal center in Lima, land is worth US$1,000 per square meter; and in Chimú of the Zárate section, it is US$400. By contrast, Miraflores and San Isidro, Lima's most prestigious addresses, the value of legal, titled property ranges from US$500 to US$1,000 per square meter.[21]

It Is an Old Story

Once governments understand that the poor have already taken control of vast quantities of real estate and productive economic units, it will become clear that many of the problems they confront are the result of the written law not being in harmony with the way their country actually works. It stands to reason that if the written law is in conflict with the laws citizens live by, discontent, corruption, poverty, and violence are sure to follow.

The only question that remains is how soon governments will begin to legitimate these extralegal holdings by integrating them into an orderly and coherent legal framework. The alternative is perpetuating a legal anarchy in which the existing property rights system continually competes with the extralegal one. If these countries are ever to achieve a single legal system, official law must adapt to the reality of a massive extralegal push toward widespread property rights.

The good news is that legal reformers will not be stepping into an abyss. The challenge they are up against, though enormous, has been met before in many countries. Developing and former communist countries are facing (albeit in much more dramatic proportions) the same challenges the advanced nations dealt with between the eighteenth century and World War II. Massive extralegality is not

20. *Economist,* May 6, 1995.

21. "Terrenos de Gamarra valen tres veces más que en el centro de Lima," *El Comercio,* 25 April 1995.

a new phenomenon. It is what always happens when governments fail to make the law coincide with the way people live and work.

When the Industrial Revolution began in Europe, governments were also plagued with uncontrollable migration, growth of the extralegal sector, urban poverty, and social unrest. They, too, initially addressed these problems piecemeal.

Blind Spot II: Life Outside Yesterday's Bell Jar

The Move to the Cities

Most writers link the coming of the great industrial and commercial revolution in Europe to the mass migrations to its cities, the growth of the population as a result of a decline in plagues, and a reduction in rural incomes compared with urban incomes.[22] In the seventeenth and eighteenth centuries, workers in the cities began to receive higher wages than those in rural areas for carrying out construction projects ordered by the ruling classes. Inevitably, the more ambitious peasants migrated to the cities, enticed by the prospect of higher wages.

In England, the first wave of migration began late in the sixteenth century. Disconcerted by the growing numbers of migrants in the cities and the resulting unrest, authorities tried to keep the peace with various stopgap measures such as distributing food among the poor. There were also persistent measures to persuade people to return to the countryside. A series of laws enacted in 1662, 1685, and 1693 required that citizens return to their place of birth or their previous fixed residence as a condition of receiving relief. The aim was to prevent more families and laborers from migrating to the cities in search of employment. In 1697, a law was passed allowing migrants to move about England only if they obtained a certificate of settlement from the authorities in their new place of residence. Although these laws did discourage migration among families and the infirm, young, able-bodied, and ambitious unmarried men devised

22. Jan De Vries, *Economy of Europe in an Age of Crisis, 1600–1750* (Cambridge: Cambridge University Press, 1976); D. C. Coleman, *Revisions in Mercantilism* (London: Methuen, 1969); J. H. Clapham, *The Economic Development of France and Germany, 1815–1914* (Cambridge: Cambridge University Press, 1963); Eli Heckscher, *Mercantilism,* ed. E. F. Soderland (London: George Allen & Unwin, 1934).

ways of returning to the cities. They were also the sort who made successful entrepreneurs—or violent revolutionaries.

Most migrants did not find the jobs they expected. Restrictive regulations, particularly difficulties in obtaining permission to expand or diversify activities, limited the capacity of formal businesses to grow and provide jobs for new laborers. Some found temporary work or entered domestic service.[23] Many were forced to settle precariously on the outskirts of Europe's cities, in "suburbs," the extralegal settlements of the day, awaiting admission to a guild or a job in a legal business.

Social unrest was inevitable. No sooner did the migration to the cities begin than the existing political institutions fell behind a rapidly changing reality. The rigidity of mercantilist law and custom prevented migrants from realizing their full economic potential. The overcrowding of an increasing urban population, disease, and the inevitable difficulties of country people adapting to life in the city further aggravated social conflict. D. C. Coleman observes that as early as the sixteenth century there were complaints in the English Parliament about the "multitude of beggars" and the great increase in "rogues, vagabonds, and thieves" in the cities.[24]

Instead of adapting to this new urban reality, governments created more laws and regulations to try to stamp it out. More regulations brought more infringements—and soon new laws were passed to prosecute those who broke the old ones. Lawsuits proliferated; smuggling and counterfeiting were widespread. Governments resorted to violent repression.

The Emergence of Extralegality

Gradually, European migrants who did not find legal employment began to open illegal workshops in their homes. Much of this work "consisted of the direct processing, with little capital equipment beyond simple hand tools."[25] Longtime city dwellers despised the work done outside the guilds and the official industrial system.

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23. Joseph Reid, *Respuestas al primer cuestionario del ILD* (Lima: Meca, 1985).

24. D.C. Coleman, *The Economy of England, 1450–1750* (London: Oxford University Press, 1977), pp. 18–19.

25. Ibid., pp. 58–59.

The migrants, of course, could not afford to be choosy; extralegal work was their only source of income, and the extralegal sector of the economy began spreading rapidly. Eli Heckscher quotes a comment by Oliver Goldsmith in 1762: "There is scarcely an Englishman who does not almost every day of his life offend with impunity some express law . . . and none but the venal and the mercenary attempt to enforce them."[26] Two French decrees (of 1687 and 1693), also cited by Heckscher, recognized that one reason why production specifications were not being complied with was that the workers, then even more illiterate than in developing countries today, could not meet even the simple legal requirement that textile manufacturers put their names on the fore-pieces of their cloth. Still, these migrant workers were efficient. Adam Smith once remarked, "If you would have your work tolerably executed, it must be done in the suburbs where the workmen, having no exclusive privilege, have nothing but their character to depend on, and you must then smuggle it into the town as well as you can."[27]

Authorities and legal businessmen were not as impressed with the competition as Adam Smith. In England, during the decades following the restoration of the monarchy in 1660, some traditionalists began to complain about the growing numbers of peddlers and street vendors, the disturbances that took place in front of established shops, and the appearance of new shopkeepers in many small cities. Formal traders tried in vain to get rid of the newcomers. In Paris, the legal battle between tailors and secondhand-clothes dealers went on for more than three hundred years. It was stopped only by the French Revolution.

The preambles to laws and ordinances of this era frequently refer to noncompliance with previous laws and regulations. According to Heckscher, printed calicoes imported from India were prohibited in 1700 in order to protect England's woolen industry. Enterprising English manufacturers produced their own calicoes, always managing to find exceptions or loopholes in the law. One way around the ban on printing cotton-based fabrics was to use fustians—English calicoes made with a linen warp. Spain also prosecuted and punished its extralegal entrepreneurs. In 1549, Emperor Charles I promulgated twenty-five ordinances aimed at extralegal businesses.

26. Heckscher, *Mercantilism,* Vol. 1, p. 323.
27. Ibid., p. 241.

One law called for authorities to mutilate fabric samples by cutting off the selvedges containing the manufacturer's mark so that buyers would know they were purchasing extralegal goods. This was intended to humiliate distributors.

Government repression of extralegals was plentiful, harsh, and, in France, deadly. In the mid-eighteenth century, laws prohibiting the French public from manufacturing, importing, or selling cotton prints carried penalties ranging from slavery and imprisonment to death. The extralegals remained undeterred. Heckscher estimates that within one ten-year period in the eighteenth century the French executed more than 16,000 smugglers and clandestine manufacturers for the illegal manufacture or import of printed calicoes. An even larger number were sentenced to the galleys or punished in other ways. In the town of Valence alone, 77 extralegal entrepreneurs were hanged, 58 were broken on the wheel, and 631 were sentenced to the galleys. Authorities found it in their hearts to set free only one extralegal.

According to Robert Ekelund and Robert Tollison, the reason the authorities prosecuted extralegals so harshly was not only because they wanted to protect established industries; multicolored prints also made taxes more difficult to collect.[28] Although it was easy to identify manufacturers of single-colored textiles and thus verify whether they were paying all their taxes, calicoes, due to a new printing system, could be made with a variety of colors, making it much more difficult to identify their origin.

The state relied heavily on the guilds—whose main function was to control access to legal enterprise—to help identify lawbreakers. But by making the laws more stringent instead of adjusting them to include extralegal manufacturing, the authorities simply forced entrepreneurs to the extralegal suburbs. When the English Statute of Artificers and Apprentices of 1563 fixed wage rates for workers and required that they be adjusted annually according to the prices of certain basic necessities, many of the earliest extralegals moved their businesses to outlying towns or established new suburbs where state supervision was less strict and regulations more lax or simply inapplicable. Retreating to the suburbs also allowed extralegals to

28. Robert B. Ekelund, Jr. and Robert Tollison, *Mercantilism as a Rent-Seeking Society* (College Station: Texas A&M University Press, 1981), Chapter 1.

escape the watchful eye of the guilds, whose jurisdiction extended only to city boundaries.

Eventually, extralegal competition increased to the point that formal business owners had no alternative but to subcontract part of their production to suburban workshops—narrowing the tax base and causing taxes to rise. A vicious circle set in: Higher taxes exacerbated unemployment and unrest, prompting greater migration to the suburbs and more subcontracting to extralegal manufacturers. Some extralegals did so well that they won the right to enter formal business—though not without paying their share of bribes and applying political pressure.

The guilds fought back. Under the Tudors, numerous laws in England prohibited extralegal workshops and services in the suburbs. But the sheer number of extralegals and their skill at avoiding detection thwarted these efforts. Among the most notable failures were the hat and coverlet makers' guilds in Norwich, which, after a protracted and highly publicized campaign against extralegal operators, were unable to enforce their exclusive legal right to manufacture hats and coverlets.[29] Competition had left the guilds reeling. Coleman attributes their decline to the "increasing labor supply, changing patterns of demand, and expanding trade; [and] the growth of new industries and the considerable extension of rural industry organized on the putting-out system."[30]

The Breaking Down of the Old Order

European governments were gradually forced to retreat in the face of growing extralegality—as governments in developing and former communists countries are doing today. In Sweden, unable to stop the establishment of extralegal settlements, King Gustavus Adolphus had to visit each settlement and give it his blessing to maintain an appearance of government control. In England, the state was forced to recognize that new industries were developing primarily in places where there were no guilds or legal restrictions; indeed, extralegals had created their own suburbs and towns specifically to avoid control by the state and the guilds. Moreover, the extralegal

29. Heckscher, *Mercantilism*, Vol. 1, pp. 239–244.
30. Coleman, *The Economy of England,* p. 74.

industries were more efficient and successful. It was widely acknowledged that the cotton textile industry had boomed because it was not regulated as strictly as the woolen industry. People soon began noticing that the extralegal settlements were producing better goods and services than their legal competitors inside the bell jars. In 1588, a report to Lord Cecil, minister to Queen Elizabeth I, described the citizens of Halifax, one of the new extralegal settlements:

> They excel the rest in policy and industry, for the use of their trade and grounds and, after the rude and arrogant manner of their wild country, they surpass the rest in wisdom and wealth. They despise their old fashions if they can hear of a new, more commodious, rather affecting novelties than allied to old ceremonies. . . . [They have] a natural ardency of new inventions annexed to an unyielding industry.[31]

Extralegals also began building within the cities. In Germany, where it was necessary to pass a test and obtain legal approval in order to build, according to one historian, "whole districts could be found in which plenty of houses were being built, though there was no one in the district legally qualified to build them."[32]

The extralegals' numbers, persistence, and success began to undermine the very foundations of the mercantilist order. Whatever success they had, it was won in spite of the state, and they were bound to view the authorities as their enemies. In those countries where the state outlawed and prosecuted extralegal entrepreneurs instead of adjusting the system to absorb their enterprise, not only was economic progress delayed, but unrest increased, spilling into violence. The best-known manifestations were the French and Russian revolutions.

Those countries that adapted quickly, however, made a relatively peaceful transition to a market economy. As soon as the state realized that a working extralegal sector was socially, politically, and economically preferable to a growing number of unemployed migrants, authorities began withdrawing support from the guilds. The result in England was that fewer and fewer people applied for admission to the guilds, thereby setting the stage for the state to alter drastically the way in which business was conducted.

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31. Heckscher, *Mercantilism,* Vol. 1, p. 244.
32. Clapham, *Economic Development of France and Germany,* pp. 323–325.

The power of the state also declined. Any legal system as rigid as the one that preceded the Industrial Revolution was bound to be rife with corruption. A 1692 ordinance in England stated that tax inspectors in many areas visited workshops and factories merely to collect agreed-upon tax payments without ever examining the goods to see how much the producers really owed. Most production supervisors, whether they belonged to the guilds or were appointed by the state, were continually accused of corruption and neglect of duties, a situation that was attributed to lack of civic respect for the law.

Even members of Parliament, which by the end of the seventeenth century had the power to authorize the establishment of businesses, were known to receive bribes for special favors. Local authorities were worse. In 1601, a speaker in the House of Commons defined a justice of the peace as "a living Creature that for half a Dozen of Chickens will Dispense with a whole Dozen of Penal Statutes." Public officials sought to blame legislative failures not on bad laws but on inadequate enforcement. "I conclude better laws in these points cannot be made, only there wants execution," concluded one pamphlet in 1577. Joseph Reid argues that the old order broke down because widespread corruption permeated all its institutions and divided the population into those who could outwit the system and those who could not. He also notes that a legal system that encouraged some people to break the law and made others suffer from it would inevitably lose prestige among both constituencies.[33] Suburban justices of the peace had little incentive to enforce laws that had been drafted in the cities and were unacceptable to suburban residents. By the end of the eighteenth century, the entire legal apparatus had been weakened and in some countries was completely corrupt.

At a time when government controlled everything, people placed all their economic expectations in the state. This gave rise to a pattern typical of precapitalism: When wages went up faster than food prices, merchants called for wage ceilings; when food prices went up faster than wages, workers demanded a minimum wage and a price ceiling on foodstuffs. Prices, incomes, and wages were fixed by political pressure and action, a situation that discouraged

33. Joseph Reid responds to the second questionnaire submitted by the Institute of Liberty and Democracy. Typewritten memoranda, ILD Library, 1985; Heckscher, *Mercantilism,* Vol. 1, pp. 247, 251.

industrial and agricultural production and hiring. Neither minimum nor maximum prices, therefore, could solve the problems of scarcity, food shortages, and unemployment. "The age," writes Charles Wilson, "was one of violence, when the pursuit of economic ends constantly demanded the backing of force."[34] It was a time ripe for ideological and partisan battle, in parliaments and in the streets.

As early as 1680, a kind of fatalism had emerged in the face of the apparent impossibility of substantial economic progress: "The generality of poor manufacturers believe they shall never be worth ten pounds . . .; and if it so be they can provide for themselves sufficient to maintain their manner of living by working only three days in the week, they will never work four days."[35]

Amidst such economic crises and social unrest, the strongest and most self-confident people chose to emigrate or join revolutionary movements. Between the seventeen and nineteenth centuries, hundreds of thousands of Italians, Spaniards, French, and other Europeans emigrated to other lands in search of a better future. In France, the persecution of the Huguenots and the extralegals in the textile sector prompted many entrepreneurs and skilled workmen to leave, mainly for England and Holland, where they and their hosts managed to prosper.

Finally—After Three Hundred Years

As badly structured regulations stifled formal businesses and as extralegals openly defied the law and voiced their dissatisfaction at being pushed to the margins, the stage was set for politicians to adapt to the facts on the ground. The law had ossified at about the same rate as the migrant settlements encircled the cities. And as peddlers, beggars, and thieves invaded the streets, as extralegally manufactured or smuggled goods glutted the markets, official corruption became rampant, and violence disrupted civil society.

Law began adapting to the needs of common people, including their expectations about property rights, in most West European countries during the nineteenth and early twentieth centuries. By that time, the Europeans had concluded that it was impossible to

34. Charles Wilson, *Mercantilism* (London: Routledge & Kegan Paul, 1963), p. 27.
35. Coleman, *The Economy* of *England,* p. 105.

govern the Industrial Revolution and the presence of massive extralegality through minor ad hoc adjustments. Politicians finally understood that the problem was not people but the law, which was discouraging and preventing people from being more productive.

Although the picture of precapitalist society and the circumstances of its decline are quite similar in most European countries, the outcome was not always the same. Countries that made legal efforts to integrate extralegal enterprise prospered more quickly than the countries that resisted change. By easing access to formal property, reducing the obstacles engendered by obsolete regulations, and allowing existing local arrangements to influence lawmaking, European politicians eliminated the contradictions in their legal and economic systems and allowed their nations to carry the Industrial Revolution to new heights.

The past of Europe strongly resembles the present of developing and former communist countries. The fundamental problem that the latter face is not that people are invading and clogging the cities, that public services are inadequate, that garbage is piling up, that ragged children beg in the streets, or even that the benefits of macroeconomic reform programs are not reaching the majority. Many of these difficulties existed in Europe (and also the United States) and were eventually overcome. The real problem is that we have still not recognized that all these difficulties constitute a sea change in expectations: As the poor flow into cities and create extralegal social contracts, they are forcing a major redistribution of power. Once the governments of developing and former communist countries accept that, they can begin to catch the wave instead of being engulfed by it.

HOW TO MAKE LAND TITLING MORE RATIONAL

BENITO ARRUÑADA*

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INTRODUCTION

Discussions on economic development have lately focused on the role of institutions in protecting property rights and reducing transaction costs. In particular, the idea has taken root that development would benefit from facilitating access to legality. It is thought that, if those in possession of even small buildings and plots of land have good titles, they will enjoy better incentives to invest and can use these real assets as collateral for credit. Similarly, if business entrepreneurs are able to "formalize" (for our purposes, publicly register) their firms easily, they will benefit from operating them as legal entities. For instance, they will have access to the courts for enforcing contracts and settling disputes, and will also be able to obtain credit and invest more. Consequently, firms will grow faster and be more productive.

These simple ideas, inspired by the works of Ronald Coase, Douglass North, and Oliver Williamson, and reminiscent of widespread arguments in the most advanced economies of the nineteenth century, have motivated thousands of reform and aid programs in developing countries, where the state of legal institutions is often considered to be inadequate. Some authors have even held that providing better institutions would in itself lead to greater development. Similar ideas have also influenced reform policy in developed countries, where some of the institutions for registering property and businesses have become outdated or captured by private interests. In both cases, simplifying administrative procedures was expected to have considerable impact on economic activity.

However, outcomes from these efforts in institutional building and reform have often been disappointing, failing to fulfill their promise of economic growth or even improve the institutional environment. Common mistakes have often been committed, such as seeing registries' controls as mere entry barriers to legality, forgetting that they must be reliable to be socially useful. This has often led to reforms that emphasize quantity and speed, thereby sacrificing quality and making registries speedy but useless. Of course, registries, like any

other institution, can be used to capture rents and deter competition. This possibility must be considered and avoided, but it only imposes one more policy and organizational constraint—it does not define registries' function and should not, therefore, be treated as their only design factor.

In other cases, the error comes from mixing up cause and consequence when assuming that informality is causing poverty instead of the other way around. This has led, for instance, to the building of universal land titling systems that spend huge amounts to little effect, as they usually miss key objectives, such as the use of land as collateral for credit. In fact, given that formalization incurs fixed costs, informality may be appropriate for low-value assets and small, incipient firms. Registries are not silver bullets for development. Decisions on the creation and coverage of registries must be guided by considerations of costs and benefits, which depend on the particular circumstances of each country.

The article is structured as follows. Its main parts critically examine titling policies, focusing on the costs and benefits of their two main decisions. First, Part I ponders whether to create a public titling system or to rely exclusively on private titling. Part II analyzes the choice between selective (i.e., voluntary) and universal (often mandatory) titling. It concludes that universal titling is seldom optimal. Based on the costs and benefits analyzed to examine these questions, the paper then concludes by suggesting that lack of titling is more a consequence than a cause of poverty.

I. PRIVATE VERSUS PUBLIC TITLING

I will use a simple graphic model to structure the analysis. Figure 1 represents the social value of land under different institutions, assuming that prices of titling services are set optimally and owners are free to choose between keeping their land claims "private" and using a *more* "public" titling system built by the government based on a public register.[1] Following Arruñada and Garoupa, the social

1. By "private" I am referring to arrangements such as customary solutions, often based on ceremonial conveyancing, possession, or even privately kept chains of title deeds. Therefore, in purity, they are not fully private, and most of them have substantial public elements. For instance, possession plays a substantial titling function when either its exercise or its delivery is public, as I argued in a related work (Benito Arruñada, *The Titling Role of Possession*,

value of a parcel of land or any other real estate asset (represented on the vertical axis) depends on the probability that claimants with better legal rights may appear and is thus a fraction of its value in an ideal world with no conflicting claims (represented on the horizontal axis).[2] This fraction will depend on the available institutions and will likely be lower if, whatever such institutions, the land remains under private titling—privacy, for short. To simplify matters, I am assuming that the figure represents all land in an area to be served by only one registry that costs an amount *F* to put in place. Titling a parcel of land means that, by incurring a given additional cost, the probability of success falls for a conflicting claim on that parcel. I thus assume that, by titling, the value of the land increases by a certain percentage: with respect to the privacy line, the titling line has a negative intercept but is steeper.

If the government creates the registry, it must also choose between voluntary and universal titling. Under voluntary titling (i.e., selective titling, often dismissively referred to as "sporadic" titling[3]), land rights are formalized at the request of individuals claiming to be owners. If owners must pay a fixed fee for publicly titling their land, they will choose not to title the less valuable parcels: those below the indifference point in the figure. Social gains arising from public

in LAW AND ECONOMICS OF POSSESSION 207–33 (Yun-chien Chang ed., 2015)). Moreover, many of those arrangements are often complemented with specific judicial solutions to purge title when needed, somewhat similar to the U.S. quiet title suit. All of them are, however, less public than the alternative titling solutions consisting, paradigmatically, of creating a register. We have analyzed elsewhere the choice between particular systems of registries, including not only land recordation of deeds and registration of rights (Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J.L. & ECON. 709 (2005)), but also the related choice about business formalization (Benito Arruñada, *Institutional Support of the Firm: A Theory of Business Registries*, 2 J. LEGAL ANALYSIS 525 (2010) [hereinafter *Institutional Support of the Firm*]). See also Benito Arruñada, *The Institutions of Roman Markets*, *in* ROMAN LAW AND ECONOMICS (Giuseppe Dari-Mattiacci ed.) (forthcoming Oct. 2016), for a deeper analysis of the choice between privacy and public titling in a historical context, focusing on classical Rome.

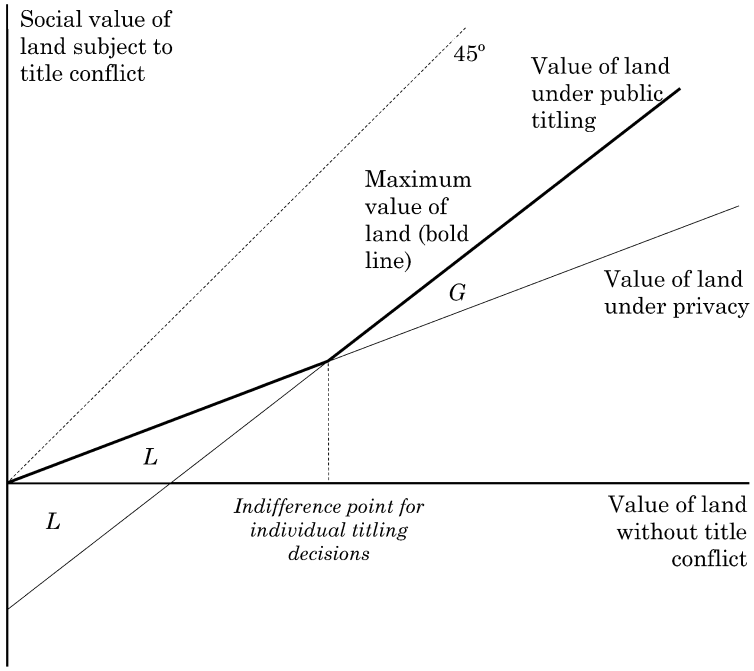
2. *See* Arruñada & Garoupa, *supra* note 1, at 713.

3. *See, e.g.*, PETER F. DALE & JOHN D. MCLAUGHLIN, LAND ADMINISTRATION (1999); U.N. Econ. Comm'n for Eur., *Land Administration in the UNECE Region: Development Trends and Main Principles*, U.N. Doc. ECE/HBP/140 (2005) [hereinafter *Land Administration in the UNECE Region*], http://www.unece.org/fileadmin/DAM/hlm/documents/Publications/landadmin.devt.trends.e.pdf; JOHN W. BRUCE ET AL., LEGAL EMPOWERMENT OF THE POOR: FROM CONCEPTS TO ASSESSMENT (2007) [hereinafter FROM CONCEPTS TO ASSESSMENT]; and JOHN W. BRUCE ET AL., LAND AND BUSINESS FORMALIZATION FOR LEGAL EMPOWERMENT OF THE POOR (2007) [hereinafter LAND AND BUSINESS FORMALIZATION]. The term "sporadic" suggests randomness, wrongly, because, in fact, it results from rational value-maximizing decisions by owners.

titling are therefore represented by the area *G*. Under universal titling, often referred as "systematic" titling, all land in an area is publicly titled, and social gains fall to *G–L*.

Focusing now on voluntary titling and forgetting momentarily about area *L*, the decision to introduce public titling should be based on comparing titling gains *G* to the fixed costs of establishing the titling system, *F*. I now explore the main determinants of these gains and costs, while addressing universal titling later.

Figure 1. Titling options (I): Choosing between private and public titling to maximize social value of land[4]



4. Figure 1 represents how the social value of land (*vertical axis*) is a function of the theoretical value of land without title conflict (*horizontal axis*) and the type of titling institutions available, which incur different costs. Social choice of titling institutions will be driven by these costs and the statistical distribution of the value of land parcels in the economy along the horizontal axis. Area *G* represents the potential gain from titling high-value land and area *L,* the potential loss from overtitling low-value land. Adapted from Arruñada & Garoupa, *supra* note 1, at fig. 2.

A. Determinants of the Gains from Titling

Title uncertainty reduces incentives to invest and increases the adverse selection suffered by potential acquirers of land rights, whether buyers or mortgage lenders. Public titling should improve the incentives to invest and reduce adverse selection.[5] In terms of Figure 1, the greater the value of potential investment and trade opportunities, the more the indifference point will be positioned to the left, and, for a given statistical distribution of the value of land parcels in the economy, the larger the social gains from public titling, represented by area *G*.

These gains, however, depend on the true existence of such opportunities, which therefore has to be confirmed before embarking on the costly introduction of public titling. Unfortunately, the effects of public titling on investment and trade are hard to estimate even after titling has been introduced.[6] And estimating the demand for public titling is even harder before a titling system is introduced: the little information available is dispersed and specific, and participants do not necessarily reveal their true valuations. A main drawback is that those who know the level of demand best are likely to benefit the most from formalization projects, because they will either be subsidized users or privileged suppliers, and thus tend to exaggerate demand.

1. Difficulties for Truthful Demand Revelation

In particular, proponents of reforms and suppliers of services for new formalization systems often commit two types of misrepresentation to exaggerate the demand for formalization. On the one hand, they tend to promote land titling and business formalization as silver bullets for growth, while disregarding that underdevelopment and poverty are mainly a cause, not a consequence, of informality.[7] In addition, they tend to present the demand for security of tenure as a demand for public titling capable of facilitating transfer and credit transactions. In this, they are often helped by owners, who, in expectation of subsidized titling, are also prone to disguise their

5. *See* Arruñada & Garoupa, *supra* note 1, at 721–23.

6. Benito Arruñada, Institutional Foundations of Impersonal Exchange: The Theory and Policy of Contractual Registries 125–38 (2012).

7. *See id.* at 125–31.

demand for greater security of tenure—which could be easily satisfied without creating expensive registries—as a demand for titles enabling land transfer and secured credit transactions—which do need such registries.

Security of tenure can indeed be provided more cheaply by simpler legislative and administrative measures, such as lessening the legal requirements for prescription and adverse possession, or explicitly recognizing the legality of some contracts or the property rights of some squatters.[8] In part, this reflects a difference between which institutions are required for supporting investment and which for supporting trade. Security of tenure often suffices to support investment, whereas trade in land tends to require public titling. However, when titling is subsidized, both land tenants and suppliers of titling services have an interest in exaggerating the demand for titling by presenting the demand for security of tenure as demand for titling. Consequently, the expectation of obtaining rents from titling may distort the opinions voiced in surveys and reports, making it more necessary for benevolent prospective reformers to rely on contractual and market signals as a source of information. Through these signals, individual transactors are more likely to reveal their true valuations because, unlike surveys and mere opinions, they result from real transactions and are backed by the real expenditures that transactors incur to carry them out.

Several types of signals meet these requirements for truthful demand revelation: use of inefficient contracts, confused and unreliable jurisprudence, and, especially, market prices. In the same vein, benevolent prospective reformers should also consider whether some components of titling projects must be interpreted as implicit recognitions that socially valuable demand is lacking. This is often the case when information campaigns are thought to be necessary to publicize the value of titling. In principle, as discussed below, owners should know better than reform suppliers. It is also the case with two other measures that are designed to palliate the bad consequences of titling, such as expropriation abuses and improvident sales. When

8. David A. Atwood, *Land Registration in Africa: The Impact on Agricultural Production*, 18 WORLD DEV. 659, 666–68 (1990), analyzes different alternatives, pondering their suitability and costs. *See also* GEOFFREY PAYNE, LAND, RIGHTS AND INNOVATION: IMPROVING TENURE SECURITY FOR THE URBAN POOR 18 (2002).

such damage control is deemed necessary, reformers should start by asking themselves why titling is a good idea in the first place.

2. Role of Market Signals for Appraising Titling Demand

Paying attention to actual contractual and organizational behavior and to market prices will help identify fake claims in titling demands, as people reveal their preferences more faithfully in their conduct. In particular, the presence of costly private contracting that would be effectively facilitated by public titling could be taken as an indication that investment in public titling is needed. For example, substantial demand for using land as collateral for credit would be signaled by the widespread use of vicarious contractual solutions, such as including repurchase agreements in contracts for the sale of land, and by the use of mortgages safeguarded by depositing the chain of written deeds with the creditor. If such arrangements or other functionally similar ones are frequent, demand for public titling or for better registries is more likely to be real. A similar market signal in business formalization would be the presence in business contracting of unincorporated companies, such as in eighteenth- and nineteenth-century England and currently in, for example, Bolivia.

A second source of hard evidence on the demand for change is provided by the inputs used and the consistency shown by judicial decisions. If judges rely on secret documents for deciding on conflicts involving third parties, this reliance often signals a lack of proper institutions. (Although judges are involved in these cases, their reliance on secret documents can still be considered a market signal because it is based on existing contracts.) In more developed countries, the subordinate role of the law of impersonal transactions can be inferred from the prevalence of law that is full of exceptions and contradictory jurisprudence. Some of the palliative organizational solutions, such as the creation of the private registry of mortgages in the United States (Mortgage Electronic Registration Systems ("MERS")),[9] can

9. In the last decade of the twentieth century, participants in the U.S. secondary mortgage market created the Mortgage Electronic Registration Systems ("MERS") as a way of avoiding the costs and delays of local recordation of mortgage loan assignments, by decoupling the local and national sides of the market. At the local level, MERS was to be the lender's representative, holding the rights in rem, enforced through the recording offices. The limitations of

also be taken as evidence of institutional demand. Their existence is a strong signal, since they require substantial investment and overcoming a collective action problem among market participants.

Lastly, market prices are also especially revealing for detecting the need to reform existing, but dysfunctional, registries. This is the case, in particular, of the spread or difference in interest rates between secured and unsecured (i.e., personal) credit. When this difference is small, as in even some developed countries, it is a definite indicator that registries and likely land law need a radical upgrade, because they are unable to realize the collateral value of land. Some other prices are also informative, but they are noisier signals and thus need closer scrutiny, such as the market price of shelf companies. The same happens with other indicators of the need for stronger contractual registries, such as mandatory intervention (both legally or de facto) by conveyancers; the relative price paid to conveyancers and registries; the use, cost, and legal complexity of lawyers' title reports; and the reliance on extensive legal opinions for ordinary company transactions.

3. Risk of Titling Abuse

When deciding to introduce public titling, the encouragement of private investment and contracting might be offset by enhanced possibilities of exploitation, rooted in land grabbing, fraud, and political failure. In terms of Figure 1, these effects would move the indifference point to the right, thereby reducing the social gains from public titling.

First, individuals might take advantage of public titling to grab land and devise frauds. In particular, initial titling opens new opportunities for the powerful to grab land,[10] a risk that is especially dangerous with respect to communal land. Community involvement is often proposed to reduce this danger,[11] but it is costly to operate and its results highly uncertain. Occasionally, artificial demand for titling is generated by the threat of the land being titled to someone else, often to elites or officials. Titling may also tend to degrade the

this solution became clear with the foreclosure crisis (*see, e.g.*, Adam Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637 (2013)).

10. Gershon Feder & Akihiko Nishio, *The Benefits of Land Registration and Titling: Economic and Social Perspectives*, 15 LAND USE POL'Y 25 (1998).

11. *See, e.g.*, LAND AND BUSINESS FORMALIZATION, *supra* note 3.

rights of some specific classes of claimants, such as women, youths, and seasonal users.[12] Moreover, even if these frauds have been more common in connection with land, all registries are prone to suffer them, as exemplified by the European Trading Scheme, the world's biggest market in carbon emissions, which closed for several weeks in January 2011 after fraudsters stole about sixty-two million USD in carbon credits from several of its national registers.[13]

Similarly, information in the public records can also be used for planning various frauds and extortions, from the proverbial pursuit of wealthy heiresses by dowry-seeking bachelors that Victorian fathers feared[14] to the present-day identity theft[15] or the sale of vacant houses after learning the identities of their owners in the public record.[16] And this possibility of fraud is not exclusive of property registries, as shown by the company registry created in Bulgaria in 2008, which provided free access to the personal data of company owners, giving not only their names and various personal identifiers but also scanned copies of their identity cards.[17] These risks of private abuse can be reduced by filtering the data to be disclosed (e.g., excluding personal identification numbers) or limiting access to the public record to those authorized by owners and those with a legitimate interest, which casts serious doubt on the current fashion of open registers (twenty-eight of the forty-two jurisdictions surveyed by the UN-ECE were wholly open to the public).[18]

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12. Ruth Meinzen-Dick & Esther Mwangi, *Cutting the Web of Interests: Pitfalls of Formalizing Property Rights*, 26 LAND USE POL'Y 36 (2009).

13. This fraud was seemingly caused by lenient registration of market participants, so that after opening accounts, fraudsters then took advantage of lax security to transfer credits from companies' accounts into their own accounts from which they were immediately sold to third parties (*Carbon Trading: Green Fleeces, Red Faces—A Theft of Carbon Credits Embarrasses an Entire Market*, THE ECONOMIST, Feb. 5, 2011, at 70).

14. J. STUART ANDERSON, LAWYERS AND THE MAKING OF ENGLISH LAND LAW 1832–1940 46–47 (1992).

15. James P. Sibley, *Is the Door to Public Records Slowly Closing?*, 85 TITLE NEWS, May–June 2006, at 9, http://www.hbwtitle.com/news/newsletter_09-2006.pdf.

16. PETER SPARKES, A NEW LAND LAW 14 (1999).

17. Petar Kostadinov, *Corporate ID Worries: Managers Still Fear Losing Their Property Through Fraud*, THE SOFIA ECHO, Nov. 28, 2008, http://sofiaecho.com/2008/11/28/665096_corporate-id-worries.

18. U.N. ECON. COMM'N FOR EUR., STUDY ON KEY ASPECTS OF LAND REGISTRATION AND CADASTRAL LEGISLATION (2000), http://www.unece.org/fileadmin/DAM/hlm/documents/Publications/wpla_inv2_p1.pdf.

Lastly, in a political vein, there might be a risk that public titling could facilitate bad government. In principle, titling should facilitate law enforcement that includes, most prominently, the collection of taxes. But this may have positive or negative social effects depending on citizens' capacity to control their own government and impede excessive taxation. If citizens do not trust their government, they will tend to avoid public registries that might be used for collecting taxes. This holds two consequences. First, the weaker the political institutions, the less sensible it is to introduce public titling because it would be less likely to succeed. Second, it makes sense for the public titling system to be independent of the tax authority, even at the price of some duplication.

In all these cases, there are reasons to be doubly cautious in regard to the risks of abuse. To avoid such risks may require preventive measures, but their presence should also alert policymakers that there might not be enough demand for titling.

4. Risk of Titling Facilitating Improvident Sales and Indebtedness

Studies of land titling have also often discussed the possibility that, by facilitating the sale and mortgage of land, titling efforts may lead the poor to improvidently lose their land. To avoid this risk, experts have advised that land marketability should be limited by different means, such as requiring the consent of spouses and administrative agencies[19] or introducing sales moratoria during which the poor would receive education. According to the United Nations' Commission on Legal Empowerment of the Poor ("CLEP"), for instance, "ceilings on ownership and sales moratoria are considered a reasonably successful protective practice, provided that they are limited in time and that time is used for legal and financial education."[20] However, my previous analysis suggests that such advice is misguided.

So far, I have implicitly assumed that owners are capable of maximizing their individual utility and hold consistent preferences across

19. *See, e.g.*, LAND AND BUSINESS FORMALIZATION, *supra* note 3, at 37.

20. 1 COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE 67 (2008) [hereinafter COMMISSION ON LEGAL EMPOWERMENT].

time. The improvident sales argument denies this assumption and therefore presumes some degree of irrationality, with owners being unable to look after themselves. However, this view is incomplete, because such allegedly irrational behavior is induced by exogenous interventions that may be destroying the institutional basis of rationality. The lack of marketable titles—whatever its rationale—might perform a self-controlling function, committing owners to act in a manner consistent with their (or their families') long-term interests. This may be a valuable institutional arrangement to achieve rational self-control in an environment of extreme hardship. When family members are dying of hunger, being precluded from selling the land may guarantee the long-term survival of some whereas being free to sell it now might mean that all will perish. The deep reluctance that farmers feel in most societies about selling their land probably serves a similar long-term rationalizing purpose.

So, the question becomes why should such land be titled in the first place. One may think that a reasonable policy would have been to not introduce titling in that area or to introduce it on a voluntary, fee-for-service basis that would encourage only efficient titling, that is, titling by those deciding to be free of the commitment arrangement. (An argument along these lines could be made based on the "libertarian paternalism" promoted by Thaler and Sunstein.)[21] However, the government often decides, first, to free the poor and then to introduce new constraints to prevent them from making mistakes and to teach them how to behave in the new environment. In a sense, it is replacing a simple legal constraint—the impediment to sell—with a hard-to-produce and harder-to-maintain education constraint. Titling efforts may well be premature in such life-threatening circumstances.

In sum, poor people may be led to desperate sales, which titling may well facilitate. However, the best way of protecting them is not to constrain their behavior with moratoria and education just after granting them full titles. In a similar manner to the risk of titling abuse analyzed in the previous section, the expectation of improvident sales should instead alert us to the risk that the whole titling effort might be premature or its universal nature inappropriate.

21. RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

B. Determinants of the Fixed Cost of the Titling System: Making Fixed Costs Variable

The fixed costs of introducing a titling system include legislative and administration costs. New legislation and judicial decisions will be necessary to reform land law, at least to solidly establish the legal effects of public titling (mainly, priority of filing in recordation and the contract rule in registration). It will be necessary not only to adapt the statute law, often in a new way, but also to train judges in the new law and to develop jurisprudence accordingly. Administration costs are involved in putting in place a titling service, which will require not only one or several registry offices but also a regulatory or managerial structure. Neither of these tasks is easy, and they are related: judges are often reluctant to enforce new principles of property law. Understandably, they are even more reluctant when the registries function imperfectly.[22]

1. Interactions Between Legislative Decisions and Administration Costs

Furthermore, legislative and administration costs interact with each other. For example, defining by law a numerus clausus and eliminating the fragmentation of property rights in order to reduce administration costs will often be useful. However, this may conflict with the recognition of customary rights, thus providing another reason for voluntary titling. When such conflict is important, titling should

22. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988). Rose summarizes this tendency graphically when she points out the repeated failed attempts at clarifying property law: "[L]egislatures pass new versions of crystalline record systems—only to be overruled later, when courts once again reinstate mud in a different form." *Id.* at 580. For history and references, *see id.* at 585–90. The resistance of judges to apply contract rules appears in many forms and contexts. For instance, New Zealand (and, to a lesser extent, Australian) courts have constructed a fraud exception with apparently little justification in the statute when judging that a right holder has registered an interest with the intention of defeating an unregistered interest. Peter Blanchard, *Indefeasibility under the Torrens System in New Zealand*, *in* TORRENS IN THE TWENTY-FIRST CENTURY (David Grinlinton ed., 2003). A further example is provided by the position held by the Paris courts regarding seventeenth-century company registers. José Girón Tena, *Las Sociedades irregulares*, 4 ANUARIO DE DERECHO CIVIL 1291 (1951) (Spain), *reprinted in* JOSÉ GIRÓN TENA, ESTUDIOS DE DERECHO MERCANTIL 125 (1955) (Spain).

be introduced only for those parcels or in those areas where keeping such customary rights as in rem rights has become inefficient, so they should be legally debased to mere contract rights.[23]

The solution adopted in England since the seventeenth century to transform the paralyzing property rights system inherited from feudal times can be understood in this way. At the start of the Industrial Revolution, owners had limited rights, as they could not mortgage, lease, or sell; many other people held property in rem rights on the same land; and land uses were often predetermined. These constraints made it impossible to use land in the most productive way, missing the valuable opportunities that were becoming increasingly available in a context of rapid economic change and growth. To be safe and avoid paying twice, acquirers had to gather the consent of all right holders, but this was often impossible because only sellers knew about many of the rights.

Between 1660 and 1830, the English Parliament enacted numerous acts restructuring property rights by relaxing such constraints.[24] With these estate acts, sales, leases, and mortgages became legal, and all interests were recorded in a way that was accessible to the public. This eliminated information asymmetries, making it possible to transact impersonally. Statutory authority acts made construction of infrastructure possible by, among other measures, organizing procedures for expropriating land. And enclosure acts mainly served to transform common property into individual property.

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23. After decades of ignoring customary rights, their recognition has become common in development programs. For example, CLEP advises the "recognition of a variety of land tenure, including customary rights, indigenous peoples' rights, group rights, certificates, etc., including their standardisation and integration of these practices into the legal system." COMMISSION ON LEGAL EMPOWERMENT, *supra* note 20, at 60. Recognizing such customary rights may or may not be efficient, but it seems contradictory with other recommendations made by the same commission, especially those for universal titling and for establishing "simplified procedures to register and transfer land and property." *Id.* Customary rights are complex, and recognizing them as property rights makes titling less simple and more costly. In the vein of the preceding section, the need for such recognition could also be understood as a sign that the titling effort is premature.

24. Gary Richardson & Dan Bogart, *Institutional Adaptability and Economic Development: The Property Rights Revolution in Britain, 1700 to 1830* (Nat'l Bureau of Econ. Research, Working Paper No. 13757, 2008), http://www.nber.org/papers/w13757.pdf; Dan Bogart & Gary Richardson, *Making Property Productive: Reorganizing Rights to Real and Equitable Estates in Britain, 1660 to 1830*, 13 EUR. REV. ECON. HIST. 3 (2009).

The experience is interesting in terms of both efficiency and fairness. Consonant with my argument for voluntary titling, right holders or communities had to apply for such restructurings, which led to these transformations occurring where they were most valuable. Moreover, damage to right holders was minimized by procedures that granted them ample scope for opposition in several layers of review. Generally, right holders who lost property rights received monetary compensation. The case therefore shows that it is possible to radically transform property rights in a manner that is fair, at least from the procedural point of view. But it also teaches a sad lesson, as England was the only European country able to achieve this transformation peacefully. Other countries had to endure their own versions of the French or Russian revolutions.

These English solutions required parliamentary acts but relied on specific administrative commissions. In general, purely legislative costs are mostly fixed with respect to the establishment of public titling. However, most administration costs can be made fixed or variable—and therefore, when variable, avoidable—depending on the titling policy being adopted. For example, considering only a given geographical area, voluntary titling allows for smaller registry offices and therefore incurs less fixed costs than universal titling. (Under voluntary titling, some titling costs are conditional on the decision by owners as to whether to title their land, a solution that, in combination with pricing decisions, helps to select which land should be titled first.) Conversely, under universal titling, all costs are fixed and unavoidable and are not conditional on owners' decisions. Similarly, fixed costs are smaller when titling is introduced only in the most promising areas. Imagine for a moment that the horizontal axis in Figure 1 represents the land in a region that would be served by multiple registry offices, each incurring a fixed cost F. In this case, if land parcels of similar values are geographically concentrated in different areas within the region, it would make sense to introduce titling selectively, starting from the areas where the most valuable land is located, which should reduce the total fixed costs. In reality, this is the solution adopted when registry offices are opened only in urban areas or in the biggest cities. This was, for example, the soluion chosen in England in 1897, which introduced

compulsory registration following property transactions only in central London. It was as late as 1990 that the system was applied to all counties in England and Wales.[25] Therefore, both selective demand and selective supply of titling services may reduce fixed costs.[26]

2. Variable Nature of Most Mapping, Surveying, and Similar Costs

The fixed or variable nature of costs also hinges on other policy options. First, establishing boundaries by surveying each land parcel is often considered to be a requirement for good titling[27] and has been included in many titling programs. Investment to demarcate land by mapping the area and identifying parcel boundaries has therefore been treated as a fixed cost. But most of it can be transformed into a variable cost by allowing parcel identifications of different quality, made on a voluntary basis, so that greater precision would be demanded either by owners for whom such precision in defining boundaries is really valuable or by the registry office in special circumstances in which it is deemed indispensable for titling. (The issue is important because at least 53.45 percent of the unit costs of land titling projects are being spent on physically identifying parcels.[28])

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25. SPARKES, *supra* note 16, at 1–3.

26. Similarly, colonial powers such as France and the United Kingdom in Africa and Ireland (ALAN WATSON, SOCIETY AND LEGAL CHANGE 56 (2001)), as well as the United States in the Philippines (Lakshmi Iyer & Noel Maurer, *The Cost of Property Rights: Establishing Institutions on the Philippine Frontier Under American Rule, 1898–1918* (Nat'l Bureau of Econ. Research, Working Paper No. 14298, 2008), http://www.nber.org/papers/w14298.pdf), introduced land registration in their colonies while keeping more traditional systems of privacy and recordation in their homelands.

27. *See, e.g.*, Jürg Kaufmann & Daniel Steudler, *Cadastre 2014: A Vision for a Future Cadastral System*, Int'l Fed'n of Surveyors (1998), https://www.fig.net/resources/publications/figpub/cadastre2014/presentation/2002-05-kaufmann-granada-cad2014-paper.pdf.

28. The unit costs incurred for physical identification in the seven projects on which sufficient detail is given in Burns amount to 38.74 percent of total costs, whereas costs are 37.17 percent for other activities and 24.09 percent for administration and management. Tony Burns, *Land Administration Reform: Indicators of Success and Future Challenges* 94–95 (The World Bank Working Paper No. 41893 2007). Allocating the proportional share of administration and management, the costs for physical identification increase to 53.45 percent. Physical identification includes the following tasks: building a geodetic network, developing cartography, investigating boundaries, surveying and marking, and preparing cadastral maps and plans. The remaining 46.55 percent is spent on compiling existing records, publicity, acquiring government equipment, collecting claimant information, mediating in conflicts, controlling quality,

Centrally demarcating land in homogeneous, easy-to-measure units has been claimed to facilitate enforcement, reduce conflict and transaction costs, and produce positive externalities, increasing land value in a context of land allocation without preexisting property rights.[29] Some of these benefits may also accrue to surveying and

legal validation, publicly displaying field results, resolving conflicts, preparing land records, designing cadastral and registry databases, entering data, registering property rights, and issuing titles to beneficiaries.

29. *See* Gary D. Libecap & Dean Lueck, *Land Demarcation Systems*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW (Kenneth Ayotte & Henry E. Smith eds., 2011). Their seminal empirical work on land demarcation systems compares the value of adjacent land in thirty-nine counties of Ohio that, due to a historical accident, were demarcated by metes and bounds ("MB") or the rectangular survey ("RS") around 1784–85. Gary D. Libecap & Dean Lueck, *The Demarcation of Land and the Role of Coordinating Property Institutions*, 119 J. POL. ECON. 426 (2011). They find that, for otherwise identical land, the RS system is associated with higher land values, more roads, more land transactions, and fewer legal disputes. However, it is unclear to what extent these significant and persistent differences can be attributed to physical land demarcation. In fact, the two sets of parcels differ not only in the demarcation technique but also in the way the land was allocated to settlers.

> The processes for demarcating *and claiming* land in Ohio were different for RS and MB lands. For farmers to obtain RS land, the federal government first surveyed parcels into square 640-acre sections, as the law required, and then made them available to individuals at the local land office, often the county seat. Individuals located a square parcel or collection of squares and obtained title through purchase and registration of the transaction . . . . Under MB there was no presurvey by the government and *no external constraint on individual plot demarcation.* Claimants first located a plot of land of any shape, marked its perimeter on trees or other natural or human monuments, filed the claim or "entry" at the local land office (again at the county seat), hired a surveyor to formally measure the boundaries, and then *recorded* the surveyed plot at the land office and received title.

Id. at 433 (emphases added).

Therefore, it seems that, where land was demarcated by the RS, settlers were granted specific parcels, guaranteeing no overlaps or conflicting claims. But, where land was demarcated by MB, settlers were given a right to appropriate a certain area, which then was freely chosen by each settler, privately surveyed and recorded, without, in principle, undergoing any purging procedure to avoid overlaps and clear the title. Consequently, whether the differences observed by Libecap and Lueck capture the effects of the different demarcation systems or those of alternative allocation and titling procedures is unknown. To isolate both effects, it would have been necessary for the land under MB to have been divided using MB before being granted to settlers, like the land divided under the RS. Therefore, the results obtained by Libecap and Lueck probably overestimate the relative importance of physical demarcation by including those of the different allocation procedures used in that case for RS and MB lands. In particular, such results might reflect the fact that the boundaries of plots under MB have not been purged and are therefore likely to overlap with those of neighboring plots. In this case, both contracted and reported acreage under MB would systematically overestimate the legal acreage really sold, as parties would try to keep their boundary claims alive. Therefore, the acre prices that they observe under MB would underestimate real prices. This hypothesis is consistent with

mapping efforts in a steady-state context with preexisting rights. Furthermore, systematic mapping generally enjoys economies of scale and does not collide with vested interests. It is therefore understandable that titling projects tend to include or be preceded by mapping and surveying of land parcels. However, the value of this physical demarcation (as opposed to nonphysical, more purely legal demarcation) depends on the nature of the land. It is greater for rural, uniform land in areas lacking fixed boundaries,[30] as well as, given the fixed costs of surveying, for more valuable land. The latter explains why surveying and other due diligence studies are customary for commercial transactions in the United States but are rare for residential ones.[31] Mapping is also costly and slow so that, above a certain frequency of transactions, even in developed economies it becomes almost impossible to keep the physical representation of the land universally updated at the speed needed today for economic activity, especially if the registry of rights is supposed to check boundaries before registration, to require neighbors' consent in case of collision, and to indemnify claimants for boundary errors.

Scotland provides an interesting example of these difficulties. The 1979 Scotland Land Registration Act created a new registry of rights, the Land Register, to replace the old register of deeds, the General Register of Sasines, which had been created in 1617. The act burdened the new registry with a duty to maintain a physical description of each parcel of land, based on the Ordnance Survey map. More than thirty years later, only 19 percent of the landmass of Scotland and 55 percent of its titles had been transferred into the new registry.[32]

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the fact that they observe such value differences in farmland but not in urban land, whose boundaries are usually more precise. It is also consistent with their finding that most 19th century litigation in metes and bounds areas is not related to boundaries (1.46 by 1,000 parcels, about 4 times more than in rectangular survey areas) or to the validity of the survey (2.48‰, 31 times more) but to the validity of the entry/patent (8.61‰, 33 times more). *Id.* at 453. Lack of clarity in the title seems to have been more important as a driver of litigation and, possibly, of transactions costs and value.

30. Libecap, Lueck, and O'Grady use a similar contextual argument to explain the variation in the land demarcation systems adopted in various British colonies. Gary D. Libecap, Dean Lueck & Trevor O'Grady, *Large-Scale Institutional Changes: Land Demarcation within the British Empire*, 54 J.L. & ECON 295 (2011).

31. MICHAEL T. MADISON, ROBERT M. ZINMAN & STEVEN W. BENDER, MODERN REAL ESTATE FINANCE AND LAND TRANSFER: A TRANSACTIONAL APPROACH 14 (2d ed. 1999).

32. REGISTERS OF SCOTLAND, LAND REGISTRATION (SCOTLAND) BILL CONSULTATION PAPER

Mapping had caused frequent refusals and delays in registration, often because of discrepancies between the plan in the deed and the Ordnance Survey map; it had also been the largest category of error in terms of indemnities[33] and had been a major cause of the slow transition into the new registry, which suffered from long turnaround times and the accumulation of a considerable backlog, in which mapping issues figured prominently.[34] The Scotland Law Commission advised in 2010 to give discretion to the registry to replace the Ordnance Survey base map with some other system.[35]

3. Danger of Focusing on Average Costs for Making Sensible Technological Choices

Besides mapping, other policy options affecting the mix of fixed and variable costs are computerization and online registration, which are also often argued to reduce costs. For instance, CLEP claims that the "costs of property certification can be considerably reduced and transparency improved by computerization and GPS systems, especially where comprehensive records do not yet exist."[36] This is partly true. Not only computers but also, in general, capital-intensive technologies achieve lower average costs. Formalization enjoys substantial economies of scale, as suggested by data such as those depicted in Figure 2. However, these economies depend on the relative prices of capital to labor and, in any case, can only be reached at high levels of output. As it happens, most poor countries have plenty of labor, and their demand for formalization is limited to the most valuable urban land and corporate firms.[37] Therefore, extensive investments in computers and information technologies are often inappropriate.

Because average cost does not measure efficiency, it should be treated with extreme caution for comparisons and probably never

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5 (2010) [hereinafter LAND REGISTRATION (SCOTLAND)], https://www.ros.gov.uk/__data/assets/pdf_file/0007/16837/lr_bill_consultation.pdf.

33. REGISTERS OF SCOTLAND, ANNUAL REPORT AND ACCOUNTS 2009–2010 26 (2010), https://www.ros.gov.uk/__data/assets/pdf_file/0004/5836/rosannualreport_09-10.pdf.

34. *Id.* at 10, 16.

35. LAND REGISTRATION (SCOTLAND), *supra* note 32, at 16.

36. COMMISSION ON LEGAL EMPOWERMENT, *supra* note 20, at 66.

37. Individual proprietorships do not need contractual registration, as shown in *Institutional Support of the Firm*, *supra* note 1.

set as an objective for reform efforts. Unfortunately, using average cost carelessly has been promoted by the popularity of international indicators that narrowly focus on them. In terms of the bottom panel of Figure 2, they pay attention only to the vertical axis instead of considering the whole cost function. Consequently, when comparing such indicators across countries, institutions in countries with lower figures are seen as more efficient. However, countries at different levels of development have different demands for formalization and their optimum average costs should also differ. Therefore, a higher average cost in a country whose system functions at a lower scale does not necessarily mean that its institutions are less efficient. They may be functioning efficiently, at precisely the frontier of productive possibilities, but at a lower scale and perhaps with different, more labor-intensive technology. And vice versa, a richer country may show lower average costs only as a result of the scale, even though its system is inefficient.

Comparing average costs cannot resolve these doubts and may also lead reformers to pursue inefficient reductions in average costs (affecting, in fact, only part of them, as most indicators only measure expenses directly paid by users, therefore producing only a partial estimate of variable average costs). This is yet another case of modern public management falling into an old trap of poorly applied managerial accounting, which for years had led industrial firms to choose capital-intensive technologies and to produce excessively large batches of products.[38] It may help to explain why many formalization projects underestimate the fixed costs involved in building institutions.[39]

Coming back to the main theme and considering that poor countries often have more labor than capital and limited demand for formalization, choosing labor-intensive technologies with higher average costs but little investment in fixed costs might be optimal. However, many have invested large amounts of capital while simultaneously trying to inflate demand and output by choosing a strategy of universal titling. I will now explore why this is generally a bad idea.

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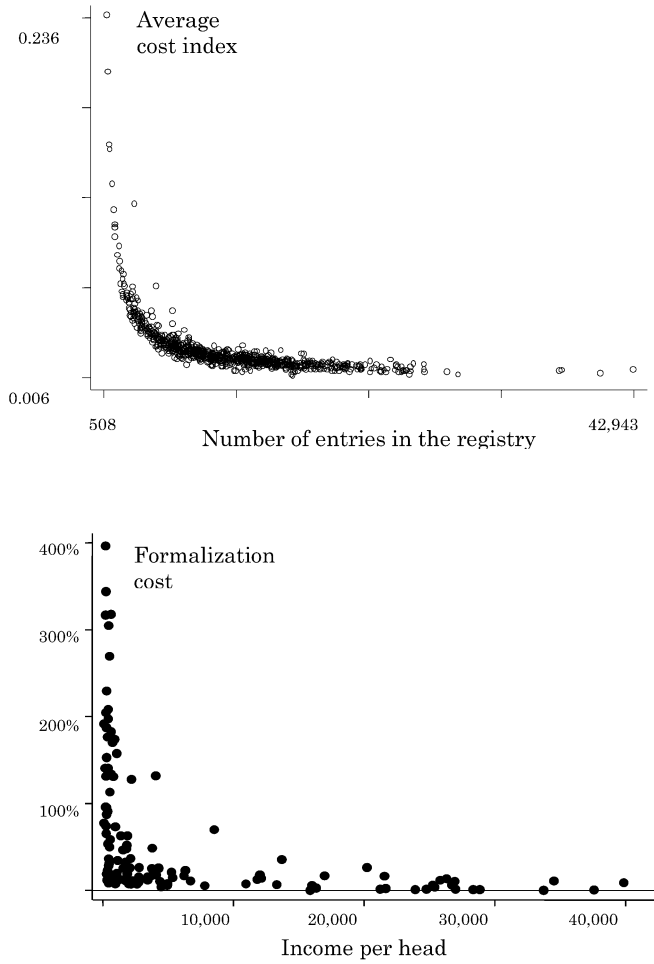
38. Michael C. Jensen & William H. Meckling, *Specific Knowledge and Divisional Performance Measurement*, 21 J. APPLIED CORP. FIN. 49 (2009).

39. Daniel Wachter & John English, *The World Bank Experience with Rural Land Titling* (World Bank Pol'y and Res. Division, Envtl. Dep't, Working Paper No. 35, 1992); LYNN C. HOLSTEIN, REVIEW OF BANK EXPERIENCE WITH LAND TITLING AND REGISTRATION (1993).

Figure 2. Possible economies of scale in formalization processes[40]



40. Figure 2: *Top*, Average total cost index of property registries in Spain as a function of their volume of activity, measured by the number of annual entries in 1998 (based on data from Dirección General de los Registros y del Notariado [DGRN], ANUARIO DE LA DIRECCIÓN GENERAL DE LOS REGISTROS Y DEL NOTARIADO [YEARBOOK OF THE GENERAL DIRECTORATE OF REGISTRIES AND NOTARIES] (1998) (Spain)). *Bottom*, Income per head (in USD) and cost of business formalization (in percentage of income per head) in 2003 across countries worldwide (based on data from *Doing Business in 2005: Removing Obstacles to Growth*, THE WORLD BANK (2004)).

II. VOLUNTARY VERSUS UNIVERSAL TITLING

Under universal titling, where all land in an area is publicly titled, social benefits fall to the difference between the gains from titling high-value land (area *G* in Figure 1) and the losses from overtitling low-value land (area *L*). Universal titling thus would be inferior to voluntary titling in the absence of positive externalities. I examine the causes of this inferiority before analyzing a possible justification of universal titling via externalities and discussing the real case of land titling in Peru. I close by questioning the direction of causality between informality and poverty.

A. Causes of "Overtitling" Low-Value Land

The negative effect, *L*, arises under universal titling because low-value land—that below the indifference point—is now titled, even if the cost of titling is higher than the resulting increase in land value. (Observe in Figure 1 that for these parcels of land the value of land under the privacy line is above the value of land under the titling line.) In practice, this situation normally results not from mandatory but from subsidized titling. Individual titling decisions are driven by the individual value of titling in terms of enhanced security of titles minus the price of titling services. Arruñada and Garoupa conclude that, in the absence of externalities, optimal titling fees should be above cost when social costs are lower than private costs.[41] The reason

41. Arruñada & Garoupa, *supra* note 1. Nonconsensual transfers of property generate not only private but also social costs because they trigger rent seeking and, generally, transaction costs, especially to make future consensual transactions possible and to protect against fraud. For instance, real resources are spent on fabricating frauds and litigating disputes on current ownership. In addition, future land sales become more difficult when titles are unclear. The situation poses the typical problem of excessive care when private benefits are higher than social benefits (*see, e.g.*, Louis Kaplow & Steven Shavell, *Private Versus Socially Optimal Provision of Ex Ante Legal Advice*, 8 J.L. ECON & ORG. 306 (1992); Steven Shavell, *The Fundamental Divergence between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997)), characterized in a wider context as "excess measurement" by Barzel. Yoram Barzel, *Measurement Cost and the Organization of Markets*, 25 J.L. & ECON. 27 (1982). GERSHON FEDER ET AL., LAND POLICIES AND FARM PRODUCTIVITY IN THAILAND (1988), suggest several reasons why the private value of formalization is greater than the social value. Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty about Property Rights*, 106 MICH. L. REV. 1285 (2008), explains along these lines several exceptions in the application of property rules to both real and intellectual property, exemplified by the tendency of courts to deny

is that optimizing individuals tend to purchase too much title assurance, given that in their titling decisions they consider not social but individual losses, which are assumed to be larger.

However, many development programs subsidize public titling by setting titling fees at nil or nominal levels and spending resources on informing owners about the benefits of public titling.[42] Most developing countries seem to follow the prescriptions of CLEP that "new and small landowners [should be] exempted from registration fees and taxes."[43] It coherently recommends institutionalizing "an efficient property rights governance system that systematically and massively brings the extralegal economy into the formal economy and that ensures that it remains easily accessible to all citizens."[44] Although it also aims for efficiency, CLEP's overarching goal seems to be a peculiar version of equality of results: "To ensure that a nation's property is recognized and legally enforceable by law, all owners must have access to the same rights and standards. This would allow bringing the extralegal economy into the formal economy systematically and massively."[45]

Under registration, first titling of land previously held under privacy is in fact even more heavily subsidized because, given that unregistered titles are unclear, first registration is both more costly and more valuable.[46] Understandably, individuals are happy to go

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injunctive relief in cases of good faith boundary encroachments and to limit such relief in patent and copyright cases.

42. According to the responses to the *Doing Business in 2005* survey, user fees accounted for an average of 32.12% of the cost of public titling in 113 countries, with governments financing 63.90% and other sources (mostly aid agencies) the remaining 3.98%. Moreover, user fees financed the whole costs of titling systems in only 23 countries. *Doing Business in 2005: Removing Obstacles to Growth*, THE WORLD BANK (2004), http://documents.worldbank.org/curated/en/883691468152697311/Doing-business-in-2005-removing-obstacles-to-growth.

43. COMMISSION ON LEGAL EMPOWERMENT, *supra* note 20, at 67.

44. *Id.* at 60.

45. *Id.* at 66. The United Nations Economic Commission for Europe has proposed an intermediate approach whereby the initial establishment of the registry would be mainly financed from general taxation while user fees would provide for the cost of maintaining the registry in the future (*e.g.*, U.N. ECON. COMM'N FOR EUR., LAND ADMINISTRATION GUIDELINES WITH SPECIAL REFERENCE TO COUNTRIES IN TRANSITION at 8, U.N. Doc. ECE/HBP/96, U.N. Sales No. E.96.11.E.7 (1996)). But even this intermediate solution is not necessary under voluntary titling when most of the fixed costs of setting up the registry are made variable, as discussed above.

46. The inclination to register shown by holders of less secure titles when both registration and recordation are available in the same jurisdiction suggests that the value of titling is generally greater the less clear the title.

to the trouble of first registration, but they often do not file subsequent transactions and successions, even if the cost is less. They instead keep their titles private:

> Frequently, the record of land rights established in mass titling is not kept up-to-date, and the system falls into disuse. Keeping the system vital and current depends upon those who hold registered rights in land and those who acquire them registering their transactions and successions. Failure to do so is frequent and occurs for a number of reasons. The costs imposed, for instance, by fees or by taxing transactions, may be too high. The system may have become corrupt, driving away beneficiaries with heavy illegal charges. The landholders may not understand the system and its potential benefits to them or, if they do understand, they may not consider them worthwhile. They may simply be more comfortable with customary practices.[47]

Titling therefore seems to be of so little value for these people that, even if they pay close to zero for it, it is not worth the time, trouble, and perhaps the possibility of being taxed, which are all associated with registration. When this happens for the majority of subsequent transactions, despite subsidized prices, it is reasonable to ask if most of this land which returns to privacy after a subsequent transaction lies, in Figure 1, to the left of the indifference point and therefore should not have been titled in the first place.

B. How Real Are the Positive Externalities of Universal Titling?

The above analysis assumes that the cost and value of titling each parcel of land is independent of whether other parcels are titled. In contrast, proponents of universal titling claim that there are substantial interdependencies, for instance, in clarifying boundaries and avoiding corruption, which should reduce the fixed cost of titling, *F*. For example, according to the United Nations Economic Commission for Europe:

> The systematic [i.e., universal] approach . . . . is in the longer term less expensive because of economies of scale, safer because it gives maximum publicity to the determination of who owns

47. LAND AND BUSINESS FORMALIZATION, *supra* note 3, at 42.

> what within an area, and more certain because detailed investigations take place on the ground with direct evidence from the owners of adjoining properties.[48]

Universal titling of an area might also produce positive externalities if the value gains produced by titling a parcel are not fully captured by its owner. Mainly, to the extent that titling encourages investments in building and renovation, some benefits of these investments will accrue to neighboring parcels.[49] Many other benefits are also possible. For instance, titling could modify in a promarket direction the beliefs of those receiving them, as observed by Di Tella, Galiani, and Schargrodsky.[50] Such a change might help stabilize political outcomes, even though this outcome has been questioned, considering that titling poor owners may be bad for the poorest tenants who lack ownership claims in slums: the poorest are often exploited not by the rich but by the poor.[51] Lastly, titles could also ease contracting for utilities, as emphasized by de Soto.[52]

All these positive externalities would add to the benefits represented by the area *G* in Figure 1. However, as often happens with externalities, their importance remains open to question. First, cost externalities are clear in mapping and surveying work, but both activities may be unnecessary. They are also unsustainable, as "no

48. *Land Administration in the UNECE Region*, *supra* note 3, at 35.

49. For the same reason, diluting property rights may cause negative externalities. For example, a number of foreclosures above a certain threshold reduces the value of all houses in a neighborhood (Jenny Schuetz, Vicki Been & Ingrid Gould Ellen, *Neighborhood Effects of Concentrated Mortgage Foreclosures*, 17 J. HOUSING ECON. 306 (2008)), potentially triggering a snowball effect when reduced home values lead to additional foreclosures. John P. Harding, Eric Rosenblatt & Vincent W. Yao, *The Contagion Effect of Foreclosed Properties*, 66 J. URBAN ECON. 164 (2009), estimate that each foreclosure reduces the value of neighboring family homes between 0.6 and 1.3 percent, an effect that decreases with distance and is caused by the visual impact of deferred maintenance and neglect; and Campbell, Giglio, and Pathak estimate that in Massachusetts a foreclosure at a distance of 0.05 miles lowers the price of a house by about 1 percent. John Y. Campbell, Stefano Giglio & Parag Pathak, *Forced Sales and House Prices*, 101 AM. ECON. REV. 2108 (2011). Accumulated average reductions may reach up to $159,000. Dan Immergluck & Geoff Smith, *The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values*, 17 HOUSING POL'Y DEBATE 57 (2006).

50. Rafael Di Tella, Sebastian Galiani & Ernesto Schargrodsky, *The Formation of Beliefs: Evidence from the Allocation of Land Titles to Squatters*, 122 QUARTERLY J. ECON. 209 (2007).

51. See, for example, PETER N. WARD, MEXICO CITY: THE PRODUCTION AND REPRODUCTION OF AN URBAN ENVIRONMENT 193 (1990), and, more generally, MIKE DAVIS, PLANET OF SLUMS 79–82 (2006).

52. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL 58–61 (2000).

project in the developing world has been able to implement and sustain high-accuracy surveys over extensive areas of their jurisdiction."[53] Second, positive externalities disappear when owners who have been given public titles decide to keep their titles private in subsequent transactions and successions. To this extent, universal titling is only universal for the initial first titling effort, and all titling systems are de facto selective and voluntary. Lastly, there might be negative as well as positive externalities such as jeopardizing untitled customary rights to land.

Moreover, the empirical evidence on the effects of titling broadly supports applying voluntary instead of universal titling. Titling is more effective in areas where there are substantial investment opportunities, most commonly in cities, and when financial services have already developed.[54] Also, the benefits of titling, especially those related to the use of land as collateral for credit, accrue mostly to large landholders.[55]

This evidence adds to the regularities observed in both the introduction of titling and the design of titling institutions, throwing some doubts on their real aims. With respect to the introduction of titling, it is common to find a symmetric failure to make sure, before the reforms, that a real demand exists, as has been admitted by CLEP;[56] and to check, after them, that such a demand has actually materialized. For example, most projects do not bother to monitor if subsequent transactions are being titled.[57] With respect to the structure of titling institutions, it is equally disturbing that most efforts rely on subsidized pricing, and policymakers are advised to continue relying on it.[58] No proper consideration is given to whether the need for subsidies is signaling a lack of demand for titling.[59] Instead, policymakers

53. *See* Burns, *supra* note 28.

54. SEARCHING FOR SECURITY OF LAND TENURE IN AFRICA (John W. Bruce & Shem E. Migot-Adholla eds., 1994); Feder & Nishio, *supra* note 10.

55. Gershon Feder, Tongroj Onchan & Tejaswi Raparla, *Collateral, Guaranties and Rural Credit in Developing Countries: Evidence from Asia*, 2 AGRIC. ECON. 231 (1988); Michael Carter & Pedro Olinto, *Getting Institutions "Right" for Whom? Credit Constraints and the Impact of Property Rights on the Quantity and Composition of Investment*, 85 AM. J. AGRIC. ECON. 173 (2003).

56. 2 COMMISSION ON LEGAL EMPOWERMENT, *supra* note 20, at 84.

57. FROM CONCEPTS TO ASSESSMENT, *supra* note 3, at 42.

58. COMMISSION ON LEGAL EMPOWERMENT, *supra* note 20, at 60, 67.

59. The recommendation to subsidize first registration and mapping but to recover recurrent operating costs (as in *Land Administration in the UNECE Region*, *supra* note 3, at 25) is hardly viable unless titling triggers a substantial increase in land values.

are advised to educate beneficiaries on the benefits of titling and protect them from bad decisions even though it is unclear who knows best.[60] Proposed policy changes share this disregard for demand. For instance, since credit does not evolve automatically from what are often supply-driven systems of property rights, CLEP advises the provision of "targeted credit," without considering whether demand (i.e., investment opportunities) for such credit really exists.[61] Yet, after all these subsidies and advertising efforts, titling projects still fail to get subsequent transactions titled.[62] In principle, all these features are consistent with the troubling hypothesis that, in spite of their empowering-the-poor rhetoric, these projects in fact serve the interests of the using-the-poor industry; mainly, the suppliers of titling and complementary services.

C. Land Titling in Peru: An Example

Peru has spent hugely on formalizing property—over 214 million dollars between 1991 and 2002 alone, in an effort financed with loans from the World Bank since 1998.[63] Positive effects on investment and on the supply of labor have been found by Field,[64] as titling supposedly allows squatters not to rely exclusively on physical possession to enforce their rights. However, a large proportion of the formalized properties leave the formal system when the land is sold again, and hardly any commercial mortgages have been registered, despite many years of subsidized prices for registration.

Furthermore, several studies have concluded that titling has produced little, if any, security or value. Webb, Beuermann, and Revilla judge that formal titles add little security, and the difference has

60. COMMISSION ON LEGAL EMPOWERMENT, *supra* note 20, at 67.

61. 2 *id.* at 82.

62. 2 *id.* at 84.

63. INSTITUTO LIBERTAD Y DEMOCRACIA [INSTITUTE FOR LIBERTY AND DEMOCRACY], LA GUERRA DE LOS NOTARIOS 65 (2007) (Peru) [hereinafter LA GUERRA DE LOS NOTARIOS], http://www.ild.org.pe/images/books/la_guerra_de_los_notarios_2.pdf. In 2006, the World Bank granted an additional loan of twenty-five million dollars, subsequent to a previous one of thirty-eight million that ended in 2004. *COFOPRI al día*, COFOPRI (COMISIÓN PARA LA FORMALIZACIÓN DE LA PROPIEDAD INFORMAL) at 1 (Nov. 28, 2006) (Peru).

64. Erica Field, *Property Rights, Community Public Goods and Household Time Allocation in the Urban Squatter Communities*, 45 WM. & MARY L. REV. 837 (2004); Erica Field, *Property Rights and Investment in Urban Slums*, J. EUR. ECON. ASS'N PAPERS AND PROCEEDINGS 279 (2005); Erica Field, *Entitled to Work: Urban Property Rights and Labor Supply in Peru*, 122 QUARTERLY J. ECON. 1561 (2007).

become smaller over time from the perspective of owners.[65] Kerekes and Williamson find that titling rural land has no effect on access to credit, even from public banks.[66] Several reports conclude that "it is not clear that beneficiaries place greater value on a registered title than on other ownership documents, such as municipal certificates or sale and purchase contracts, which have not necessarily been purged and registered."[67] A report made for the promoters of the reform argues that "to some extent this can be explained by the widespread culture of informality among the population and also by the lack of knowledge of the benefits of having a registered title."[68] This argument is behind its observation that "a large percentage of the formalized population would not be placing any additional value on the fact that their ownership title has been properly purged and registered."[69] Also in line with this ignorance argument, the titling agency (*Comisión para la Formalización de la Propiedad Informal* ("COFOPRI")) has been carrying out an extensive information campaign with the aim of "preventing the great effort at formalization from being wasted because a register that is not updated is of little use and everything seems to indicate that, once the COFOPRI title has been registered, a large proportion of the beneficiaries have not registered second transactions."[70]

It is, however, doubtful whether it is owners who underestimate the value of titles or, rather, title suppliers who overestimate it. It is hard to estimate true values in a dynamic context with possible collective-action effects, but data on credit suggest the latter:

> No important differences are noted for each type of title certificate, except for a slightly higher degree of approval of Cofopri applications (96%). . . . [nor] a higher use of the ownership title in access to credit, because this seems to be linked more to the applicant's payment capacity than to the holding of guarantees for the financial institution. The results show that the probability

65. RICHARD WEBB, DIETHER W. BEUERMANN & CARLA REVILLA, LA CONSTRUCCIÓN DEL DERECHO DE PROPIEDAD: EL CASO DE LOS ASENTIMIENTOS HUMANOS EN EL PERÚ (2006) (Peru).

66. Carrie B. Kerekes & Claudia R. Williamson, *Propertyless in Peru, Even with a Government Land Title*, 69 AM. J. ECON. & SOC. 1011 (2010).

67. FELIPE MORRIS GUERINONI, LA FORMALIZACIÓN DE LA PROPIEDAD EN EL PERÚ: DESVELANDO EL MISTERIO 20 (2004) (Peru), http://www.urbe.edu/UDWLibrary/InfoBook.do?id=53228.

68. *Id.*

69. *Id.*

70. *Id.* at 21.

> of approval of applications for loans is similar for those having a Cofopri title as for those having no ownership document as the two groups gained access to formal sources in the same proportion.[71]

What did increase slowly was the number of mortgages registered (between 4.18 and 5.59 percent, a tiny percentage considering that only 76,272 mortgages had been registered by the end of 2003 out of a total of 1,824,087 formalized parcels, for which 1,364,434 titles had been granted).[72] But it is unknown whether these mortgages effectively reduced the interest rate on the loans. More importantly, most of their lenders were public firms. According to Miranda:

> [A]fter six years work and more than one million registered land titles, . . . [most credit] is from the Banco de Materiales, a government credit system that provides credit to those with secure incomes and which is not based on those who have formal titles. There is not one private bank giving mortgage credit warranted by the titles registered.[73]

These failures in subsequent transactions and mortgages have been blamed on the rising prices of notarial intervention.[74] However, even if notaries do make formalization more expensive, the problems with subsequent transactions and mortgages arose prior to the reintroduction of notarial privileges in 2002 and 2004. To make things worse, in later years, COFOPRI managers resigned amid allegations of prevalent corruption, including the hiring of thousands of political cronies and the sale of public land to friends at nominal prices.[75]

CONCLUDING REMARKS: DOES INFORMALITY CAUSE POVERTY, OR IS IT A CONSEQUENCE?

Policies promoting titling and formalization efforts have become part of the conventional wisdom for fighting poverty. These efforts are grounded on the dual assumptions that the poor are poor because

71. *Id.* at 23–24.

72. *Id.* 98–99.

73. Óscar Miranda, *Cofopri fue infectado por la corrupción*, PERÚ 21, Aug. 31, 2010, at 263 (Peru), http://laantorchaeducativa2010.blogspot.com.es/2011/10/.

74. LA GUERRA DE LOS NOTARIOS, *supra* note 63.

75. Miranda, *supra* note 73.

they are informal and that their informality is caused by high formalization costs. The argument goes that, as the poor cannot afford the fees required to register their land and their businesses, they lose economic opportunities. In particular, they are unable to use their land as collateral for credit, and their businesses cannot rely on courts to enforce their contracts. The solution is simple: provide the poor with affordable—often meaning free or at least subsidized—formalization services, in the hope that this will increase the value of their land, allow them to use it as collateral, and expand their businesses.

However, these universal and affordable formalization policies may be misguided if causation between poverty and informality runs in the opposite direction—that is, the poor remain informal because they are poor. This might well be the case because their assets are of low value and their economic activities are of a personal nature; therefore, for most poor people the benefits of formalization are below its cost. According to this argument, informality is prevalent among the poor because formalization processes are costly, which makes access to all dimensions of legality—including the definition of property rights, written contracts, and litigation—less efficient for those who own fewer assets or subscribe smaller contracts. These costs of formality are real social costs, not arbitrary fees, and may well be higher than the benefits that the poor and society as a whole would obtain with formalization if the poor lack the impersonal trade opportunities for which formalization is really valuable. Individuals thus tend to formalize their activity more or less fully depending on their wealth: very poor people are not even registered as individuals; poor people are registered as individuals, but their assets are not valuable enough for their rights or titles to figure in a public record; and wealthier people have more valuable assets that are recorded in a more formal way. If registries in developing countries mainly serve the elite, far from being a problem, this is often an efficient outcome. Even though it does not justify their high costs and low quality, it is consistent with the priority of demand and value over costs. (Moreover, it might also be fairer than spending scarce tax or aid money on useless titling or formalization efforts.)

Consequently, focusing formalization efforts on the poor may well be inefficient, and governments and international aid organizations often invest too much in formalization projects and structure them badly, aiming for simple but, in the end, useless solutions. In fact,

some formalization efforts may be no more than another way of exploiting the poorest—for example, those without land to entitle—for the benefit, not of those who have some land, but mainly of the suppliers of formalization solutions. It is also inevitable that many of these projects become unsustainable: more often than not it is efficient not to sustain them and their inefficiency may even have been clear from the beginning.[76]

Even if in many countries improving formalization institutions and lowering formalization costs is often a worthy objective, when properly based on costs and benefits, formalization policies should not focus on the poor. They should instead aim to improve registries for those already using them, focusing on improving the value of their services. And user fees should be levied so that charging beneficiaries at least part of the cost of formalization from the very beginning will provide a test on the social balance of costs and benefits and ensure sustainability.[77] Such policies would benefit the poor by achieving more efficient formalization, via lower costs or greater benefits, which would increase economic growth and lead some of the poor to formalize.

This argument is applicable to both land and businesses. Firms tend to be informal when they are small and not the other way around. To the extent that some formalization costs are fixed with the size of the firm, it will be socially optimal that smaller firms remain informal and choose simpler contractual structures. This may be especially important when considering that formalization decisions influence the costs of public enforcement. For example, to the extent that incorporation facilitates tax evasion, easing the administrative burden of very small companies therefore increases the fixed costs of tax enforcement on the activities now channeled through these companies. From this perspective, policies that focus on reducing the regulatory burden (not mainly the initial but the recurrent costs) of smaller companies are misguided to the extent that, relative to their size, at least the smallest ones may impose greater costs on society.

Furthermore, protecting the poor by legal means often conflicts with developing the institutions needed for a market economy. In particular, a legal foundation for a market economy is equal treatment

76. LAND AND BUSINESS FORMALIZATION, *supra* note 3, at 42.

77. As argued in ARRUÑADA, *supra* note 6, at 193–97.

for all citizens, yet policies that "empower the poor" often include laws targeted to favor them.[78] For instance, governments are encouraged not only to provide land registration but also to recognize land occupants as owners, as well as provide advice and support to new small businesses, which distorts competition between firms of different sizes and promotes production at an inefficiently low scale. Governments are even advised to encourage workers' unionization efforts, as if unions did not have a dubious record in helping the really poor. And this is not to argue against redistribution to the poor in society. The criticism goes against implementing this redistribution by establishing unequal legal rights that at best benefit the poorest owners and not the poorest citizens.

78. FROM CONCEPTS TO ASSESSMENT, *supra* note 3, at 5–6.

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FORMALIZATION, POSSESSION, AND OWNERSHIP

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This paper is a comment on the work of Hernando de Soto, who has done so much to highlight the importance of property rights, especially in the context of what I will call migrant communities within developing countries. These are the shantytowns of Peru, the *favelas* of Brazil, and the *bidonvilles* of Haiti. De Soto characterizes these communities as "extralegal zones." They consist, in his words, of "modest homes cramped together on city perimeters, a myriad of workshops in their midst, armies of vendors hawking their wares on the streets, and countless crisscrossing minibus lines."[1] I am interested in de Soto's work on these migrant communities for two reasons, which are related.

First, de Soto's work sheds important light on a problem in property theory with which I have been concerned for several years. This has to do with the distinction between two different ways for allocating resources among humans living together in some kind of organized society—possession and ownership.[2] There is a broad divide among property scholars between "Humeans" who see informal possessory rights as the origins of property, and "Hobbesians" who see the State as the critical institution that gives rise to claims of property.[3] De Soto's migrant communities are organized according to claims of possession that are extra-legal, that is, they are not sanctioned by the State. So they provide an important piece of data bearing on the causal debate about the origins of property.

Second, de Soto's work has spawned a worldwide reform effort that seeks to jump start economic growth in developing countries by

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1. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 78–79 (2000) [hereinafter DE SOTO, MYSTERY].

2. Thomas Merrill, *Ownership and Possession*, *in* LAW AND ECONOMICS OF POSSESSION (Yun-chien Chang ed., 2015); Thomas W. Merrill, *Property and the Right to Exclude II*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 1, 13–21 (2014).

3. The distinction is often expressed in terms of whether property emerges "bottom up" (evolving out of social norms) or "top down" (is imposed by the State). *See* James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009); Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331 (2002).

formalizing the informal possessory rights that exist in migrant communities, that is, by transforming extra-legal possessory rights into legal property rights.[4] The primary rationale for such formalization programs is to make these claims eligible for use as collateral for loans, which in turn will provide the capital needed to build structures, obtain equipment and inventory, and enter the world of modern capitalism. This idea has been tremendously influential with international aid agencies and the World Bank and has been adopted, in one form or another, by a large number of developing countries throughout the world.[5] The results have largely been disappointing.[6] Once we pinpoint the key information-cost distinction between systems that allocate resources by possession and those that use ownership, we can come to an understanding of why the formalization projects have largely failed in their stated objectives. This understanding also points toward alternative reforms that may have greater chances of success.

I. THE THEORETICAL ISSUE

Possession is a social concept. It refers to a claim by a person of exclusive control of a physical object. It is grounded in actual control. One cannot gain possession simply by pointing to an object or taking a picture of it. Once actual control is obtained, however, possession does not require continuous control. It is sufficient to mark the object in such a way as to signal to others that one intends to retain control of the object.

The institution of possession is a universal feature of all known human societies, including hunter-gatherer bands. The objects eligible for claims of possession vary considerably from one society to another, as do the marks that signal to others that an object is possessed. No matter how claims of possession are communicated, in reasonably stable human societies there is a strong disposition to respect possession established by others. To be sure, there is variation here too, as some societies have higher rates of thievery than

4. Klaus Deininger & Gershon Feder, *Land Registration, Governance, and Development: Evidence and Implications for Policy*, 24 WORLD BANK RES. OBSERVER 233 (2009).

5. For further discussion of the formalization projects, see *infra* Part II.

6. *See infra* notes 13–14 and accompanying text.

others and there is often, unfortunately, a marked fall-off in respect for possession by out-groups relative to in-groups. But respect for possession exists, to some degree, even within bands of thieves.[7]

Ownership is a legal concept. Like possession, it refers to control over things. Ownership, however, refers to a legally enforceable right to exclusive control of a thing. In a society with a functioning legal system, ownership trumps possession. Ownership is also broader than possession because it is not limited to physical objects. One can own intellectual property rights, shares in companies, security interests, money, and lots of other things that are intangible.

The main point I would emphasize for present purposes is that every moderately sophisticated society with a functioning legal system will rely on both possession and ownership in allocating rights to resources. It is a mistake to think of possession as some rudimentary state of affairs that prevails in primitive societies but which is eventually replaced by ownership as development takes off. Even in the most advanced societies, possession is by far the most frequently used basis for allocating claims to resources.

In navigating through everyday life, for example, we make thousands of judgments about whether particular resources are claimed or unclaimed. Think of our response to cars in a parking lot, houses along a street, coats on a coat-rack, and goods piled up on the sidewalk in front of a shop. We make judgments about whether these objects are claimed or unclaimed based on perceptions about whether someone has signaled an intention to retain possession of the object in question. We do not ponder whether they are owned, and if so, by whom and in what sort of title. Even when we engage in transactions, most of the time we rely on possession as a sufficient basis for the right to engage in exchange. This applies to nearly all transactions in relatively low-valued goods, like food, clothing, books, and so forth. When you buy a bottle of water from a street vendor, you do not stop to ponder whether the vendor owns the bottles of water. You assume, based on his possession of the bottles, that he has the right to sell them.

Ownership, in contrast, comes into play only in relatively specialized contexts. These are typically high-stakes situations, such as

7. *See* Thomas W. Merrill, *Possession as a Natural Right*, 9 N.Y.U. J.L. & LIBERTY 345, 356–63 (2015) (and sources cited).

resolving a boundary dispute over land, establishing whether the seller has good title when buying a house or car, or determining whether to loan money to someone secured by collateral.

The reason why possession is used most of the time and ownership comes into play only exceptionally is primarily a matter of information costs. Determinations of possession are based on physical cues about objects that are processed by our brains almost instantaneously and unconsciously. They exist in the realm of cognition that Daniel Kahneman has called "system 1" or "thinking fast."[8] Somehow we learn these cues at a very young age, just by observing how people interact with objects of value.

Determinations of ownership, in contrast, entail much higher information costs. In order to identify someone as the "owner" of a thing it is necessary to trace its provenance in order to ascertain that the relevant rights (paradigmatically to exclude others) have not previously been transferred to someone else.[9] Such a determination may entail commissioning a survey, finding documents memorializing past transactions, figuring out what these documents mean, perhaps consulting some kind of registry of rights, possibly hiring a lawyer to sort all this out, and maybe even filing a lawsuit. Even the most streamlined of these enquiries requires a conscious effort to gather information and decide what it means. Determining ownership is a quintessential example of what Kahneman calls "system 2" cognition or "thinking slow."[10]

Once we see that possession is an informationally cheap way of allocating rights to resources, whereas ownership is an informationally expensive way of allocating resources, we can see why possession remains the predominate principle for most everyday purposes. And this is true in even the most sophisticated societies with the most elaborate systems of property rights and enforcement of those rights.

What remains controversial about this account of possession and its relation to ownership is a question of causation. My view, which you could call neo-Humean or perhaps a sociobiological view, is that there is something we can call the "possession instinct" which is

8. DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011).

9. Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401 (2003).

10. KAHNEMAN, *supra* note 8.

hard wired in human psychology.[11] People everywhere have a natural proclivity to identify certain objects as being possessed by others, and a natural proclivity to respect possession established by others. Obviously, it is not all biological; the possession instinct is significantly mediated by culture and by individual learning. But if a group of strangers, each from a different culture, were stranded on a desert island, they would quickly develop a normative understanding of which objects or places on the island belong to whom, and there would be widespread respect for this understanding.

The opposing view, which has been informally advanced on several occasions in response to my views, can be called neo-Hobbesian. This is the view that possession only works as a basis for allocating resources because it is backstopped by the power of the State. Take one of my favorite examples of the use of possession in the modern world—the luggage carousel at an international airport. People from all over the world and all sorts of cultural backgrounds understand that they are entitled to take only the suitcase uniquely marked as their own; they understand they are not to interfere with suitcases marked as belonging to someone else. The process works the same at airports all over the world and most of the time operates without any official checking of claim tags, once bags are retrieved.

To which the neo-Hobbesians respond: The system of suitcase allocation works only because everyone understands that someone, somewhere, is the legal owner of each of these suitcases. Particular suitcases may be borrowed, or may even be stolen. But each is owned by someone. We learn in our youth that taking property owned by someone else is a crime, punishable by the State. So we desist from taking a suitcase that we perceive is not our own, because we fear the power of the State. In this particular example, possession may serve up the cues as to who is entitled to what, but it is functioning simply as a proxy for ownership. Ownership supplies the underlying explanation for the respect for possession.[12]

What I like about de Soto's account of the migrant communities in the developing world is that it presents a kind of natural experiment for testing these rival theories. As he describes the circumstances of

11. Merrill, *supra* note 7.

12. *Cf.* Carol M. Rose, *The Law is Nine-Tenths of Possession: An Adage Turned on Its Head*, *in* 40 LAW AND ECONOMICS OF POSSESSION (Yun-chien Change ed., 2015) (arguing that possession is best explained by "acting like an owner").

these communities, they are essentially outlaws from the perspective of the formal system of property rights. The people living in these communities inhabit handmade structures built on land they do not own. They operate businesses they are not licensed to operate. They commute on minibuses that have no franchises authorizing them to provide service. Yet, as de Soto makes emphatically clear, these are bustling communities, filled with entrepreneurship and energy.[13] They constitute a major part of the wealth of the countries in which they operate. De Soto's point is that they could do even better if they had formal property rights; if they could join the system of private property from which they have been excluded.[14]

From my perspective, the migrant communities that de Soto describes operate on the principle of possession—they allocate resources based on perceptions of possession and respect for possession established by others. Moreover—and this is the critical point in terms of the causation debate—they do so in a context where everyone knows they do not have ownership rights. The principle of possession here cannot be explained as a proxy for ownership, because everyone knows these communities are not grounded in formal property rights. They are a real world instantiation of my hypothesis about a group of people marooned on a desert island. There can be no claim that the millions of people living in these migrant communities respect possession because it is backstopped by law and the power of the State. They respect possession because it is the natural human thing to do.

II. THE FAILED FORMALIZATION PROJECT

The distinction between possession and ownership, and the recognition of the radical difference in the information costs associated with these two ways of allocating resources, also has important implications for the fate of de Soto's key policy proposal, which is to formalize the informal rights to resources that people have in migrant communities in developing nations. A major reason for formalizing these rights of possession, de Soto argues, is to create a foundation for

13. HERNANDO DE SOTO, THE OTHER PATH 17–127 (1989) [hereinafter DE SOTO, THE OTHER PATH].

14. *See* DE SOTO, MYSTERY, *supra* note 1, at 15–37.

secured lending based on the collateral in these resources. This injection of capital, he argues, would allow the occupants of these migrant communities to start or expand a business, or otherwise improve these resources, which would jump start economic growth and promote greater equality.[15]

The evidence to date indicates that this formalization project, where it has been carried out, has generally failed to achieve its announced objective. A number of country-specific case studies suggest that the urban poor who receive these formalized rights do not use them to obtain secured loans. Instead, once formalization occurs, they frequently cash out by selling to larger landholders or developers.[16] Perhaps most critically, in light of the argument de Soto advanced in support of formalization, a comprehensive review of the literature by two World Bank researchers reports that evidence of improved access to credit "is scant."[17]

There are undoubtedly a variety of explanations for why formalization projects have failed to achieve economic lift-off in developing countries. For example, if formal titles are distributed in such a way that they conflict with customary rights, this can give rise to conflict between indigenous populations and formal rights holders.[18] Or, if state institutions are too weak or corrupt to enforce formal titles effectively, control over resources may revert to informal rights holders.[19] These sorts of explanations, however, do not seem to account for the failure of formalization to stimulate secured lending in the migrant communities that have emerged in and around major cities in developing countries. With respect to these communities, there is no conflict between the person in possession and the person with newly formalized title—they are one and the same. And as de Soto

15. *See id.* at 153–205.

16. BENITO ARRUÑADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 148–50 (2012); Rashmi Dyal-Chand, *Leaving the Body of Property Law? Meltdowns, Land Rushes, and Failed Economic Development*, *in* HERNANDO DE SOTO AND PROPERTY IN A MARKET ECONOMY 90–91 (B. Barros ed., 2010); John Gravois, *The De Soto Delusion*, SLATE (Jan. 29, 2006), http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/2005/01/the_de_soto_delusion.html.

17. Deininger & Feder, *supra* note 4; *see also* NIALL FERGUSON, THE ASCENT OF MONEY 278 (2008) (citing evidence that only four percent of squatters given formalized title in Quilmes, Argentina managed to secure a mortgage).

18. Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1038–42 (2006).

19. *Id.* at 1042–45.

points out, most of the countries where these migrant communities are located have already established systems of land title registration and enforcement—which work tolerably well for the elite who own and trade in conventional property rights.[20]

There is an alternative and more parsimonious explanation for the failure of formalization to stimulate secured lending in migrant communities. Once we understand the distinction between possession and ownership, and the information-cost reasons for making possession the general default principle in allocating resources, the failure of formalization to induce secured lending should not be surprising. The most general explanation is that the rights in question are not sufficiently valuable to justify the higher information costs associated with determining ownership of property. More specifically, the failure of these formalized rights to stimulate secured lending can be pinpointed to two factors.

First, a bank or other lender will enter into a secured loan only if the expected return on the loan exceeds the costs of establishing that the borrower has the relevant ownership rights to provide collateral for the loan. From de Soto's account of migrant communities, it seems clear that the original value of the individual formalized rights—to a small plot of land improved by a homemade shack for example—will be small. Thus, at least initially, lenders may conclude that the return on entering into a secured loan will be too small to justify the costs of verifying title to the collateral.

Let me elaborate. One can characterize the decision by a bank or other lender to engage in secured lending with a simple formula. The bank makes money by charging interest on loans that is higher than its cost of capital. This is known as the interest rate spread. The amount of money the bank will make on any particular loan is a function of the spread times the principal value of the loan. Suppose the spread is two percent and the principal value of the loan is ten thousand dollars. The expected return is .02 times $10,000 or $2,000. (I ignore the complication of discounting the expected return over time and so forth.) In deciding whether to enter into the loan, the bank will compare this expected return to various costs it will incur in making the loan, such as origination costs, collection costs,

20. *See* DE SOTO, MYSTERY, *supra* note 1, at 73–74, 153.

the risk of loss on default, and so forth. For present purposes, I will focus on only one cost—the cost of doing a title search.

Suppose, to continue my hypothetical, the cost of a title search is three thousand dollars. On this assumption, the loan, which will generate expected revenue of two thousand dollars, will not be made. Clearly this will be true if the bank bears the cost of verifying title to the collateral. It is also not likely to be made if the bank shifts the cost of verifying title to the collateral onto the borrower, through an origination fee. The borrower would have to earn a very high rate of return on the borrowed funds, above and beyond the interest payments on the loan, in order to cover the cost of the title search, which I have posited to be three thousand dollars.

The lesson we derive from this simple example is that the decision to engage in secured lending is critically dependent on the principal value of the loan. At a minimum, the principal value of the loan must be large enough to exceed the costs of a title search and the other costs of originating and managing the loan. If the cost of a title search is positive, as it always will be, then the principal value of the loan must be large enough to cover the title search costs. Neither the bank nor the owners of newly formalized plots of land who are the target of the formalization reform effort will be interested in participating in securing lending if the principal value of the loan is too small to cover the costs of verifying title to the collateral.

Some indirect confirmation of this observation is provided by looking at a relatively unusual market for secured lending in the United States—where the collateral takes the form of a lease. There is no conceptual reason why a tenant cannot use her lease as collateral for a loan. Obviously this is uncommon. I have never heard of a residential tenant with a year-to-year lease securing a loan by posting the tenancy as collateral. There are examples of leases being used as collateral in the commercial lending context. Grocery stores, for example, commonly enter into twenty to twenty-five-year leases for the buildings in which they operate, and they have used these leases as collateral for securing revolving lines of credit. Typically, multiple leases are bundled together in a single package of collateral. This makes sense—the more leases that are bundled, the larger the collateral and the bigger the principal amount of the loan. Owners of cooperative apartments are another example. Persons

who buy cooperative apartments today can obtain mortgages to purchase their apartment unit. Technically the assets that secure the mortgage are the shares the unit owner holds in the cooperative corporation. But the only reason the shares have any economic value is because they come with a long-term lease of a particular apartment unit, which is often worth one million dollars or more in a market like New York City.[21]

These examples of leasehold mortgages show that secured lending is nonexistent when the lease has a relatively small value, as would be the case for a short-term residential lease. When the value of the leasehold is large, either because it is a major commercial lease or because it is a very long-term residential lease, we see that secured lending, like magic, appears. I take this as confirmation that secured lending is feasible only when the value of the collateral, and hence the principal amount of the loan, is sufficiently large to justify the costs of performing a title search and the other costs associated with originating and managing the loan.

Second, secured lending works only if there is a credible threat by the lender to foreclose on the collateral if the loan is in default. This is not because lenders have any desire to take possession of the collateral. Taking possession of the collateral is usually a losing proposition for the lender.[22] The reason lenders prefer to make loans secured by collateral is that this gives them enhanced leverage to persuade borrowers to continue making payments on the loan. Such leverage will exist only if the lender has a credible *threat* to foreclose and take possession of the collateral. And the threat to foreclose will be credible only if the costs of foreclosure process are less than the value the collateral will obtain on a sale once it is seized.[23]

Foreclosure of real estate in the United States is expensive, often entailing a judicial hearing and, if the mortgagor does not voluntarily relinquish possession, an eviction procedure carried out by the sheriff's office. Because of various statutory redemption rights, foreclosure is also value destroying—reducing the price the foreclosed-upon

21. *See, e.g.*, Michael H. Schill et al., *The Condominium Versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 36 J. LEGAL STUD. 275, 281 (2007).

22. Ronald Mann, *The Concept of Collateral*, *in* CASES AND MATERIALS ON COMMERCIAL FINANCE (2017).

23. By "costs of the foreclosure process" I refer to the costs of gaining possession of the collateral and selling it to recover some or all of the principal value of the loan.

property can obtain in a sale by as much as forty percent.[24] Foreclosure on delinquent auto loans—it's called repossession in this context—is less costly. Still, it entails using "repo" men to find the vehicle and tow it away in the dead of night, which can lead to conflict or litigation.

In contrast, when we consider a third type of secured lending, the costs of foreclosure are very small. Pawnshops loan money to individuals secured by collateral in the form of personal property, like jewelry, musical instruments, guns, and so forth. The unique aspect of pawnshops is that possession of the collateral is transferred to the shop for the duration of the loan. There are a variety of explanations for this practice, but surely one is that the costs of foreclosure are dramatically reduced when the collateral is already in the hands of the lender. If the borrower defaults, the pawnshop just takes the collateral off the shelf and sells it. If the collateral remains with the borrower, it would be prohibitively expensive, relative to the value of the collateral, to hire a repo man to seize possession of the guitar or engagement ring that secures the loan, even assuming the repo man could gain entrance to the dwelling where these objects are kept.

We can again see that the value of the collateral is critical by comparing the practice of pawnshop lending to other forms of secured lending using personal property as collateral. Various forms of personal property, such as autos, airplanes, and boats, serve as collateral for secured loans. Like guitars and engagement rings, and unlike land, they are moveable and concealable. Yet for these high-valued forms of personal property, the collateral stays with the borrower. The costs of repossession are sufficiently low, relative to the value of the collateral, to make this feasible. The fact that pawnshops insist on a transfer of possession to the lender as a condition for making the loan reflects the relatively high costs of foreclosure relative to the value of the collateral. So the historical experience of pawnshops provides some confirmation that low-valued collateral will not support a robust system of secured lending—unless possession of the collateral is transferred to the lender before the loan is made. And of course, in the case of the plots of land and the fixtures described by de Soto, transfer of possession to the lender in advance

24. Mann, *supra* note 22 (citing statistics on commercial real estate loans indicating that "a typical foreclosure sale results in a loss to the lender of about 40% of its original loan amount").

of the loan would defeat the very purpose of generating a market in secured credit to jump start economic growth.

There is another, cultural reason why the threat of foreclosure is unlikely to be credible with respect to newly formalized land. Foreclosure entails a willingness to allow ownership rights to trump possessory rights. If the dominant ethos of the squatter community is possession, it may be difficult to accept the idea that a lender can oust a possessor for nonpayment of a loan. There is a parallel here to the behavior of the so-called claims associations in the United States in the nineteenth century, which refused to allow squatters to be displaced by persons who had purchased land in formal land sales.[25] Over time, it is reasonable to think that the ethos of the squatter community will give way to a sensibility that recognizes the necessity of periodic foreclosures of debtors who, for whatever reasons, cannot repay the loan. But it is likely to take some time and experience with the process of secured lending and periodic foreclosure to develop such an ethos.

III. OTHER PATHS

I am highly sympathetic to the basic reform strategy outlined by de Soto, which is to bring migrant communities into the world of modern capitalism by enhancing the security of their rights to material possessions, and giving them access to credit markets so that they can engage in small scale entrepreneurial enterprises. If formalization of possessory rights does not work to yield these results, are there other ideas that might work better?

Perhaps the most widespread proposal for creating enhanced opportunities for access to capital among the world's poor goes by the name microfinance. Although there are many variations, the root idea is to establish nonprofit entities, which obtain funding from developed countries or international organizations and then make small unsecured loans to individuals in developing countries for purposes of improving land, starting businesses, and so forth.[26] These have achieved mixed success. The literature about the promise and

25. DE SOTO, MYSTERY, *supra* note 1, at 108–48.

26. *See generally* Katherine Hunt, *The Law and Economics of Microfinance*, 33 J. L. & COM. 1 (2014).

perils of microfinance is vast. There have been some ingenious proposals for using social pressure to encourage repayment of loans. But because these proposals generally do not entail any modification of property institutions, I have little to say about them.

An alternative that would entail modification of property institutions would be to pursue a formalization strategy, along the lines proposed by de Soto, but on a much more modest basis. Perhaps the central flaw in de Soto's formalization project is that it seeks to leap from possessory rights to property rights in one large bound. A more promising approach might be to start more modestly with formalization of *possessory* rights, rather than trying to transform possessory rights into property rights. De Soto himself has shown that in some of the shantytowns and favelas he describes, the possessors post signs on their holdings attesting to their possessory rights. He has also developed evidence that possessory rights are transferred within these communities.[27]

This suggests that a more modest reform, with arguably greater prospect of success, would be to create a system of documentary proof of *possession*. The possessors of small plots of land and fixtures would be given official pieces of paper describing and attesting to their possession of a particular plot of land and associated fixtures. Persons having the relevant certificate of possession could call on the State to repel trespassers. Transfers of the certificates would signify a transfer of possession. The State of Minnesota has adopted a program of certificates of possessory title which could serve as a potential model for such a reform.[28]

Legalization of possessory rights in this fashion should enhance the security of these claims by allowing disputes over possession to be resolved through a legal process rather than relying solely on self-help or social pressure. Among other benefits, this would allow household members to leave the family plot during the day to seek employment, rather than require at least one member to remain on the premises to stand guard against usurpers.[29] It would also facilitate the transfer of possessory rights from one claimant to another.

27. *See* DE SOTO, THE OTHER PATH, *supra* note 13, at 25–26.

28. Kimball Foster, *Certificates of Possessory Title: A Sensible Addition to Minnesota's Successful Torrens System*, 40 WM. MITCHELL L. REV. 112 (2013).

29. *See* Erica Field, *Entitled to Work: Urban Property Rights and Labor Supply in Peru*, 122 Q.J. ECON. 1561 (2007).

One could envision such a system of formalized possessory rights evolving into the basis for secured lending, at least on a neighborhood level. Perhaps over time it would evolve into something like full-blown property. At least a Humean can imagine that this would be possible.

Another potential reform would be to encourage the development of firms devoted to compiling credit scores of individuals who participate in the informal economies of migrant communities. Historically, the primary forms of personal lending were based either on the reputation of the borrower as known to the lender or on the posting of collateral to secure the loan. Modern economies (like the United States) have developed a third form: what can be called algorithmic lending. The basic idea here is to gather data on the past behavior of the potential borrower and process it through an algorithm that predicts the probability of repayment of a loan. The most familiar example is credit card borrowing, where the issuance of the card and determination of the credit line is based on an algorithmic analysis of the borrower's historical pattern of behavior in participating in financial transactions, most prominently as distilled through a so-called credit score. Similar techniques are widely used in assessing applicants for purchase money loans for autos, homes, and the like. Recent studies suggest that even peer-to-peer lending, which was originally conceived as an alternative form of finance that would break free of conventional forms of lending, has largely been subsumed by institutions that rely heavily on credit scores and algorithmic analysis of borrower characteristics.[30]

All of which suggests that developing economies might do much to enhance access to finance capital by promoting (or even subsidizing) the emergence of firms devoted to compiling the data needed to develop algorithmic lending. The development of such an industry requires that there be some method of compiling information about the past behavior of the borrower in paying off various obligations, which in turn can be synthesized into a credit score. If a person has a history of consistent repayment of obligations, their credit score goes up, resulting in greater access to credit from various sources. The system works only if information can be shared among lenders about the past performance of borrowers, which requires some

30. Kathryn Judge, *The Future of Direct Finance: The Diverging Paths of Peer-to-Peer Lending and Kickstarter*, 50 WAKE FOREST L. REV. 603 (2015).

assurance of confidentiality. This in turn requires the enactment and enforcement of appropriate legislation allowing sharing of information while protecting against unauthorized disclosure. If appropriate legislation providing these assurances can be adopted, the information can be distributed digitally, at much lower cost than is associated with verifying ownership of collateral and engaging in the process of foreclosure.

The trick in extending algorithmic lending to the urban poor in developing countries lies in getting them into the system of making purchases using credit. Obviously, a legal infrastructure must be in place, which permits the assembly of information about individual behavior with respect to credit along with appropriate assurances of confidentiality. If this is established, then perhaps the poor could start with simple debit cards, based on prepaid credit balances. Once individuals have established a history of proper usage of such debit cards, banks might be willing to offer them credit cards with small lines of credit. Successful management of the credit card would lead to larger and larger credit lines, to the point where the borrower would be able to finance a small shop or other entrepreneurial venture. None of this will be easy for developing countries to achieve. But the information-cost demands should be much lower than that associated with secured lending, at least when the value of the collateral is relatively small relative to the value of the loan.

CONCLUSION

Hernando de Soto's pioneering work on migrant communities in developing countries provides important insights into the relationship between possession and ownership. His studies help us see that an extensive system of allocating resources by possession occurs on a widespread basis in contexts where possessory rights cannot be regarded as proxies for ownership. His advocacy of formalization of possessory rights into ownership, in order to jump-start secured lending to the individuals living in these migrant communities, has largely failed. Once we understand that the roots of this failure lie in the very high information costs associated with systems of ownership, we are in a better position to identify alternative strategies for making capital more widely available to persons in these communities.

FREEDOM IN PROPERTY: FROM THE MAGNA CARTA TO LAND REFORM IN JAMAICA

JANET BUSH HANDY*

INTRODUCTION

The Brigham-Kanner Property Rights Conference provides a unique opportunity for members of the practicing bar and academia to explore recent developments in the laws that affect property rights. In 2016, this opportunity was expanded to consider international themes with the joint sponsorship of William & Mary Law School and the Grotius Centre of International Legal Studies at the Thirteenth Annual Brigham-Kanner Property Rights Conference at the Peace Palace in The Hague. The recent law developments herein addressed concern the continuing evolution of land reforms in Jamaica and the lessons that they provide about the continuing importance of the work of this year's Brigham-Kanner Prize winner, Hernando de Soto. This essay attempts to place those land reform efforts in a historical context. A short essay can only skim the surface of a history of people who have faced untold challenges, but it is offered as a tribute to those who end their national pledge with an invocation of hope, asking that Jamaica may "increase in beauty, fellowship and prosperity, and play her part in advancing the welfare of the whole human race."[1]

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1. The Jamaican National Pledge in its entirety:

> Before God and all mankind, I pledge the love and loyalty of my heart, the wisdom and courage of my mind, the strength and vigour of my body in the service of my fellow citizens; I promise to stand up for Justice, Brotherhood and Peace, to work diligently and creatively, to think generously and honestly, so that

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In August 2016, a celebration was held on the lawns of Jamaica House, Saint Andrews in honor of two hundred Jamaicans being presented with titles to land under a program administered by the Land Administration and Management Programme and the Development Bank of Jamaica.[2] Except for the lack of formal title, the lands being conveyed were lands which "belonged" to these long-term residents of the land. Long before the titles were delivered, the homes and yards were distinguished by their individually selected combinations of fruit trees and other expressions of the families within. Even strangers walking in their neighborhoods would have been able to distinguish the boundaries of the different home parcels.

This ability to identify the boundaries of homesites in areas where those sites were not delineated in formal land registries is a worldwide phenomenon. The pioneering economist, Hernando de Soto, illustrates this reality by his much repeated story of how he was able to distinguish the property boundaries during a walk in Bali, because each time he "crossed from one farm to another, a different dog barked."[3] If in July of 2016, de Soto had walked past the homes of these two hundred Jamaican citizens, he would have recognized that Jamaica, like Bali, was "one of the most beautiful places on earth" and that even without titles, the people of both islands had created spaces which were uniquely their own, which even the neighborhood dogs could differentiate.[4] Until the title celebration, these two hundred people of Jamaica had operated with only loose extralegal property arrangements. Under such loose controls, the

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> Jamaica may, under God, increase in beauty, fellowship and prosperity, and play her part in advancing the welfare of the whole human race.

National Pledge, *Anthem & Pledge*, JAM. INFO. SERV., http://jis.gov.jm/information/anthem-pledge/ (last visited July 10, 2017).

2. *Holness Tells Land Title Owners to Build 'Bigger Houses,'* JAM. GLEANER (Aug. 24, 2016), http://jamaica-gleaner.com/article/lead-stories/20160824/holness-tells-land-title-owners-build-bigger-houses [hereinafter *Bigger Houses*].

3. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 163 (2000).

4. Hernando de Soto, *Listening to the Barking Dogs: Property Law Against Poverty in the Non-West*, CATO INST. (originally appearing in Hernando de Soto, *Listening to the Barking Dogs: Property Law Against Poverty in the Non-West*, 41 FOCAAL-EUROPEAN J. OF ANTHROPOLOGY (2002)), https://www.cato.org/publications/commentary/listening-barking-dogs-property-law-against-poverty-nonwest1.

land was an asset without "the fungibility, bureaucratic machinery and network required to produce capital."[5]

During the celebration, Prime Minister Andrew Holness of Jamaica recognized the limitations of this loose extralegal system when he proclaimed:

> Your title is an asset that can be used to secure your future, and that of your children . . . . In fact, it (land title) changes the whole profile of a family and provides a foundation on which to build dreams and goals of a better, more prosperous life. Your title can be used as collateral for a loan, it can be used in helping you to start a business . . .

The Prime Minister then encouraged the participants, "build a house—build a bigger house."[6]

This celebration of two hundred titles was a recognition that these two hundred properties were an achievement, but they were only a miniscule potion of Jamaica's land ownership issues.

> This has resulted at times, in the lack of security with respect to tenure, low productivity, inability to access credit, abandonment and illegal sale/mortgage of whole or part of the holdings in several instances. It is estimated that there are as many as 50,000 parcels of land in Housing Schemes and Land Settlements for which titles have not been issued.[7]

Jamaica's current attempts at land reform began in 2000 with the creation of the National Land Agency through the Land Administration and Management Programme ("LAMP"). LAMP's objective was to streamline the administration and management of land and to create a land-titling system. A key component of this program was the formation of adjudication committees created for the resolution

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5. DE SOTO, *supra* note 3, at 182.

6. *Bigger Houses*, *supra* note 2.

7. Jacqueline daCosta, Land Policy, Administration and Management: Case Study Jamaica, Conference Paper at the Learning Workshop on Land Policy, Administration and Management in the English Speaking Caribbean 21 (Mar. 19–21, 2003), http://www.terrainstitute.org/carib_workshop/pdf/jamaicaces.pdf (supported in part by the Inter-American Development Bank ("IDB"); the U.S. Agency for International Development ("USAID"); the Department for International Development ("DFID"); and the Ministry of Agriculture, Land and Marine Resources, Government of Trinidad and Tobago).

of disputes. Despite the formation of these committees, for the next decade there were numerous disputes, and some even became violent. Most people were still reluctant to participate.[8]

In 2010, LAMP II was implemented to improve the time frame in which titles can be perfected from several years to six months, to reduce the cost, and to establish registries to prevent fraud by providing notification when someone is placing a claim on property that is possessed by someone else.[9] These changes reflect efforts to reform the existing law to better mirror the unique culture and relationship to the land.

The titles for Jamaica's beautiful resort areas and the best agricultural land can be traced from the colonial planters to today's landholders, including international corporations. Those titles can be traced through sales, inheritances, and other formal property transfers, which when challenged could be defended through litigation pursuant to traditional English concepts of land ownership. Apart from these large holdings, much of the land in Jamaica is without the protection of legal title, being held as "family land" or "Treaty Lands"—two distinct categories of land held in common.[10]

Even without titles, certain families have lived and farmed for generations on their family land or Treaty Lands. The Jamaican immigrants who now reside around the world have maintained their ties to this land, usually by sending remittances to ensure that the land is protected and maintained for their families.[11]

While the government sees the land title process as a way to improve life for Jamaican people, many whose lands were held collectively by their family consider the process to be a way to foster the

8. Munsung Koh and Garfield Knight, LAMP II: A Land Registration in Jamaica, Paper at the Twenty-fifth FIG Congress: Engaging the Challenges—Enhancing the Relevance (June 17, 2014), https://www.fig.net/resources/proceedings/fig_proceedings/fig2014/papers/ts01c/TS01C_koh_7075.pdf.

9. Garfield Myers, *LAMP Faster, Cheaper Means of Getting Titles*, JAM. OBSERVER, July 25, 2010, http://www.jamaicaobserver.com/news/LAMP-faster,-cheaper-means-of-getting-titles.

10. Jean Besson, History, Land and Culture in the English-Speaking Caribbean, Keynote Paper, Conference on Land Policy, Administration and Management for the English-Speaking Caribbean, held by the Land Tenure Ctr., Univ. of London & Dev. Alternatives, Inc. 15–16 (April 24, 2003), http://pdf.usaid.gov/pdf_docs/Pnadc122.pdf.

11. Jean Besson, Maroons, Free Villagers and 'Squatters' in the Development of Independent Jamaica, Conference Paper at Fifty Years of Jamaican Independence: Developments and Impacts, held by the Inst. for the Study of the Americas, Univ. of London (Feb. 10, 2012), http://sas-space.sas.ac.uk/6506/1/Jamaica%2050th%20FINAL%20VERSION%20for%20ISA%20Besson.pdf.

breaking of family ties to the land and to each other. In undertaking the current adjustments to the initial efforts of land reform, the Jamaican people are attempting to find ways to allow a new system of titles to recognize these collective forms of ownership. A first step in this process is to recognize the history of how these collective ownerships developed. While the history of each form of title is vital to the current process, the history of the Treaty Lands provides important insights into how the concepts of freedom and property ownership reflected in the Magna Carta and the Charter of the Forest have developed into a framework unique to Jamaica.

The Spanish were the first European culture to exert dominion over the island of Jamaica. The Spanish initially attempted to utilize indigenous people as forced laborers. When Christopher Columbus visited the island in 1494, native peoples, with both Arawak and Tainos heritage, populated the island. It is estimated that there may have been as many as five hundred thousand to six hundred thousand living on the island.[12] Over the next one hundred and fifty years, the Arawaks were decimated; many died as a result of the Spanish efforts to enslave the native peoples, and survivors were killed by European diseases.[13]

As the numbers of Arawaks diminished, the Spanish began to enslave people in West Africa to be imported for slave labor on Jamaica. It is important to acknowledge "that no African slaves were removed from Africa, only African people were removed. They were blacksmiths, farmers, fishers, priests, members of royal families, musicians, soldiers, and traders. They were captured against their wills and then enslaved in the Caribbean and Americas."[14] Some of these people were able to escape the brutal life of slavery by fleeing to the remote mountains and establishing communities. The Spanish referred to these people as *cimarrones*.[15]

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12. TAINO: PRE-COLUMBIAN ART AND CULTURE FROM THE CARIBBEAN (Fatima Bercht et al. eds., 1997).

13. *History of Jamaica*, EMBASSY OF JAM.: WASH, D.C., http://embassyofjamaica.org/ABOUT history.htm (last visited July 10, 2017).

14. Molefi Kete Asante, *The Ideology of Racial Hiearchy [sic] and the Construction of the European Slave Trade* (May 14, 2009), http://www.asante.net/articles/14/the-ideology-of-racial -hiearchy-and-the-construction-of-the-european-slave-trade/ (first delivered in Lisbon, Portugal on December, 1998 at an international conference sponsored by UNESCO).

15. ALVIN O. THOMPSON, FLIGHT TO FREEDOM: AFRICAN RUNAWAYS AND MAROONS IN THE AMERICAS 47–48 (2006) ("The Spanish word *cimarrón*, from which the English term Maroon

In 1655, an English force led by Admiral William Penn and General Robert Venables began a conquest of Jamaica. "[F]ollowing the British invasion of the island, Jamaica witnessed a combination of Spanish and African guerrilla forces fighting to expel the invaders. However, the Blacks were not fighting for the Spanish cause; rather, they were fighting to assert and maintain their independence from the British."[16] As the Spaniards realized that their defeat was imminent, they escaped to Cuba, abandoning their property and leaving behind most of the enslaved people. Many of these remaining people joined the previously established *cimarrone* communities as they fled the victorious English taking control of the coastal settlements and towns. Ultimately, the name of these people who had escaped their bondage to live in the mountains of Jamaica evolved from *cimarrone* to Maroons.[17]

After the Spanish were vanquished, English people began to arrive as settlers. In accordance with English law, the settlers considered all of Jamaica to be English land and as such was owned by the Crown. In order to promote the settlement of the remote island, the Crown soon began to identify portions of land which were sold. "The transplantation of such English land law to the British West Indies not only served as an instrument of domination and control but also defined the identity of the colonists as 'English' and, after 1707, as 'British.'"[18] As each area was apportioned and sold, the English title system was imposed, allowing the tracking of titles through sales and other legal exchanges. The Maroons ignored this process and lived in remote areas of the island practicing sustenance farming and hunting.

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is derived, is translated in the Collins Spanish Dictionary as 'wild', 'rough', 'uncouth', and its historical origin is given (wrongly) as 'negro—(Hist) runaway slave, fugitive slave'. Likewise, *The Shorter Oxford English Dictionary* (third edition) defines *Maroon* as 'wild, untamed runaway slave'."). *See also* Kathleen Wilson, *The Performance of Freedom: Maroons and the Colonial Order in Eighteenth-Century Jamaica and the Atlantic Sound*, 66 WM. & MARY Q. 45, 50 (2009).

16. THOMPSON, *supra* note 15, at 82 (citation omitted).

17. The term "Maroon" is used in this article to refer specifically to the people of the specific Jamaican communities, herein discussed, even though "[m]aroonage (escaping slavery and establishing autonomous maroon communities, sometimes in association with slave revolts) typified the entire span of New World slavery and was widespread throughout African America." Besson, *supra* note 10, at 6.

18. *Id.*

The English renewed the importation of slaves for work on the newly acquired land. By the late 1600s the economy was transitioning from the original small farms to rapidly expanding plantations. These plantations were dependent on the work of a continually growing number of enslaved workers. These workers were the survivors of the Middle Passage, who arrived in Jamaica after being captured in Africa and "packed aboard the slave ships, in spaces not much bigger than coffins, chained together in the dark, wet slime of the ship's bottom, chocking in the stench of their own excrement."[19]

The enslaved workers were a key component in the colonial Englishmen's development of the lands of Jamaica. During that process of development, the English colonial people maintained their connections to England and their allegiance to their king. In the laws passed by the legislature of Jamaica and their entreaties to the Crown, these English colonial people recognized the importance of their control of the land and objected to the Crown's strengthening of its rights to the lands of the intestate as a "manifest violation of their rights as Englishmen, depriving them of so essential a part of their liberties."[20] Although they were in Jamaica, they could not "forget that we are Englishmen, and the subjects of our good and gracious prince," thereby claiming the liberties granted by the Magna Carta.[21]

These loyal subjects used the same arguments made in defending their ownership of land in making their claims to "ownership" of the enslaved laborers so vital to the plantation economy. Most of the commonwealth countries used the property rights of the Magna Carta to justify the enslavement of human beings. "One of the fundamental principles of British colonial slave laws was that slaves were regarded as chattels. They could be bought, sold, mortgaged, bequeathed, or liable to be impounded in satisfaction of a debt. This was provided in the laws of the West Indies and in English statutory law."[22]

The characterization of enslaved people as chattel proved problematic in Jamaica, as chattel could be easily separated from the

19. HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 26 (2003).

20. Lee B. Wilson, *A "Manifest Violation" of the Rights of Englishmen: Rights Talk and the Law of Property in Early Eighteenth-Century Jamaica*, 33 L. & Hist. Rev. 543 (2015).

21. *Id.* at 565.

22. Colin Bobb-Semple, *English Common Law, Slavery, and Human Rights*, 13 TEX. WESLEYAN L. REV. 659, 662 (2007).

land, and plantations without the enslaved workforces were worthless. To promote the connection of the plantation with those who were forced to work there, the early planters of Jamaica characterized the enslaved people not as chattel but as "real property." By law in 1696, they created a legal construct to define these men, women, and children as subject to the same rules of ownership as land, including escheat.[23]

By 1722, the plantation economy was entrenched, and the population consisted of eleven slaves for each white colonist.[24] The Maroons lived separately from this system, but their interaction with the enslaved population terrified the English living on Jamaica. The English reported that Maroons were infesting the roads to the east and cutting off communications, enticing slaves to give them food and shelter, and infiltrating the Sunday markets to buy provisions and gunpowder. By the 1730s,

> as the winds of slave revolt blew elsewhere in the Caribbean and desertions, military defeat, and rumors of Cuban aid to the rebels punctuated British efforts to stamp out their "Dangerous Spirit of Liberty," local governors resorted to sending frantic requests for troops to the king, claiming that the "Negroes' rebellion" had proved impossible to quell: "wee [sic] are not in a condition to defend ourselves, the teror [sic] of them [the Maroons] spreads itself everywhere and the ravages and barbarities they commit, have determin'd [sic] several planters to abandon their settlements." . . . Maroons engaged the British "in continuall [sic] and open war . . . . Confident in their great Number and elated their not only resisting but even worsting us they kept no bounds."[25]

Despite increasing numbers of troops sent from England, the situation escalated and the English waged war against the Maroons for five years. The Maroons utilized the mountainous areas of Jamaica to fight from unseen locations, perfecting the art of the ambush (before the word was even known). "After such assaults, Maroon men and women carried off slaves, moveable livestock, ammunition, and people and left behind the carcasses of cattle and pigs,

23. Lee B. Wilson, *supra* note 20, at 568.
24. *Id.* at 568.
25. Kathleen Wilson, *supra* note 15, at 56.

fired sugar mills, and fields."[26] Finally, the English realized that they could not defeat the Maroons, who had perfected the ambush technique to such an extent that survivors complained they never saw their attackers.

> In the end the Maroons proved impossible to quell militarily. Philip Thicknesse's opinion was widely shared: "all the regular troops in Europe, could not have conquered the wild Negroes, by force of arms; and if . . . not wisely given . . . what they contended for, Liberty, they would, in all probability have been, at this day, masters of the whole country."[27]

Recognizing the difficulties of continued warfare, negotiations commenced and the representatives of the Crown met with the representatives of two sets of Maroons. Like the barons at Runnymede,[28] the Maroons met the Crown's representatives in a forest and demanded that their rights be recognized. The Maroons did not have the written heritage that the barons brought to their field. Still they were able to negotiate treaties that recognized the same concepts of freedoms that were fundamental to the Magna Carta. These negotiations were compelled as a result of the military success of the two Maroon Groups, the Leeward Maroons led by Cudjoe and the Winward Maroons led by Grandy Nanny.[29]

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26. *Id.* at 57.

27. *Id.*

28. "The terms of the Magna Carta were negotiated on or near the battlefront during a cessation in an English civil war between King John and rebellious barons. The barons had been driven to the breaking point by John's abusive practices and similar actions by his predecessors." Vincent R. Johnson, *The Ancient Magna Carta and the Modern Rule of Law, 1215–2015*, 47 ST. MARY'S L.J. 1, 4 (2015).

> As one Maroon captain politely explained to planter J. B. Moreton in the 1780s, "king Cudjo . . . very candidly told me, that when the island was taken by the Spaniards, his ancestors would not surrender themselves, but resolved to be free, or perish; and held out so long in the woods, that having killed several of the English, and tired the rest, a treaty of peace was concluded upon; since which time they have been loyal subjects."

Kathleen Wilson, *supra* note 15, at 57.

29. On March 31, 1982 the Right Excellent Nanny of the Maroons was conferred the Order of the National Hero as per Government Notice 23 Jamaica Gazette . . . ." *Nanny of the Maroons*, JAM. INFO. SERV., http://jis.gov.jm/heroes/nanny-of-the-maroons/ (last visited July 10, 2017). Her picture is part of the Jamaican five-hundred-dollar note.

> National heroine, Nanny, stands out in history as the only female among Jamaica's national heroes. She was a leader of the Maroons at the beginning of

At the conclusion of negotiations, a treaty with the Leeward Maroons in 1738 and a treaty with the Windward Maroons in 1739 were consummated by blood oaths. The officer who signed one of the treaties explained he was:

> "obliged to tye myself up, by a Solemn Oath . . ." According to later Maroons, this consisted of the White officer and the Maroon chief mixing their blood with rum in a calabash, from which they both then drank. The treaty thus became for Maroons a "blood treaty" that could not be broken.[30]

Echoing the Magna Carta, the treaties included the following language:

> That the said Captain Cudjoe, the rest of his captains, adherents, and men shall for ever hereafter [live] in a perfect state of freedom and liberty . . . .
> . . . That they shall enjoy and possess, for themselves and posterity for ever, all the lands situate and lying between Trelawney Town and the Cockpits . . . .
> . . . That they shall have liberty to plant the said lands with coffee, cocoa, ginger, tobacco, and cotton, and to breed cattle, hogs, goats, or any other flock, and dispose of the produce or increase of the said commodities to the inhabitants of this island.[31]

And echoing the terms of the Charter of the Forest, which history has diminished by frequently overlooking its fundamental relationship to the Magna Carta, the treaty provided "that they have liberty to hunt where they shall think fit," and when groups of hunters meet "then the hogs [were] to be equally divided between both parties."[32]

> the 18th century and was known by both her people and the British settlers as an outstanding military leader. She became a symbol of unity and strength for her people during times of crisis and was particularly important to them in the fierce fight with the British during the First Maroon War from 1720 to 1739.

The Rt. Excellent Nanny of the Maroons, Bank Notes, BANK OF JAM. http://www.boj.org.jm/currency/currency_banknotes.php.

30. Barbara Klamon Kopytoff, *Colonial Treaty as Sacred Charter of the Jamaican Maroons*, 26 ETHNOHISTORY 45, 49 (1979).

31. *Articles of Pacification with the Maroons of Trelawney Town, Concluded March the first, 1738*, HARV. BUS. SCH., https://cyber.harvard.edu/eon/marroon/treaty.html (last visited Feb. 26, 2016) [hereinafter *Articles of Pacification*].

32. *Id.*

The treaty acknowledged the authority of the king over Jamaica, and the Maroons agreed to join in the defense of Jamaica under British leadership when needed.

The Magna Carta was revoked by the Pope within a year and needed to be reestablished additional times,[33] but despite the efforts of the British to negate the treaties, the Maroons' invocation of the treaties has been continuous.

For the next one hundred years the treaties continued in force. The treaties "enhanced the Maroons' distinctive place for them in the island society, thus emphasizing their uniqueness."[34] During these years, the Jamaican plantation economy continued to be reliant upon the horrors of slavery. Always fearful of a slave revolt, the English developed economic incentives for the armed Maroon community to remain separated from the much larger number of enslaved peoples. The English provided the Maroons with "a source of income in tracking runaway slaves."[35] The treaties "transformed rebels into subjects, allies of the plantation system, and turned former allies—the enslaved—into enemies."[36] Even though a small group of free former enslaved people lived away from plantations, the only people of African descent whose ownership in land on Jamaica was legally recognized were the Maroons. That legal recognition was through the treaties. The land was held collectively by the Maroon community and became known as the Treaty Lands.

When the emancipation process began in 1832, the planters searched for ways to keep the formerly enslaved workers economically dependent on the plantations for work. The Jamaican Maroons continued the collective ownership of their Treaty Lands, providing a model for former slaves who began to assert claims to land, through continued occupation of the lands adjacent to the plantations formerly used by the slaves for sustenance.[37]

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33. Paul Babie, *Magna Carta and the Forest Charter: Two Stories of Property What Will You Be Doing in 2017?*, 94 N.C. L. REV. 1431, 1455 (2016).

34. Kopytoff, *supra* note 30, at 52.

35. *Id.* at 51.

36. Kathleen Wilson, *supra* note 15, at 61.

37. Eleanor Marie Lawrence Brown, *The Blacks Who "Got Their Forty Acres": A Theory of Black West Indian Migrant Asset Acquisition*, 89 N.Y.U. L. REV. 27, 66 (2014) ("In 1672, only seventeen years after the English takeover of Jamaica, an early English governor issued a decree with the force of formal law: Any plantation owner who acquired a new plantation was obligated to allocate individual plots of land to slaves so that the slaves could feed themselves and their families.").

While the communities recognized these lands as belonging to individual families, there were no titles or legally enforceable ownership rights. The first Jamaican people of African descent with individual and legally enforceable titles were those who were able to purchase land in defiance of the law, through the assistance of church groups. In that way, "the missionaries (especially the Baptists) acted as covert intermediaries on the land market between planters and ex-slaves, establishing church-founded village communities."[38]

The Jamaican planters saw any ownership of land by people of African descent as a threat to their ability to continue the plantation economy. Efforts to continue the forced work after emancipation, through a system of forced "apprenticeship," failed and was ended early in 1838.[39] While fighting with the former slaves over squatting and avoidance of title law, they no longer needed the Maroons to play their previous role as slave catchers. The separation of the Maroons from the population of the newly freed slaves no longer served the planters' economic interests. After emancipation, the primary focus was on a separation of classes based primarily on race. The enforcement of this racial separation was undermined by the continuation of a separate Maroon society, free from control of the British, with a proud historic legacy revolving around the continued joint ownership of the Maroon Treaty Lands.

Using the logic that would be repeated throughout the world, the white establishment decided it was time to force the Jamaican Maroons to integrate into the Jamaican society.

In 1842, "[t]he Maroons Land Allotment Act, as it was called, declared all prior Maroon legislation, including the acts ratifying the treaties, to be null and void . . . . and revested the Maroon common lands in the Crown, to be reallocated to individual Maroons."[40]

The Act in 1842 attempted to negate the Maroons' identification of themselves as a people defined by the rights granted in the treaties finalized in the woods of Jamaica. It was this definition as a free people that made the treaties so unacceptable to the establishment that was struggling to establish a post-slavery society based upon the supremacy of a white English class, which was far outnumbered by the people of African descent. Officials justified the unilateral

38. Besson, *supra* note 10, at 9.

39. *Id.*

40. Kopytoff, *supra* note 30, at 53 (citation omitted).

cancellation of the treaties explaining: "[A]n arrangement between a Sovereign and one of his subjects in the shape of a treaty or arrangement (like the celebrated Magna Carta between King John and his Barons) is always liable to such changes as the Sovereign Authority may hereafter from time to time enact . . . ."[41]

The planters failed to recognize that the revocation of the treaties and the revesting of the Treaty Land to the king was no different than an order divesting the English land owners of all of their Jamaican land and revesting it to the king. It is unlikely than any British subject would have presented a similarly cavalier response to such an outrageous rejection of longstanding rights. Responding to such an attack on the rights to their land, white Englishmen would have set forth their grievances in writing.[42]

The lives of the Maroons did not afford the luxury necessary for such learned missives. Instead their response to being advised of the attempted revocation of what they had come to see as their sacred charter was to refuse to believe that such an outrageous act could have taken place. Hearing of the 1842 Act, Maroons protested, viewing the Act "with suspicion and dread, an attempt to injure them, by breaking up their establishment, and taking from them the lands which they hold by the pledge of a treaty, lands on which they were born, and which contain the bones of their ancestors."[43] Instead of following the typical colonial response of continuously pleading for recognition of their rights as Englishman from Parliament or the Crown, the Maroons took another approach to this Allotment Act; they simply refused to comply.

> The new law did not force the Maroons to go along with the division of their lands; rather, it tried to elicit their cooperation. Individual Maroons were themselves to arrange and pay for surveys marking out their small plots. The division was begun, but not completed, in three of the Maroon villages, Charlestown, Moore Town, and Scotts Hill; in the fourth, Accompong Town, it was not even begun. When the Accompong Maroons showed themselves reluctant, and others had not completed the division, the only action the Government took was repeatedly to extend

41. *Id.* at 54.
42. *See, e.g.*, John Dickenson, *Letters from a Farmer in Pennsylvania*, *in* A FARMER (1767).
43. Kopytoff, *supra* note 30, at 56.

> the deadline for complying and eventually to drop the matter entirely. The land not allotted to individuals was then technically revested in the Crown, but the government did not provoke the Maroons by attempting to interfere with their use of it; the Maroons continued to live on the land undisturbed.[44]

Deadlines for the division of the Treaty Land into the forced individual parcels passed without the Maroons taking any steps to comply. Surveyors were chased away by people with machetes. Resistance prevented attempts in 1862 and 1868 to force the creation of individual titles and the payment of taxes. In 1870 mules were confiscated to cover unpaid taxes. Instead of a confrontation, the Maroons allowed the mules to be confiscated. Within days, the Maroons located the livestock and were met with no resistance when they took the mules back to their Treaty Land.[45]

The refusal of the Maroons to acknowledge the validity of the Allotment Act in 1842 and the continuation of that refusal through the twentieth century is understandable as they have continued to believe that "[t]he treaty is not just any treaty . . . It was signed in human blood. To break that treaty they could not just tear up a paper; they would have to tear up human bodies. It just could not happen that the treaty could be broken."[46] Just as the Maroons have resisted the efforts of the Allotment Act, today they resist any effort of the land reform to divide the Treaty Lands.[47]

The 2012 celebration of the Fiftieth Anniversary of Jamaica's independence began with a commemoration of the signing of the 1738 treaty in the Maroon area of Accompong Town, Saint Elizabeth. Speaking on behalf of the government of Jamaica, Governor General Sir Patrick Allen explained,

> Cultural identity is essential for the peaceful cooperation of civilisations [sic]. When people have a strong sense of self-identity through culture, they are more likely to interact peacefully with other cultures, with respect for the diversity of value systems and religious beliefs as well as the tangible aspects of culture.[48]

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44. *Id.* at 55.
45. *Id.* at 57.
46. *Id.* at 59 (citation omitted).
47. *See supra* notes 2–3, 5–7, 11 and accompanying text.
48. Horace Hines, *Maroon celebrations kick starts 'Jamaica 50'*, JAM. OBSERVER, (Jan. 19,

The English history of Jamaica began almost a century before the 1738 treaty, but to begin the 2012 celebration with the recognition of the Maroon treaty was to acknowledge the unique importance of the demand of a people to be recognized as free. It was also an acknowledgement that the treaties retain their relevance in a free Jamaica.

The treaties would be historical relics if it were not for the continued recognition of the Treaty Lands. The land reform of 2000 did not recognize that the treaties continued to define a free people and their relationship to their communal property. Even though the Treaty Lands are a small percentage of all of the land in Jamaica, their importance to all of the people of Jamaica is greater than that percentage. These lands are considered "sacred space and a cultural site in the global networks of modern migrant maroons who return to visit and participate in the annual Myal ritual."[49]

Increasing the number of people of Jamaica having title to their own land and reducing the number of squatters throughout the country are goals which can coexist with the continued communal ownership of the Treaty Lands. The 2010 LAMP II land reform amendments will strengthen the efforts to reach these goals while recognizing the freedom inherent in the continued existence of the Treaty Lands. The improvements reflected in these amendments seek to achieve the results from land ownership that Hernando de Soto has recognized. That impact can be measured by indicia of economic vitality.

The continued importance of the recognition of freedom inherent in the Treaty Lands, however, cannot—and should not—be defined in economic terms alone. The value of that freedom as being greater than economic parameters was recognized by Governor General Sir Patrick Allen's commencement of the independence celebrations with the recognition of the importance of the treaties. Just as the celebration of fifty years of Jamaican independence included recognition of the fundamental freedoms reflected in the treaties, the eight hundredth anniversary of the Magna Carta should have included respect for the fact that 278 years ago (thirty-eight years before a group of affluent white Englishmen gathered in Philadelphia to assert "certain unalienable Rights, that among these are Life, Liberty

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2012), http://www.jamaicaobserver.com/westernnews/Maroon-celebrations-kick-starts--Jamaica-50-_10588223.

49. Besson, *supra* note 10, at 19 (citation omitted).

and the pursuit of Happiness"[50]—freedoms which Americans continue to trace to the Magna Carta) a group of Jamaicans of African descent who had previously escaped the bonds of slavery asserted their freedom to "live in a perfect state of freedom and liberty and That they shall enjoy and possess, for themselves and posterity for ever, all the lands situate and lying between Trelawney Town and the Cockpits."[51]

50. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
51. *Articles of Pacification*, *supra* note 31.

PROPERTY'S ROLE IN THE FUNDAMENTAL POLITICAL STRUCTURE OF NATIONS: THE SOUTHERN AFRICAN EXPERIENCE

HEINZ KLUG*

INTRODUCTION

There is a dominant assumption that private property is a fundamental element in the protection of "all other rights" and serves as a bulwark against oppressive government.[1] Yet, we also recognize that historically there has been an intimate relationship between the power of the State and property, including private property. As the prominent legal realist, Felix S. Cohen, famously argued in his *Dialogues on Private Property*, private property may best be described by the statement:

> To the world:
> Keep off X unless you have my permission, which I may grant or withhold.
> Signed: Private citizen
> Endorsed: The State[2]

While this statement reflects a core element of the relationship between property and the State, its focus is on the relations between people over access to resources. It does not address how the relationship between the State and citizens might be complicated by the State's endorsement of any particular claims to property. This essay will reflect on the case of southern Africa—Botswana, South Africa, and Zimbabwe in particular—to consider the relationship between the State, property, and the fundamental political structure of nations.

Legitimacy—both democratic and constitutional—is a key resource for a State. If the relationship between king and subject was

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1. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (Kermit L. Hall ed., 3d ed. 1992).

2. Felix S. Cohen, *Dialogues on Private Property*, IX RUTGERS L. REV. 357, 374 (1954).

mediated by the recognition of independent rights to property from the Magna Carta onwards, the relationship between the State and different forms of tenure in the post-colonial context—including indigenous, communal, colonial, as well as private ownership and a range of new forms—becomes crucial. In his seminal book, *Citizen and Subject*, Mahmood Mamdani describes the link between land rights and governance in colonial Africa and how the distinction between different forms of property recognized by the State has perpetuated colonial forms of domination in the post-colonial era.[3] Mamdani argues that this distinction gives the colonial State a particular essence—one that lies in its institutional segregation, creating what he terms a "bifurcated state," reflecting the dynamics of direct and indirect rule.[4] In southern Africa this bifurcation was reflected initially in a distinction between private property and communal land and later as a justification, during the colonial period, for the exclusion of the African majority from political participation.[5] While racist ideology would later come to predominate as a rationale for political exclusion, it was the initial exclusion from political citizenship, based on the holding of private property, that served as a rationale for the bifurcated colonial State in the settler colonies of the Cape and Southern Rhodesia.

The relationship between political structure and property is thus embedded in the history of southern Africa. From the dawn of the colonial era, a process of violent dispossession began. It took over two hundred fifty years and culminated in South Africa with the adoption of the Natives Land Act of 1913.[6] That Act created a legal structure that sought both to legitimize the history of dispossession and to prevent the African majority's future access to land. While the pattern of colonial settlement and the creation of African reservations

3. *See* MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM (1996).

4. MAMDANI, *supra* note 3, at 16–18.

5. *See* SOL (SOLOMON TSHEKISHO) PLAATJE, NATIVE LIFE IN SOUTH AFRICA (Longman African Classics 1987) (1916); Sam Moyo, *The Land Question in Southern Africa: A Comparative Review, in* THE LAND QUESTION IN SOUTH AFRICA (Lungisile Ntsebeza & Ruth Hall eds., 2007); BETHUEL SETAI, THE MAKING OF POVERTY IN SOUTH AFRICA (1998).

6. Natives Land Act 27 of 1913 (S. Afr.). *See* William Beinart & Peter Delius, *The Native Land Act of 1913: A Template But Not a Turning Point*, *in* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY (Ben Cousins & Cherryl Walker eds., Jacana Press 2015).

(later called "bantustans" and "homelands" in apartheid South Africa) was repeated in Zimbabwe (formerly Southern Rhodesia), the relationship between land and people in Botswana followed a slightly different pattern because the former British Protectorate, Bechuanaland, was not a settler colony. As a result, most of the arable, rural land in Botswana remained under the control of traditional authorities until after its independence in 1966. At that time the new government began to introduce a series of tenure reforms that both changed the relationship between traditional authorities and land and expanded the area of land available for private ownership. While there are clear differences in these three cases, the fundamental distinction lies in the level of dispossession that distinguishes the settler colonies of South Africa and Rhodesia from the Bechuanaland Protectorate.

In order to explore the relationship between property and the structure of the State, this essay will first address the connection between land tenure, sovereignty, and legitimacy. This will be followed by a brief outline of the general history of land reform before focusing more directly on the relationship between land and the State in southern Africa. Finally, the essay will look at tenure diversity as a basis for restructuring the relationship between democratic legitimacy and the post-colonial State in southern Africa.

I. LAND TENURE—SOVEREIGNTY, LAND, AND LEGITIMACY

While property extends far beyond the idea of land ownership, and wealth is no longer based primarily on landholdings, the focus of this essay will be on property in land. This requires recognition of the fact that in southern Africa, at least, the manner in which property in land is held varies greatly from fee simple tenure (the notion of full, private ownership) to a range of other tenure forms including common ownership, leasehold, public ownership, and various indigenous forms of landholding and control. This diversity means that it is important to understand that when considering rights to land, we are really looking at a range of land tenure arrangements and not simply full private ownership of property. In addition to the variety of tenure forms, it is also necessary to recognize that many of these forms may be held by completely different social and legal entities including the state, legal entities such as corporations or

trusts, private individuals, or even communities. While these different forms of tenure are often determined by the history, location, and use of the relevant parcels of land, another broad and significant distinction is between rural and urban land. Although this is an artificial distinction, it maps the forms of tenure onto geographic and use distinctions that fundamentally impact the nature of tenure at various times and locations. Furthermore, the distinction between rural (or agricultural) land and urban (or housing) property is a distinction of fundamental importance to understanding the relationship between the State and property in southern Africa.

The particular histories of different countries in the region and the evolution of property relations within each State had significant consequences for the nature of each State during the colonial period. In the post-colonial era, it is the legacy of these histories—and how they have shaped relations between public authorities and the governed—that is of central concern to the future of democracy in the region. Democratic legitimacy is, in this sense, tied to the processes of land reform and restitution that have been undertaken in the post-colonial era. Where these processes have stalled, or failed, there remains a sense of betrayal and a belief that the country still is not fully decolonized or returned to the people. In other contexts the types of land reform or the transfer of property through illegitimate means has led to impoverishment and even international isolation. In this sense, it may be argued that the political structure of the post-colonial states of southern Africa have indeed been fundamentally shaped by the nature of property relations. This is especially so in the cases of Zimbabwe and South Africa, where the dispossession of land was a central grievance of the liberation struggles. However, it is also significant to the structure of post-colonial Botswana, where the relationship between communal land and public authority remained a key area of contestation in shaping local governments, particularly in the rural villages of the country.

Dispossession and forced removals were central to the colonial and apartheid projects. These processes were not only the basic means of colonization but continued late into the twentieth century, as the darkest face of apartheid policy,[7] justifying the international community's

7. *See* COSMAS DESMOND, THE DISCARDED PEOPLE: AN ACCOUNT OF AFRICAN RESETTLEMENT IN SOUTH AFRICA (1971).

designation of apartheid as a crime against humanity.[8] It is this legacy—in which millions were forced from their homes and declared pariahs in the land of their birth;[9] in which communities were dismantled brick by brick and their members scattered across the most barren wastelands of the country;[10] in which people clung to the land and refused to give up their claims[11]—that set the stage for the recognition and shaping of property rights in post-apartheid South Africa. In Zimbabwe, the liberation movement's struggle was premised on the demand for land, and the history of post-independence Zimbabwe has been shaped by shifting struggles between the government and white farmers that culminated, at the turn of the century, in fast-track land reform and the subsequent collapse of the economy. While dispossession of land was not a direct driver of the relationship between the colonial State and the communities in the Bechuanaland Protectorate, the different Tswana chiefdoms that made up the Protectorate all experienced conflict over land as a result of state formation and colonial expansion throughout the late eighteenth and early nineteenth centuries.

In South Africa, the history of land dispossession, primarily of rural land, now defines the relationship between the State and property. In addition to the legacy of dispossession, the framework of land law inherited by post-apartheid South Africa has been characterized by a number of elements which have undermined its legitimacy and have had profound consequences for the establishment of a functional system of land law. These elements include a hierarchy of land tenures in which freehold title was privileged; the fragmentation of land law in different parts of the country; the lack of an adequate system for recording all land rights; the prevalence of bureaucratic discretion over the land rights of many landholders (particularly in the former Bantustans); and the need to establish new laws and forms

8. *See generally* G.A. Res. 2202 (XXI), The Policies of Apartheid of the Government of the Republic of South Africa (Dec. 16, 1966); G.A. Res. 2396 (XXIII), The Policies of *Apartheid* of the Government of South Africa (Dec. 2, 1968); G.A. Res. 3068 (XXVIII), United Nations General Assembly resolution: International Convention on the Suppression and Punishment of the Crime of *Apartheid* (Nov. 30, 1973).

9. *See* PLAATJE, *supra* note 5, at 6.

10. *See* 1–5 SURPLUS PEOPLE PROJECT, FORCED REMOVALS IN SOUTH AFRICA: THE SURPLUS PEOPLE PROJECT REPORTS (1983).

11. *See* TRANSVAAL RURAL ACTION COMMITTEE, A TOEHOLD ON THE LAND: LABOUR TENANCY IN THE SOUTH EASTERN TRANSVAAL (1988).

of regulation to address this history.[12] In the period since 1994 there have been major efforts to address this legacy. Although the degradation and pain of the communities and individuals who had these policies of dispossession and forced removal thrust upon them can never be adequately documented, there is an intimate link between these struggles and the shaping of property rights in South Africa today.[13] As a result, the legacy of dispossession and forced removals has become as central to building justice in post-apartheid South Africa as these processes once were in perpetuating the original injustices of apartheid.

A. History of Land and Agrarian Reform

The history of agrarian reform in the twentieth century reveals a range of circumstances giving rise to a diverse pattern of rural struggles, government interventions, and legal reform. The most far-reaching processes of land redistribution take place at moments of extreme political change, whether in the context of violent revolutions or post-war contexts. Beginning with the Mexican revolution and continuing through the Russian and Chinese revolutions, agrarian reform was characterized by the appropriation of land and its transfer into different forms of collective land tenure, from village-based holdings to massive state-run collective farms. After the Second World War, agrarian reform played a major role in the reconstruction of Japan, Korea, and Taiwan; but in these cases the land was transferred to the existing individual land users with compensation paid to former landlords. Processes of wide-scale land reform in post-colonial settings, such as the million-acre campaign in Kenya[14] and the left-wing electoral victory in Chile,[15] were pursued in legal

12. *See* UNTITLED: SECURING LAND TENURE IN URBAN AND RURAL SOUTH AFRICA (Donna Hornby et al. eds., 2017) [hereinafter UNTITLED].

13. *See* DESMOND, *supra* note 7; LAURINE PLATZKY & CHERRYL WALKER, THE SURPLUS PEOPLE: FORCED REMOVALS IN SOUTH AFRICA (1985).

14. The million-acre campaign in Kenya involved the transfer of one million acres of land held by white settlers in the "white" highlands to twenty-five thousand Africans in a large land reform and resettlement scheme. *See* CHRISTOPHER LEO, LAND AND CLASS IN KENYA (1984); John W. Harbeson, *Land Reforms and Politics in Kenya, 1954–70*, 9(2) J. OF MOD. AFR. STUD., 231 (1971).

15. The election of Salvador Allende in Chile saw a dramatic expansion of the existing land reform program. *See* Joseph R. Thome, *Law, Conflict, and Change: Frei's Law and Allende's*

environments that dramatically limited the pace and depth of the reform process. One limiting factor was the process of resettlement in cases where land was obtained for purposes of redistribution, and communities or individuals were required to uproot and move to the newly acquired lands. Not only was this a costly and often conflicted process, but the beneficiaries of such reforms often lacked local knowledge of the land or the capacity to place it into production without major inputs of capital or government aid. Despite payment of compensation according to the agrarian-reform laws, the reaction of landed interests, often allied with conservative domestic and international forces, led to the reversal of agrarian reforms, or counter-reforms in which land was returned to the previous owners.[16]

Since the end of the Cold War, the impetus for agrarian reform has come less from demands for land redistribution than from demands for reparation or restitution for past injustices. In former state-socialist countries, there was pressure for the privatization of state-owned land as part of the market reform process.[17] At the same time, land hunger and social movements representing the rural landless in countries such as Brazil and South Africa have continued to raise questions of redistribution and tenure reform. In the United States, claims for restitution were first recognized by the Indian Claims Commission ("ICC"); however, the ICC, which attempted to resolve claims by Native American tribes against the United States government, could only grant monetary compensation.[18] Today, First Nation and Native American land claims represent both the demand for the recognition of past injustice and the demands for political recognition and the right to governmental authority over communities and natural resources. United Nations

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Agrarian Reform, in SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA 188 (ed. William C. Thiesenhusen ed., 1989).

16. After both the military coup in Chile in 1973 and the defeat of the Sandinista government in Nicaragua in 1990, there were significant reversals of the prior land reforms. *See* Lovell S. Jarvis, *The Unraveling of Chile's Agrarian Reform, 1973–1986, in* SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA, *supra* note 15, at 240; LAURA J. ENRÍQUEZ, HARVESTING CHANGE: LABOR AND AGRARIAN REFORM IN NICARAGUA, 1979–1990 (1991).

17. *See* RENEE GEOVARELLI & DAVID BLEDSOE, U.N. FOOD & AGRICULTURE ORG., LAND REFORM IN EASTERN EUROPE, WESTERN CIS, TRANSCAUCUSES, BALKANS, AND EU ACCESSION COUNTRIES, U.N. Job No. AD878 (2001), ftp://ftp.fao.org/docrep/fao/007/AD878E/AD878E00.pdf.

18. U.S. INDIAN CLAIMS COMMISSION, FINAL REPORT (1979), http://www.narf.org/nill/documents/icc_final_report.pdf.

recognition of the rights of indigenous peoples has also raised questions about the territorial claims of indigenous communities around the world.[19] The South African land-claims process, initiated by the first post-apartheid constitution in 1994, explicitly recognized the need to return the land and—only in exceptional circumstances—to substitute monetary compensation to those who lost their land as a consequence of racially discriminatory laws between 1913 and the first democratic elections in 1994.[20] In contrast to the steady but constrained process of land reform in South Africa, the conflict over land and its fast-track land reform in neighboring Zimbabwe has highlighted the continued salience of agrarian reform in the twenty-first century.

B. The Role of the Law in the Protection of Property and Land Reform

Law is central to the definition and protection of property rights, but it is also a key element in the processes of agrarian reform. While all significant reforms have usually accompanied major shifts in political and social power, the role of law has been central to the justification and stabilization of changes in ownership and tenure relations. Land commissions and special land courts have enabled restitution processes and mediated conflicts between tenants and landlords from South Africa to Eastern Europe. However, courts have also played a major role in resisting land reform efforts in post-independence India[21] and, under the government of President Frei, in Chile.[22] Whether through statutory change or constitutional mandate, the law has, in some places, fundamentally altered the existing gendered relations to land access, particularly under indigenous or customary law as well as in circumstances where traditional authorities have retained or regained control over the allocation of

19. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007); *see also* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, INDIGENOUS PEOPLES AND THE UNITED NATIONS HUMAN RIGHTS SYSTEM, at 6, Fact Sheet No. 9/Rev 2 (2013), http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf.

20. *See* S. AFR. (INTERIM) CONST., 1993; Restitution of Land Rights Act 22 of 1994 (S. Afr.).

21. *See* John Murphy, *Insulating Land Reform from Constitutional Impugnment: An Indian Case Study,* 8 S. AFR. J. ON HUM. RTS. 362 (1992).

22. Thome, *supra* note 15.

land and the adjudication of disputes.[23] At the other end of the legal spectrum, law plays a central role in creating and securing a market in land rights as well as resolving conflicts between land owners. Another important role of law in agrarian reform has been in the regulation of agricultural markets, production, and financing, which are central to the reshaping of a rural economy as it responds to the needs and opportunities created by new tenure relations and participants on the agrarian landscape.

The State's power of eminent domain has historically been the most effective means of achieving agrarian reform. At the same time, the use of this power to expropriate private property, whether from landlords in India and Chile or large landowners in Nicaragua and Zimbabwe, has led to heightened social and legal conflict. It was only under the umbrella of military occupation or war—for example, in Japan,[24] South Korea,[25] and Taiwan[26]—that the transfer of large amounts of land from landlords to tillers and the mass redistribution of property rights, with government compensation used to stimulate industrial investment, was swiftly and effectively achieved. In other contexts, government use of expropriation has faced costly legal challenges, including constitutional challenges to the taking of property for the purpose of redistribution and endless litigation over the use of related legal mechanisms (such as ceilings on landholdings, effective use requirements, and other measures designed to force the owner to relinquish control over significant portions of their landholdings). Challenges to the amount and form of compensation

23. The tension between traditional authorities, "customary" law, and the recognition of gender equality in many new constitutions in Africa and across the developing world has produced ongoing debates and legal struggles over women's rights to land in these contexts. *See* Sindiso Mnisi Weeks, *Women Seeking Justice at the Intersection Between Vernacular and State Laws and Courts in Rural KwaZulu-Natal, South Africa*, *in* 2 THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY 113 (Heinz Klug & Sally Engle Merry eds., 2016).

24. *See* RONALD DORE, LAND REFORM IN JAPAN (2013); Toshihiko Kawagoe, *Agricultural Land Reform in Postwar Japan: Experiences and Issues* (The World Bank Policy Research, Working Paper No. WPS2111, 1999).

25. *See* Inhan Kim, *Land Reform in South Korea Under the U.S. Military Occupation, 1945–1948*, 18(2) J. COLD WAR STUD. 97, 97–129 (2016); Yong-Ha Shin, *Land Reform in Korea, 1950*, 5 BULL. POPULATION AND DEV. STUD. CTR. 14 (1976), http://s-space.snu.ac.kr/bitstream/10371/84988/1/2.LAND_REFORM_IN_KOREA__1950%5dYong-Ha%20Shin.pdf.

26. *See* CHEN CHENG, LAND REFORM IN TAIWAN (1961); Li Duan, Land Reform, Its Effects on the Rice Sector, and Economic Development: Empirical Case Study in Taiwan (May 2015) (unpublished thesis, University of California-Berkeley), https://www.econ.berkeley.edu/sites/default/files/Li%20Duan%20%281%29.pdf.

offered by the government after expropriation have also tied up land reform programs. In the most recent wave of land reform, the emphasis—often encouraged by multilateral financial institutions—has shifted from expropriation to the privatization of state property, market-assisted land reform, and the principle of "willing-buyer-willing-seller."[27]

A central feature of these most recent processes of agrarian reform has been the reassertion of individual land titling as the goal of agrarian reform. Despite a long history of ineffective and ultimately failed land-titling processes, such as the million-acre program in Kenya just after independence, an enormous amount of resources have been poured into new titling regimes in Eastern Europe and Africa, particularly post-1989.[28] Once again, however, the question of using traditional forms of communal title, rooted in indigenous systems of landholding and governance, has raised questions about the sustainability of individual titling, particularly in Africa. At the same time, it has been recognized that even under "traditional" systems of land tenure, there exists a spectrum of rights and duties, for individuals and communities, that were not recognized in the colonial codification of "customary law." Demands for the recognition of different forms of land tenure have become most acute in debates over land restitution and the reform of land tenure arrangements imposed by colonial, post-colonial, and, in the case of South Africa, apartheid authorities. Both as a result of the recognition of legal pluralism and because of greater democratic participation, there has emerged a deeper understanding of different forms of land tenure and the need, even outside of systems of legal pluralism, to formally recognize a range of tenure forms and not just private property.

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27. A willing buyer and a willing seller have traditionally been assumed to be the basis for a fair market transaction, which will produce a fair market value. In the southern-African context, this concept is presumed to be the basis of fair compensation according to South Africa's Expropriation Act 63 of 1975, and the concept also served as the basis for compensation in the 1979 Lancaster House Agreement and, through the implementation of this agreement, in Zimbabwe's first post-independence constitution.

28. *See* Solomon Bekure, 3 Benefits and Costs of Rural Land Titling: The International Experience, Documentation from the Event on Standardization of Rural Land Registration and Cadastral Surveying Methodologies: Experiences in Ethiopia, Addis Ababa, Ethiopia (March 20–24, 2006), https://www.researchgate.net/publication/265099679_3_Benefits_and_Costs_of_Rural_Land_Titling_The_International_Experience.

Struggles over land—whether over access to arable land in rural areas, between agrarian and pastoral communities, or over land use and the needs of people for housing in urban areas—have continued to play an important role in political conflicts, particularly in Latin America and Africa. Recognizing the need to address these issues, the World Bank has affirmed that future economic stability requires that land claims be settled and tenure security guaranteed.[29] Debate continues, however, over the impact of land reform in releasing rural capital for development and over the exact parameters of tenure security. Outside of their policy departments, the World Bank and the International Monetary Fund, in particular, continue to push for market-related strategies such as individual land titling and are less open to demands for recognition of diversity in land tenure systems, including communal and indigenous tenure forms.[30] This emphasis on the market fails to recognize that access to land in many developing countries serves a range of purposes: the formation and maintenance of identity for indigenous communities; providing a home of last resort for many rural/urban migrants; encouraging the diversification of economic opportunity and risk among rural families; and finally, and possibly most importantly, providing a form of social security in times of economic hardship and old age.

Market-led reform was the mantra of the World Bank in the 1990s, as it attempted to mediate between claims for restitution, demands for redistribution, and the need to resuscitate and stabilize markets in countries emerging from state socialism, authoritarian dictatorships, apartheid, and civil conflict.[31] However, these policies have faltered in countries, such as Zimbabwe, where the post-colonial settlement dictated a willing-buyer-willing-seller process yet failed to provide the resources required to address the vast and colonially derived inequalities in land ownership.[32] In South Africa, there has

29. *See* FRANK F. K. BYAMUGISHA, SECURING AFRICA'S LAND FOR SHARED PROSPERITY: A PROGRAM TO SCALE UP REFORMS AND INVESTMENTS (2013), http://documents.worldbank.org/curated/en/732661468191967924/pdf/780850PUB0EPI00LIC00pubdate05024013.pdf.

30. *See* Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14(2) WORLD BANK RES. OBSERVER 247 (August 1999); *e.g.*, *IMF Recommends Land Reforms*, IRIN, Nov. 9, 2012, http://reliefweb.int/report/swaziland/imf-recommends-land-reforms.

31. *See* Elizabeth Fortin, *Reforming Land Rights: The World Bank and the Globalization of Agriculture*, 14(2) SOC. & LEGAL STUD. 147 (2005).

32. *See* HENRY V. MOYANA, THE POLITICAL ECONOMY OF LAND IN ZIMBABWE (1984); JOSEPH

thus far been less economic and political disruption, with the process of restitution providing some relief and promise of change. Yet the process remains extremely slow and the overall disparities continue to stimulate agrarian tension and, at times, violent disruption. In other circumstances the process of privatization and individual titling continues apace; however, there is little evidence that this has significantly stimulated agrarian economies and lives. Faced with persistent rural poverty, developing countries and international non-government organizations, such as Oxfam,[33] have pointed to the farm subsidies of developed countries and the unequal access to land and capital as causes for the continued marginalization of agrarian economies in developing countries.[34] As a result, the Doha Development Round (the most recent international trade negotiations of the World Trade Organization ("WTO")) has focused on the need to address these disparities in the context of the WTO.[35] Yet the WTO seems unable to achieve its goals because domestic interests in the developed world continue to resist changes to agricultural policies that would inevitably lead to significant changes and agrarian reforms in their own countries.[36]

1. Land Reform in Southern Africa

If, today, land reform in southern Africa is immediately equated with the economic travails of Zimbabwe, a more nuanced history

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HANLON ET AL., ZIMBABWE TAKES BACK ITS LAND (2013), http://www.openbooks.tig.org.za/Mugabe/Zimbabwe_Takes_Back_its_Land_book_pages_1-11.pdf.

33. Oxfam is an international confederation of charitable organizations initially founded in 1942 by a group of Quakers, social activists, and Oxford University academics. *See Oxfam*, WIKIPEDIA, https://en.wikipedia.org/wiki/Oxfam (last visited Aug. 9, 2017).

34. *See* Patricia Amat et al., *Make Trade Fair for the Americas: Agriculture, Investment and Intellectual Property: Three Reasons to Say No to the FTAA* (Oxfam, Briefing Paper No. 37, 2003), https://www.oxfam.org/sites/www.oxfam.org/files/trade.pdf; *The Global Food Crisis and Fairtrade: Small Farmers, Big Solutions?* (Fairtrade Found. Report, 2009), http://www.fairtrade.org.za/uploads/files/Research/Research_papers/2009_Feb_The_global_Food_Crisis_and_FT.pdf.

35. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002), https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

36. *See Goodbye Doha, Hello Bali*, ECONOMIST, Sept. 8, 2012, http://www.economist.com/node/21562196?zid=309&ah=80dcf288b8561b012f603b9fd9577f0e; *cf.*, World Trade Organization, Nairobi Ministerial Declaration of 19 December 2015, WTO Doc. WT/MIN(15) /DEC, https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm; World Trade Organization, Export Competition, Ministerial Decision of 19 December 2015, WTO Doc. WT/MIN(15)/45 (2015)—WT/L/980, https://www.wto.org/english/thewto_e/minist_e/mc10_e/l980_e.htm.

will recognize that the first experience of post-colonial land reform was undertaken by the Republic of Botswana after it gained independence in 1966.

a. Botswana

The first case of post-colonial land reform in southern Africa saw the reform of indigenous processes of land distribution and conflict resolution in Botswana. With nearly half of the land formally designated as tribal reserves and about eighty percent of the nation living on those lands, the Botswana government adopted the Tribal Land Act in 1968, fundamentally transforming the existing tenure relations. At independence, Botswana's land mass was divided into three forms of tenure: state lands (formerly crown lands), freehold lands, and tribal lands (native reserves). While freehold tenure was limited to a few areas of the former "white" settlements, comprising about six percent of the land, the colonial division between crown lands and native reserves was never as clear. Some estimated that up to seventy percent of the land area was under tribal authority rather than the forty-eight percent that was formally designated native reserves. It was in this context that land reform in Botswana proceeded: first, with the adoption of the Tribal Land Act in 1968; second, with the State Land Act of 1970; and finally, with both the Tribal Grazing Land Policy, introduced by President Sir Seretse Khama in 1975, and its counterpart, the Arable Lands Development Programme in 1980.[37]

This process of land reform in Botswana has had a profound impact on both access to land and the political structure of the country. Instead of traditional authorities having the power to allocate land, the Tribal Land Act placed all tribal land under the jurisdiction of twelve land boards, which began operation in 1970.[38] While initially the land boards continued to be dominated by local, traditional authorities, amendments to the Tribal Land Act in 1989 removed

37. *See* BOTSWANA, 1 NATIONAL POLICY ON TRIBAL GRAZING LAND, GOVERNMENT PAPER NO. 1 OF 1975 (Republic of Botswana 1975).

38. B. Machacha, *Botswana's Land Tenure: Institutional Reform and Policy Formulation*, *in* LAND POLICY AND AGRICULTURE IN EASTERN AND SOUTHERN AFRICA (J. W. Arntzen et al. eds., 1982), http://www.unu.edu/unupress/unupbooks/80604e/80604E00.htm.

both chiefs and councilors from membership, ensuring that broader interests gained greater influence on the boards—particularly the national government through appointments by the Minister of Local Government, Lands, and Housing, as well as the appointments of two ex-officio members by the Minister of Commerce and Industry and the Minister of Agriculture.[39] Five of the twelve members of the main land boards are still elected in the local *Kgotla*—the traditional court of the chief—while the remaining seven are appointed. The main roles of the boards continue to be the allocation of land, land use planning, and the adjudication of land disputes.[40] In larger districts, subordinate land boards were created to address applications for land use and to hear local disputes, although their decisions have remained subject to appeal to the main land boards under which they were created. The operational difficulties of the land boards have been well documented—including the continued influence of local traditional authorities as well as problems of self-allocations and pre-allocations, involving applicants who would justify their requests based on a claim that they had been granted the land prior to the creation of the land boards. Despite these difficulties, the system has continued to evolve and represents a unique feature of governance in Botswana.[41]

While resisting the formal expansion of freehold tenure, Botswana's land reform process has fundamentally transformed the traditional land tenure system. Through the implementation of both the Tribal Grazing Land Policy in 1975 and the Arable Lands Development Programme in 1980, the land boards have granted individualized rights based on the demarcation and fencing off of land. Introduced in response to the problem of overgrazing and in recognition of the fact that forty-five percent of Batswana owned no livestock at all, these policies have produced a diversity of tenure forms within the

39. B. M. Mathuba, Paper Presented at the DFID Workshop on Land Rights and Sustainable Development in Sub-Saharan Africa: Lessons and Way Forward in Land Tenure Policy: Land Boards and Customary Land Administration in Botswana (Feb. 16–19, 1999), *cited in* Boipuso Nkwae, *Botswana's Experience on Recognizing Traditional Land Rights on a Large Scale* (World Bank Paper), http://siteresources.worldbank.org/INTIE/Resources/475495-1202322503179/NKwae_Paper2008WB.doc_2_.pdf (last visited April 9, 2017).

40. *Id.*

41. JOHN L. COMAROFF, THE STRUCTURE OF AGRICULTURAL TRANSFORMATION IN BAROLONG: TOWARDS AN INTEGRATED DEVELOPMENT PLAN (1977).

former tribal lands.[42] Even as critics have described the grazing policies' creation of individual ranches as synonymous with the historic highlands enclosure and as inequality in access to land has continued to grow, the political impact of land reforms has been profound. If, before the Tribal Land Act, a "strong chief enjoyed . . . sole control over the distribution of fields, pasturage, and residential plots . . . and a monopoly over the creation of new political constituencies," the introduction of land boards diffused local power and gave more authority to the national post-colonial state institutions.[43] At the same time, the retention of tribal lands and the role of the *Kgotla* and traditional authorities within the political system have provided what Jean and John Comaroff describe as a "civic culture that specifie[s] the means of producing a certain kind of participatory politics, a politics grounded in an articulate popular ideology of good government."[44] In the case of Botswana, the retention of the forms of land tenure that are rooted in the historic forms of governance has had a profound impact on the nature of the post-colonial State and what the Camoroffs' identify as a form of "popular sovereignty and direct state accountability" in post-independence Botswana.[45]

b. Zimbabwe

In contrast to Botswana, the history of post-independence Zimbabwe has seen a chaotic process of land reform that is considered the direct cause of the country's economic collapse and subsequent erosion of democracy. Understanding the origins of this process provides another important lens with which to view the relationship between property rights and state formation in southern Africa. Unlike Botswana, Zimbabwe was a settler colony, and at independence, six thousand white farmers owned forty-two percent of the arable land while four and a half million black Zimbabweans lived in the overcrowded communal areas, the former "native reserves."[46]

42. Machacha, *supra* note 38.

43. JEAN COMAROFF & JOHN L. COMAROFF, THEORY FROM THE SOUTH: OR, HOW EURO-AMERICA IS EVOLVING TOWARD AFRICA 104 (2014).

44. *Id.* at 111.

45. *Id.* at 113.

46. Robin Palmer, *Land Reform in Zimbabwe, 1980–1990*, 89 AFR. AFF. 163 (1990).

It was in this context that the 1979 Lancaster House Agreement which ended the war and led to democratic elections in Zimbabwe in 1980 included, in summary form, the text of Zimbabwe's first post-independence constitution.[47] The summary of the constitution included a guarantee of a specific number of seats for white settlers in the new Parliament until 1987,[48] as well as a clause in the Declaration of Rights that protected existing property rights and specified that the new government could only expropriate land for specific purposes and under very stringent conditions.[49] It also provided that there could be no amendment to the Declaration of Rights, and hence the property clause, except by unanimous agreement for the first ten years of independence.[50] As a result, the Zimbabwe Constitution Act of 1979, which came into force as the Constitution of Zimbabwe at independence in April 1980, prevented the government from obtaining land for the purpose of land reform except under circumstances in which the land was obtained in conformity with the willing-buyer-willing-seller principle.[51] While this principle refers in the common law to the idea of market value, in this context it included a limitation on the ability of the new government to exercise its inherent power of eminent domain rather than merely defining the measure of compensation that would be due in the aftermath of expropriation. However, this settlement was effectively limited by the terms of the independence constitution to ten years.[52] After this time period, the Parliament, which remained sovereign in the tradition of parliamentary sovereignty inherited from Britain, would be free to amend the constitution.

However, when it came to land, the policies of the Zimbabwean government, freed from the Lancaster House constitutional limitations, were at first unexpected. While the Zimbabwean legislature moved fairly quickly in 1990 to remove the willing-buyer-willing-seller

47. SOUTHERN RHODESIA: REPORT OF THE CONSTITUTIONAL CONFERENCE (Sept.–Dec. 1979), http://www.rhodesia.nl/lanc1.html (presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs in January 1980).

48. *Id.*, annex C, § E, ¶ 29.

49. *Id.*, annex C, § C, ¶ V(1)–(3).

50. *Id.*, annex C, § E, ¶ 30.

51. Zimbabwe Act, U.K.-Zimb., ch. 60, Dec. 20, 1979, http://legislation.gov.uk/ukpga/1979/60/pdfs/ukpga_19790060_en.pdf.

52. ZIMB. CONST. art. 52(4) (1979).

limitations in the constitution,[53] the government in practice continued to promote economic stability and foreign investment by pursuing a policy of willing-buyer-willing-seller as it purchased land from white farmers for purposes of resettlement and related land reform efforts. It was only when the ruling ZANU–PF (Zimbabwe African National Union–Patriotic Front) party and President Robert Mugabe began to face a serious electoral challenge in the late 1990s that the slow pace of land redistribution became a focus of government rhetoric.[54] It was in this context that Zimbabwe adopted ever more aggressive policies of land acquisition, which after 2000 led to a wave of farm invasions and a subsequent collapse of the economy.[55] While the conditions that led to the economic collapse are multiple and complex, it was the adoption of constitutional changes that revoked the government's duty to pay compensation altogether—by tying it to the unfulfilled promises of the former colonial power to offer financial aid to cover the costs of compensation—that has been the focus of attention.[56] These provisions of the constitution remained a core element of contestation in the process of constitutional amendment, or constitution-making, that ultimately produced a new constitution in 2013 but failed to resolve the political crisis in Zimbabwe. As Muna Ndulo has argued, "[t]he Lancaster House Constitution itself failed to serve as a framework for local political and economic actors to negotiate the transformation from a colonial state with great economic disparities to a more equitable Zimbabwe," and thus it "failed to gain legitimacy or provide a framework for the democratic governance of Zimbabwe."[57]

c. South Africa

Not unlike Zimbabwe, the South African system of land ownership historically functioned effectively for only a very small percentage of

53. ZIMB. CONST. amend. 16, § 16A (1980) (inserted by Section 3 of Act 5 of 2000).

54. *See* HANLON ET AL., *supra* note 32.

55. *See* LAWRENCE HOBA, THE TREK AND OTHER STORIES (2009). *But cf.* IAN SCOONES ET AL., ZIMBABWE'S LAND REFORM: MYTHS & REALITIES (2011).

56. ZIMB. CONST. amend. 16, § 16A(1)(i)–(ii) (1980) (inserted by Act 5 of 2000).

57. Muna Ndula, *Zimbabwe's Unfulfilled Struggle for a Legitimate Constitutional Order*, *in* U.S. INST. OF PEACE, FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 182 (Laurel E. Miller ed., 2010).

the South African population. Primarily, this was the result of the racial division of land that predated formal apartheid and was legally enshrined in the Natives Land Act 27 of 1913 (Black Land Act) and the Native Trust and Land Act 18 of 1936 (Development Trust and Land Act). The 1913 Land Act denied the land rights of black South Africans and established the spatial distribution of land use that became the basis of the apartheid system, in which the human dignity of the majority of South Africans was denied. It has been "estimated that some 3.5 million black South Africans had been uprooted from their homes and relocated in furtherance . . . of the apartheid agenda between 1960 and 1982."[58] In addition to this often violent dispossession, the effects of the Land Acts were twofold: first, they created a land market from which nearly eighty percent of the population was excluded; and second, they privileged freehold tenure—denied to all but "white" South Africans—over other forms of tenure.[59] In time this distinction would not only determine the racialized socio-economic conditions of wealth and poverty but also the distribution of political rights, leading to a system of racial oppression under apartheid.

Unsurprisingly the issue of property was, and remains, a significant point of contention in South Africa. While the internationally endorsed process for the democratic transition from apartheid included a commitment to the rule of law and the inclusion of a justiciable bill of rights, there was no clarity on the contents of these commitments. Just prior to the beginning of substantive constitutional negotiations in early 1993, the two major participants,[60] the African National Congress ("ANC") and the apartheid government, presented dramatically different proposals for how they wished to see property addressed in a post-apartheid constitution. On the one

58. CHERRYL WALKER, LAND-MARKED: LAND CLAIMS AND LAND RESTITUTION IN SOUTH AFRICA 2 (2008).

59. *See* Cherryl Walker & Ben Cousins, *Land Divided, Land Restored: Introduction*, *in* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY, *supra* note 6; *see also* Andries Johannes Van der Walt, *Introduction*, *in* LAND REFORM AND THE FUTURE OF LANDOWNERSHIP IN SOUTH AFRICA (Andries Johannes Van der Walt ed., 1991).

60. At this time, the two major participants in the negotiations were the African National Congress, which was a liberation movement, and the government, which was controlled by the National Party. While the ANC would later contest elections and govern as a political party, the only political parties legally recognized before the 1993 Interim Constitution was adopted were those that worked within the apartheid system, including the "white" political parties, the "Indian" and "Coloured" parties recognized under the 1983 Tricameral Constitution, and the different political parties recognized in the various "bantustans," or black "homelands."

hand, the ANC was willing to protect the undisturbed enjoyment of personal possessions; however, all property entitlements were to be determined by legislation, and provision was to be made for the restoration of land to people dispossessed under apartheid. On the other hand, the apartheid government's proposals were aimed at protecting all existing property rights and would only allow expropriation for public purposes, subject to cash compensation determined by a court of law according to the market value of the property. In response, the ANC suggested that no property clause was necessary at all.[61]

As the negotiations progressed, the conflict over the property clause focused on specific issues. The apartheid government insisted that property rights be included in the constitution and that the measure of compensation include specific reference to the market value of the property. In contrast, the ANC insisted that the property clause should not frustrate efforts to address land claims and that the State must have the power to regulate property without obligation to pay compensation unless there was a clear expropriation of the property. The conflict soon focused on whether provisions for land restitution should be included within the property clause or whether they should be limited to the corrective action provisions of the equality clause. The 1993 Interim Constitution resolved these conflicts by providing a separate institutional basis for land restitution which was guaranteed in the corrective action provisions of the equality clause and by compromising on the question of compensation by including a range of factors the courts would have to consider in determining just and equitable compensation. Despite predictions that there would be very little change in the constitution during the second phase of the constitution-making process, particularly on such sensitive issues as the property clause and the Bill of Rights, in fact the property issue once again became one of the lightening-rod issues in the Constitutional Assembly.[62]

Although the committee charged with reviewing the Bill of Rights was at first reluctant to change the formulation of the 1993 compromise, challenges that centered on questions of land restitution and

61. HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 125–138 (2000).

62. *Id.*; Matthew Chaskalson, *Stumbling Towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution*, 11 S. AFR. J. ON HUM. RTS. 222 (1995).

reform forced open the debate once more.[63] In this case the impetus came from the Workshop on Land Rights and the Constitution organized by one of the Constitutional Assembly's subcommittees, Theme Committee 6.3.[64] The subcommittee's task was to resolve issues related to specialized structures of government such as the Land Claims Commission and Land Court that had been created by the Interim Constitution. The focus on the land issue once again raised the problem of property rights in the constitution. While some participants asked whether there should be any property protection at all, the most significant change since the 1993 Interim Constitution was negotiated, was that the participants in this workshop, even those representing long established interests like the National Party and the South African Agricultural Union, now agreed on the need "to rectify past wrongs" and on the need for land reform.[65] Disagreement here was over the means. The South African Agricultural Union, for example, continued to assert that land reform "should be done in a way that did not jeopardize the protection of private ownership," while the National Party now embraced the World Bank's proposals, arguing that land reform should "be accomplished within the parameters of the market and should be demand-driven."[66]

The outcome of this workshop and the written submissions to Theme Committee 6.3 was a report to the Constitutional Assembly that both challenged the existing 1993 formulation of property rights and called for a specific land clause to provide a "constitutional framework and protection for all land reform measures."[67] While Theme Committee 4, which was responsible for the Bill of Rights, had simply adopted a property clause that incorporated the 1993 constitution's restitution provisions, the *Report on Land Rights* threw the proverbial cat among the pigeons. Some objected to Theme Committee 6.3's very discussion of property rights, while others sensed an opportunity to reopen the debate on property rights and to once again question their inclusion in the Bill of Rights. Thus, the draft Bill of Rights

63. THE MAKING OF THE CONSTITUTION: THE STORY OF SOUTH AFRICA'S CONSTITUTIONAL ASSEMBLY, MAY 1994 TO DECEMBER 1996 (Paul Bell ed., 1997).

64. Report from the Constitutional Assembly, Constitutional Subcommittee Theme Committee 6.3: *Report on Land Rights* (Oct. 9, 1995) (currently unavailable; copy on file with Heinz Klug) (S. Afr.).

65. *See id.*

66. *Id.*

67. *See id.*

published by the Constitutional Assembly on October 9, 1995 included an option that the "final" constitution contain "no property clause" at all.[68] It was in this context that an alternative option, a property clause including specific land rights as well as a subclause insulating land reform from constitutional attack, began to gain momentum. While a strategy to insulate land restitution and land reform from constitutional attack had been implicit from early on in the debate, it was the inclusion of a specific subclause—insulating state actions aimed at redressing past discrimination in the ownership and distribution of land rights—that enabled the negotiators to reach a compromise between those demanding the removal of the property clause and those, like the Democratic Party, who remained opposed to even the social democratic formulation that was modeled on the German Basic Law.[69] Still the debate raged on and the draft formulations of the property clause continued to evolve. Political agreement on the property clause was finally reached at midnight on April 18, 1996,[70] when Subsection 25(8)—the "affirmative action," or insulation subclause of the property clause[71]—was modified so as to make it subject to Section 36(1), the general limitations clause of the constitution.[72]

Despite final agreement in the Constitutional Assembly, a number of opposition parties and civil society groups argued that the property clause violated the constitutional principles contained in Schedule 4

68. *Special Edition*, CONST. TALK: OFFICIAL NEWSL. CONST. ASSEMBLY, WORKING DRAFT EDITION (S. Afr. Const. Assembly 1990–1999), at 7 (undated) (on file with author) (describing option one of the options suggested for then-section 24 of the Bill of Rights, *adopted as* S. AFR. CONST., 1996 ch. 2 § 25).

69. *See 2A Land Rights,* Constitutional Comm. Constitutional Assemb., 13–41 (Sept. 15, 1995) (S. Afr.). The ANC's conception of constitutional property was intellectually modeled on the property provision of the German Basic Law, which in conformity with a social-democratic vision recognizes that property ownership involves both rights as well as obligations to society—what is referred to as the social function of property. *See* KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS (1976).

70. THE MAKING OF THE CONSTITUTION, *supra* note 63.

71. S. AFR. CONST., 1996 § 25(8).

72. THE MAKING OF THE CONSTITUTION, *supra* note 63. Concerns that the new "insulation" clause would completely exempt all land reform policies from constitutional review were answered by the inclusion of the phrase, "provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)." This is the general limitations clause and provides that the "rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom," taking into account a range of designated factors. S. AFR. CONST., 1996 § 36(1).

of the negotiated 1993 'interim' Constitution. Since the newly established Constitutional Court was required by the constitution-making clauses of the Interim Constitution to certify that the Constitutional Assembly had abided by these principles, they argued that certification of the "final" constitution should be denied. Two major objections were raised: first, that unlike the Interim Constitution, the new clause did not expressly protect the right to acquire, hold, and dispose of property; second, that the provisions governing expropriation and the payment of compensation were inadequate.[73] The Constitutional Court rejected both of these arguments. First, the court noted that the test to be applied was whether the formulation of the right met the standard of a "universally accepted fundamental right" as required by Constitutional Principle II ("CPII"). Second, the court surveyed international and foreign sources and observed that "[i]f one looks to international conventions and foreign constitutions, one is immediately struck by the wide variety of formulations adopted to protect the right to property, as well as by the fact that significant conventions and constitutions contain no protection of property at all."[74] Furthermore, the court held that it could not "uphold the argument that, because the formulation adopted is expressed in a negative and not a positive form and because it does not contain an express recognition of the right to acquire and dispose of property, it fails to meet the prescription of CPII."[75] The second objection—the argument that the provisions for expropriation and compensation were inadequate—met the same fate, with the court concluding that an "examination of international conventions and foreign constitutions suggests that a wide range of criteria for expropriation and the payment of compensation exists," and thus the "approach taken in NT 25 [New Text Section 25] cannot be said to flout any universally accepted approach to the question."[76]

As a result the final property clause guarantees not only the restitution of land dispossessed after the adoption of the 1913 Land Act[77] and a right to legally secure tenure for those whose tenure

73. *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*, 1996 (4) SA 744 (CC) at para. 70.

74. *Id.* at para. 71.

75. *Id.* at para. 72.

76. *Id.* at para. 73.

77. S. AFR. CONST., 1996 § 25(7).

remains insecure as a result of racially discriminatory laws or practices,[78] but also obligates the State to promote citizens' access to land on an equitable basis.[79] Furthermore, the State is granted a limited exemption from the protective provisions of the property clause so as to empower it to take "legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination."[80] At the same time, it protects the rights of property holders, stating in Section 25(1) that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property." While the clause does recognize the State's power to expropriate property "[for] a public purpose or in the public interest"[81] and "subject to compensation,"[82] there is a clear attempt to both protect land reform from constitutional challenge and to ensure that the payment of compensation is tied to a recognition of the history and use of the relevant property.[83]

This constitutional response to the legacy of apartheid land law led to the establishment of a land-claims process that in its first iteration saw sixty-four thousand claims based on the constitutional right of "a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices" to claim either "restitution of that property or . . . equitable redress."[84] The property clause also gave a right to secure tenure[85] and imposed a duty on the State to "take reasonable legislative and other measures within its available resources, to foster conditions which enable

78. *Id.* § 25(6).
79. *Id.* § 25(5).
80. *Id.* § 25(8).
81. *Id.* § 25(2)(a).
82. *Id.* § 25(2)(b).
83. *Id.* § 25(3). The amount of the 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 the 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.
84. *Id.* § 25(7).
85. *Id.* § 25(6).

citizens to gain access to land on an equitable basis."[86] By the end of the first process of land restitution, nearly eighty thousand claims (mostly to urban land) were received by regional land claims commissions and adjudicated in some cases by a Land Claims Court, a system specifically designed to implement the constitutionally mandated process of restitution.[87] When combined with the additional processes of land redistribution and land tenure reform that were introduced by statute, the land reform process redistributed over 3.4 million hectares—although this remains far short of the redistribution target of thirty percent of 82 million hectares of white-owned farmland initially set by the new government in 1994.[88]

Another major challenge facing the post-apartheid land system was the effective incorporation of the existing nonfreehold rights into the legal system.[89] Despite the adoption of a number of laws to address this legacy as well as laws designed to reduce insecurity of tenure, the task of providing security of tenure through formal processes of survey, titling, and registration remains daunting. Even reducing the levels of accuracy required for traditional modes of land survey is unlikely to bring about reduced costs because, although the technology is readily available to surveyors, professional control of the process and a reluctance to abandon past practices prevents significant reductions in cost.[90] The new legal regime designed to increase tenure security includes: a provision for securing tenure rights to persons occupying land with the owner's permission in rural

86. *Id.* § 25(5).

87. Cherryl Walker, *Sketch Map to the Future: Restitution Unbound, in* LAND DIVIDED, LAND RESTORED: LAND REFORM IN SOUTH AFRICA FOR THE 21ST CENTURY, *supra* note 6, at 323.

88. *See* HJ Kloppers & GC Pienaar, *The Historical Context of Land Reform in South Africa and Early Policies*, 17(2) POTCHEFSTROOM ELECTRONIC L. J. 677 (2014), http://dx.doi.org/10.4314/pelj.v17i2.03.

89. This is particularly true regarding the rights in Schedule 2 of the Upgrading of Land Tenure Rights Act 113 of 1991 (S. Afr.), and the occupation and site permits referred to in the conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (S.Afr.).

90. The average surveying fee in four Independent Development Trust–capital subsidy upgrading projects represents a mere 2.6% of the total costs of the projects. Section 7 of the Land Survey Act 71 of 1927 (S. Afr.), provides that regulations may be made prescribing the fees which a land surveyor shall charge for the survey of land. Regulation 67 of the Land Survey Regulations, GN R1814 (11 Feb. 1962) (S. Afr.), provides that the tariff for services shall be in accordance with the tariff prescribed in Annexure A to the Regulations. Provision is made for charges to be agreed upon at a higher rate. Although the contrary is not stated, it is understood that surveys are also undertaken at rates lower than the tariff.

and peri-urban areas;[91] legislation protecting and allowing labor tenants to gain permanent rights to the use of land held as tenants;[92] laws providing temporary protection to those who might gain land rights as a result of land and tenure reform;[93] and new legislation prohibiting unlawful evictions, which fundamentally changed the legal and practical relationship between occupiers and title holders.[94] Despite these attempts to protect existing occupiers, the future legitimation of all landholdings was understood to rest on the recognition of historic land claims and the creation of a restitution process for those who had already been denied possession of their lands.

Despite this focus on rural land, urban land and housing is today the most significant form of property for the majority of individual South Africans who live in a country that has seen massive urbanization since the collapse of the apartheid's internal pass system[95] in the mid-1980s. A separate constitutional provision states that "everyone has a right to have access to adequate housing"[96] and imposes the same duty on the State to ensure this right within its available resources.[97] This provision also guarantees that "no one may be evicted from their home, or have their home demolished, without an order of court."[98] Constitutional Court jurisprudence has subsequently interpreted the right to housing to include a tenant's right not to be evicted unless provided with alternative accommodation and only after "meaningful engagement" by the relevant governmental authority.[99] In its attempts to address the vast urban

91. Extension of Security of Tenure Act 62 of 1997 (S. Afr.).

92. Labour Reform (Labour Tenants) Act 3 of 1996 (S. Afr.).

93. Interim Protection of Informal Land Rights Act 31 of 1996 (S. Afr.).

94. Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (S. Afr.).

95. The pass laws provided for a system of "internal passports" used to control the movement of the African majority during the apartheid era, although pass laws have a long history in South Africa and were used to establish a migrant labor system, control urbanization, and generally to segregate the society. *See Pass Laws in South Africa 1800–1994*, SOUTH AFRICAN HISTORY ONLINE, http://www.sahistory.org.za/article/pass-laws-south-africa-1800-1994 (last updated Mar. 21, 2011).

96. S. AFR. CONST., 1996 § 26(1).

97. *Id.* § 26(2).

98. *Id.* § 26(3).

99. The requirement of meaningful engagement was introduced into South African jurisprudence in *Port Elizabeth Municipality v. Various Occupiers* 2005 (1) SA 217 (CC). *See generally* Lucy A. Williams, *The Right to Housing in South Africa: An Evolving Jurisprudence*, 45 COLUM. HUM. RTS. L. REV. 816 (2014).

housing shortage created by apartheid and post-apartheid urbanization and immigration, the government first adopted a housing policy under its 1994 Reconstruction and Development Programme ("RDP"), which produced over 3.3 million low-cost housing units in the first twenty years of democracy.[100] Over the same period, the population grew by approximately 13 million (to over 53 million), and only about fifteen percent of the country's approximately 14.5 million households earned enough income to secure financing in the formal banking system. With changing economic policies, the government's housing policy shifted in the first decade of this century towards a bifurcated policy, which, on the one hand, promoted a rental-housing sector under a social-housing policy and law[101] and, on the other hand, sought to promote a more market-based housing policy, in which the granting of title would facilitate private investments and improvements in housing.[102]

Recent government policies focus heavily on helping the poor gain formal title to their property, largely because of the influence of Hernando de Soto's notion that granting title will unleash capital already held by the poor.[103] De Soto's claims rely on the notion of the housing ladder—that property values increase, enabling those who hold property to gain wealth through ownership, which they can use to work towards a better home in the future, until they sell their final home to fund their retirement and live somewhere smaller and simpler.[104] The Breaking New Ground housing policy started in 2004

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100. *See* NAT'L DEP'T OF HOUS., WHITE PAPER: A NEW HOUSING POLICY AND STRATEGY FOR SOUTH AFRICA (1994) (S. Afr.), http://www.gov.za/sites/www.gov.za/files/16178_0.pdf; FIN. & FISCAL COMM'N, RP303/2013, EXPLORING ALTERNATIVE FINANCE AND POLICY OPTIONS FOR EFFECTIVE AND SUSTAINABLE DELIVERY OF HOUSING IN SOUTH AFRICA: STATEMENT BY THE FINANCIAL AND FISCAL COMMISSION, (Oct. 21, 2013) (S. Afr.), http://www.gov.za/exploring-alternative-finance-and-policy-options-effective-and-sustainable-delivery-housing-south.

101. Social Housing Act 16 of 2008 (S. Afr.).

102. DEP'T OF HUM. SETTLEMENTS, "BREAKING NEW GROUND": A COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF SUSTAINABLE HUMAN SETTLEMENTS (2004) (S. Afr.), http://abahlali.org/files/Breaking%20new%20ground%20New_Housing_Plan_Cabinet_approved_version.pdf.

103. *See* Graduate School of Public and Development Management, University of the Witwatersrand, *Are Hernando de Soto's Views Appropriate to South Africa?* (University of the Witwatersrand, Occasional Paper Series No. 1, Oct. 2007) [hereinafter *Hernando de Soto's Views*], http://www.dbsa.org/EN/About-Us/Publications/Documents/De%20Soto%20Colloquium%20FINAL.pdf.

104. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000); *see also*, ROSALIE KINGWILL ET AL., MYSTERIES AND MYTHS: DE SOTO, PROPERTY AND POVERTY IN SOUTH AFRICA (Int'l Inst. for Env't & Dev. Gatekeeper Ser. No. 124, 2006).

closely resonates with de Soto's ideas. Its primary goal is to deliver housing, with secondary goals that include realizing the value of assets and "reducing duality in the housing sector" by enhancing access to title.[105] Key policies for reducing the duality included supporting demands for subsidies for secondary market transactions, reducing the prohibition on the sale of government subsidized property from eight to five years, stimulating the transfers of free-standing public housing stock, and accelerating the registration of transfer for subsidized homes. However, the de Soto–thesis relies on four factors other than title deeds that are not present in South Africa: (1) a functioning secondary housing market, (2) sufficient affordable housing, (3) affordable mortgage finance, and (4) mortgage lenders willing to lend to low-income people. The case of Joe Slovo Park in Cape Town illustrates some of the problems with inserting formal title regimes into an area without regard for the cultural institutions there.[106] Individual ownership actually reduced tenure security for many, especially women.[107] Tenure rights and responsibilities that were formally linked to kinship were now registered in the name of one member of the household, usually male.[108] The process itself was slow, and there were allegations of bias, with some community leaders receiving more than one house.[109] Many of the sales were informal. Sometimes people who legally owned their houses were unable to use them because street committees decided who should be the owner, or the houses had been rented out by people who were not the owners.[110] The process upended well-established informal markets and tore apart social networks, which in the informal economy

105. Lauren Royston, *Snakes and Ladders: A Housing Perspective on de Soto and the First and Second Economy Debate in South Africa*, *in Hernando de Soto's Views*, *supra* note 103, at 35–36. The idea of "duality" in the housing sector refers to the existence on the one hand of a regular housing market in which properties are regularly bought and sold, and on the other hand of a separate "market" in which houses are traded informally or under the table so as to avoid either the legal restrictions on their transfer or the costs of transfer in the regular market. This duality is reflected, too, in the location of houses since properties in the former "white" areas generally make up the "regular" market, while those in the former "black" townships and in informal settlements make up the second "irregular" market.

106. Rosalie Kingwell et al., *Mysteries and Myths: De Soto, Property and Poverty in South Africa, in Hernando de Soto's Views*, *supra* note 103, at 58.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

were vital to doing business.[111] The houses were also too small for large families, a fact that many had relied on in order to make payments.[112] Informal sales have continued to be a significant element of South Africa's titling program with a study conducted for the Cape Metropolitan Council in 2000 finding a "significant incidence of buying and selling of subsidized residential properties" either "immediately as people acquire their houses . . . [or] more gradually as people run into difficulties in paying the municipal service charges."[113] The study concluded that "the urgent need for cash [was] forcing some subsidised homeowners to sell their houses illegally" and the in many cases prices were "almost 50% less than the replacement cost[s]."[114]

II. LAND REFORM AND THE STRUCTURE OF GOVERNANCE

Different patterns of land tenure and reform efforts have produced very different impacts on the structure of governance across these three southern African countries: Botswana, Zimbabwe, and South Africa. The outcome and continuing conflict are products of both the inherited pattern of colonial land relations as well as the choices made by the post-colonial State in these different circumstances. In Botswana the limited amount of freehold tenure and the political strength of traditional authorities at the time of independence saw land policies focus on the "Tribal Areas." It was the slow, evolving process of national intervention and the continued vitality of the political culture of the *Kgotla* that has produced a gradual transformation in land rights as well as a stable political regime. In this structure, the dominant political party—the Botswana Democratic Party—has relied on rural support to continue to win national elections, even as the major urban areas have seen local governments controlled by the political opposition. The net result has been the emergence of a particular form of democratic State where national and local politics are quite distinct. Even if there are questions about the exact form of local democracy, there is recognition that national elections are free and fair.

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111. *Id.*

112. *Id.*

113. BRUCE BOADEN & ALY H. KARAM, THE INFORMAL HOUSING MARKET IN FOUR OF CAPE TOWN'S LOW-INCOME SETTLEMENTS 24 (2000).

114. *Id.* at 35.

This is in stark contrast to developments in Zimbabwe where the failure to engage in an ineffective land reform in the immediate post-independence era saw a perpetuation of inequality and land hunger reminiscent of the colonial era. This continuing inequality produced first a political crisis and then economic collapse when Robert Mugabe's government responded by adopting what became known as "fast track land resettlement" and land invasions from 2000 to 2003.[115] While there is increasing evidence that this process has seen black Zimbabweans gain more access to land, the government's failure to uphold the rule of law and their undermining of the courts has had a long-term impact on the structure of the State. After flawed elections and increasing authoritarianism, there has been an attempt to reconstitute the State through a process of constitutional renewal. The failure of both the democratic process and the many constitutional reforms has produced "a government which lacks both national and international legitimacy."[116] It is in this context that we might compare developments in South Africa and ask what effect the process of land reform might have on the future structure of the new South African constitutional State that emerged from apartheid in the mid-1990s.

After more than twenty years of democratic governance, the debate over South Africa's land reform program has become an argument over whether the glass is half full or half empty. The promise of the 1994 ANC election manifesto—to transfer thirty percent of the land—has clearly not been met. Even so, thousands of families and individuals from the most marginalized sections of society have been beneficiaries of the government's threefold land reform strategy—land restitution, land redistribution, and land tenure reform—as well as the country's massive subsidized housing program.[117] Despite these slow gains, it remains the fact that the clearest indicator of poverty in South Africa, even after twenty-three years of democracy,

115. *See* HANLON, ET AL., *supra* note 32.

116. Ndula, *supra* note 57, at 177.

117. *See* EDWARD LAHIFF, LAND REFORM IN SOUTH AFRICA: A STATUS REPORT 2008 (Programme for Land and Agrarian Stud., Res. Rep. No. 38, 2008), http://www.plaas.org.za/sites/default/files/publications-pdf/RR38_0.pdf; *see also* Report Presented at Istanbul+5, Reviewing and Appraising Progress Five Years After Habitat II: The South African Housing Policy: Operationalizing the Right to Adequate Housing (June 6–8, 2001), http://www.un.org/ga/Istanbul+5/1-southafrica.doc.

is being black, female, and a resident of a rural area. Unfortunately, after a change in land reform policy in the early 2000s when the government decided to target black commercial farmers instead of marginalized rural communities to be the beneficiaries of land reform, these indicators of poverty seem even less likely to change. These developments did not solve the underlying problem of unequal access to land, and issues of legitimacy and the slow pace of land reform soon resurfaced in the political realm.[118]

As the ANC moved towards its national conference at the end of 2012, there were repeated calls for greater government intervention in the distribution of property, particularly land. In the lead-up to the organization's mid-year policy conference, which produced a draft policy document for the national conference, there were repeated calls from various ANC constituencies, the ANC Youth League and trade unions in particular, for a constitutional amendment. These organizations wished to remove what they understood to be the constitutional requirement of willing-buyer-willing-seller that they blamed for the slow pace of economic transformation and land reform in particular. In response to these calls, the official opposition, the Democratic Alliance, issued a press statement warning that the ANC government was "contemplating dramatic changes to the Constitution . . . which threatens the very foundation of our constitutional state."[119] Responding to these demands and concerns, the Minister of Rural Development and Land Reform, Gugile Nkwinti, said the debate about changing the constitution might be irrelevant as "the ANC had come up with four proposals to transform land ownership in South Africa without changing the Constitution."[120] But at the same time the ANC Youth League called for "changing . . . the Constitution to do away with land expropriation with compensation."[121]

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118. For a critical assessment of South Africa's land reforms and related programs see, BEN COUSINS, LAND REFORM IN SOUTH AFRICA IS SINKING. CAN IT BE SAVED? (2016) (A provocation commissioned by the Nelson Mandela Foundation.), https://www.nelsonmandela.org/uploads/files/Land__law_and_leadership_-_paper_2.pdf. *See also* FRED HENDRICKS ET AL., THE PROMISE: UNDOING A CENTURY OF DISPOSSESSION IN SOUTH AFRICA (2013).

119. Dene Smuts, Press Release, Democratic Alliance: Property a Basic Right, Not a Sunset Clause (Cape Town, Mar. 4, 2012).

120. Gillian Jones, *Changing Constitution Not the Answer*, IOL, June 11, 2012, http://www.iol.co.za/news/politics/changing-constitution-not-the-answer-1316513.

121. *Id.*

While the constitution may not include a willing-buyer-willing-seller standard, the apartheid-era Expropriation Act 63 of 1975 does in fact include this standard as a basis for determining the compensation to be paid in the event of expropriation.[122] Although the Constitution is supreme in South Africa and explicitly provides criteria for determining compensation in the event of expropriation, in application the State may only exercise its power of eminent domain within the terms granted by the legislature in the Expropriation Act. This explains in part why the willing-buyer-willing-seller standard has some resonance in the South African debate over expropriation. However, a broader view of the debate, including an understanding of the conflict over land in the southern African region more generally, provides a much clearer perspective on why this standard has such resonance in the political debates over land and in the possibility of constitutional change specifically. Only once the history of land struggles and the pattern of constitutional amendment and crisis in Zimbabwe are taken into account, does it become clear why the willing-buyer-willing-seller language has such power and relevance.

In an attempt to address the inconsistency between the statutory law and what is arguably a more permissive constitutional requirement, the South African government first introduced a bill to reform the Expropriation Act in April 2008. In its explanation for the bill the government argued that the new law would create a "framework to give effect to the Constitution" and in particular the State's "constitutional obligation to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis."[123] The new statute would also require the recognition of unregistered rights as well as provide new institutional mechanisms to regulate expropriations. Significantly, the draft law also revised the standards for compensation, including the range of factors that had been negotiated during the democratic transition. Reaction to the bill was vociferous, particularly from those who had fought so hard to protect their property interests during the transition from apartheid. In the face of these objections, the bill has been repeatedly withdrawn and

122. Expropriation Act 63 of 1975 § 12(1)(a)(i).

123. Publication of Explanatory Summary of the Expropriation Bill 2008, GN 440 of GG 30963 § 2, at 3 (11 Apr. 2008) (S. Afr.).

revised. It was eventually passed by the Parliament in 2016. However, it was returned by President Zuma, who is concerned that it might be unconstitutional, and it remains yet again in limbo.

CONCLUSION

This brief comparison between three post-colonial states in southern Africa provides a clear demonstration of the relationship between the particular history and nature of property rights and the fundamental political structures of these nations. In each case the structure of the post-colonial State has been or is still being formed around the history and nature of tenure relations—whether these relations are based on indigenous and colonial relations to the land or are being forged through claims of historical dispossession and restitution. In each of these cases it has been the history of land reform post-independence that has had a profound impact on the structure of democratic politics and legal institutions—whether at the local level in Botswana or at multiple levels in Zimbabwe and South Africa. Where land reform has failed or has been inadequate in addressing the legacies of colonialism, there have been profound political consequences. In Zimbabwe, these early failings have put the very structure of the State in jeopardy. In South Africa, the inability to address economic inequality has led politicians to increasingly point to land distribution and reassert the claim that the land must be returned to the people. While often serving as a proxy for a more general claim for wealth redistribution, it is the continuing inequality in access to land, both urban and rural, that enables these claimants to increasingly question the legitimacy of the post-apartheid constitutional order.

The distinction between marketable and nonmarketable land, as well as its racial character, was reflected in the relationship between the State and land in most southern African countries—including Botswana and Zimbabwe—prior to independence, although not to the same extent or with the same consequences as experienced during the apartheid period in South Africa. The continued vitality of this distinction, even outside of southern Africa, may be seen in the new plurinational constitutions of Ecuador and Bolivia; in the recognition of different forms of tenure for tribal and First

Nation sovereignties in North America; and in the multitude of tenure forms that exist across Africa, Asia, and other regions of the world. From this perspective, it is no longer possible to ignore the diversity of tenure forms or to impose a simple one-size-fits-all notion of property on the world. Recognizing these alternate realities and working out how these different forms may coexist means that we may begin to benefit from local recognition and legitimacy of governmental institutions that must interact and manage these different forms of property.[124] In fact, different forms of tenure—private ownership, different types of co-ownership and tenant arrangements, as well as condominiums and community land trusts—already exist and are acknowledged in most western legal systems. The task now is to improve the interactions of these different forms of tenure in rural and urban contexts in the developing world in order to secure the benefits for those holding property and to promote the legitimacy of those institutions of good governance that are so essential to ensuring an effective and legitimate political structure in these post-colonial nations.

124. *See* UNTITLED, *supra* note 12.

PRIVATE PROPERTY FOR THE POLITICALLY POWERFUL

JAMES BURLING*

INTRODUCTION—A SHORT HISTORY OF THE EROSION OF RESPECT FOR PRIVATE PROPERTY

Traditional Anglo-American law always considered property rights nearly sacrosanct, with the giants of the legal field equating private property with liberty and an area that was best not molested by government.[1] A central purpose of government was seen to be a protector of private rights and liberties, including and especially, rights in property.[2] And, so great was the regard for private property, that not even actions for "the common good" could violate it.[3] Of course, the practical necessity of condemnation was recognized by early theorists such as Blackstone, who cautioned government to use that

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1. *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES *2 ("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."); JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 222 (Peter Laslett, ed., student ed., Cambridge Univ. Press 1988) (1689) ("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."). This understanding was not confined to Great Britain. In the prior century, Hugo Grotius wrote, "Thus property, as now in use, was at first a creature of the human will. But, after it was established, one man was prohibited by the law of nature from seizing the property of another against his will." HUGO GROTIUS & ARCHIBALD COLIN CAMPBELL, THE RIGHTS OF WAR AND PEACE INCLUDING THE LAW OF NATURE AND OF NATIONS 21 (1901) (translation of HUGO GROTIUS, LAW OF WAR AND PEACE, ch. 1, § X (1625)).

2. *See, e.g.*, THE FEDERALIST NO. 10 at 49 (James Madison) (J.R. Pole ed., 2005) ("The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government."); *see also* JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (3d ed., 2007). Of course, there are contrary views. *See, e.g.*, David Abraham, *Liberty Without Equality: The Property-Rights Connection in a "Negative Citizenship" Regime*, 21 L. & SOC. INQUIRY 1, 47–48 (1996) ("property less and less the 'guardian' of other rights, and more transparently a form of individual and class domination").

3. 1 WILLIAM BLACKSTONE, COMMENTARIES *135 ("So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.").

power sparingly—noting that it is not the sort of power that an individual man, or even a "set of men," can exercise.[4]

But there is also a critical reality to the nature of government that is common to all forms of government not run by angels: those in power take advantage of those who are not. And in the context of eminent domain, the advantage taken is often private property. To avoid abuse of any power wielded by the government—either by the executive or the legislature—the judiciary is supposed to mediate. The judiciary is given the authority to act as a neutral arbiter between government and individuals. This judicial power to interpose between individuals and their government is key to liberty. It was an essential epiphany to those involved in the struggles for power between the monarchy, the parliament, and the judiciary of seventeenth century England that not even the king could command his subjects or pass judgment upon them without the law adopted by Parliament and the interpretation of that law by independent judges.[5] With the elimination of the monarchy's own prerogative courts such as the Star Chamber, an *independent* court system—with the ability to say "no" to the Crown—became an essential element of the British Constitution, and ultimately many state constitutions and the Constitution of the United States.[6] Thus, the courts have had a long and storied tradition of protecting the liberties of the people against all manner of attempted usurpations. And the liberty of property is no different. Indeed, one of the first great attempts to assert the liberties of the American colonists against British usurpations came in the famous challenge by James Otis in 1761 to the Crown's writs of

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4. Blackstone continues that only the legislature can "interpose and compel":

> If a new road . . . were to be made through the grounds of a private person, it might perhaps by extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. . . . the legislature alone, can [compel only] . . . . by giving him a full indemnification and equivalent for the injury thereby sustained. . . . All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.
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> *Id.*

5. *See generally* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014).

6. *Id.* at 279. "[T]he cardinal achievement of the English in their constitutional struggles was to subdue the Crown under the law, particularly under the English constitution." *Id.* at 493–94.

assistance,[7] an event considered by John Adams to have given birth to the American independence movement.[8]

Private property rights deserve an equally forceful protection by the judiciary from the government's power of eminent domain. In the case of eminent domain, government officials are not just entering and "break[ing] locks, bars, and everything in their way."[9] They are *taking* the locks, bars, and everything in their way, as well as the house itself and the very land upon which the house sits. The Constitution limits such power only to instances where the taken property is to be put to public use, and it tasks the judiciary with ensuring that government power, including the power of eminent domain, is exercised only within constitutional limits. And yet, in the context of the forced transfer of property from those without power to those with it, that process fails because the judiciary defers too much to those who are doing the taking. And in recent times that process has failed badly because "judicial deference" has taken on an exalted status in the nation's courthouses.[10]

The United States, however, was not founded upon principles of deference. The structure of the government was instead designed to establish vigorously competing branches of government. Moreover, each branch is imbued with an interest in preventing the undue arrogation of power by the other branches. Such a check on the amassing of power was seen to be the best guarantor of liberty, and property, for the people.[11] But this fundamental vision of the proper role of

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7. *See* James Otis, Oral Argument Against Writs of Assistance (Feb. 24, 1761), *in* 1 CLASSICS OF AMERICAN POLITICAL AND CONSTITUTIONAL THOUGHT, 151, 152 (Scott J. Hammond et al. eds., 2007):

> A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient.
>
> This wanton exercise of this power is not a chimerical suggestion of a heated brain.

8. *See generally* JOHN ADAMS & WILLIAM TUDOR, NOVANGLUS AND MASSACHUSETTENSIS: OR POLITICAL ESSAYS (1819).

9. *See* Otis, *supra* note 7, at 152.

10. *See* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 55–61 (2015).

11. *See, e.g.*, THE FEDERALIST NO. 47, at 246 (James Madison) (Garry Wills ed., 1982)

government began to metamorphose over a century ago. Government power, instead of being the chief protector of the liberties and property of the people, transformed into the chief guarantor of the general welfare of the people, even if that meant that liberty and property had to step aside.[12]

It has been argued by some that the institution of private property, and the protections given to private property, serve only to protect the haves against the have-nots.[13] But when employed as designed, the institutions of private property really serve to protect the interests of the working and middle classes as much as anyone else. Nowhere is that seen more clearly than with eminent domain. If constrained to its constitutional limits, the power of eminent domain would pose only a limited risk to the rights of individuals.

It is not a coincidence that the expansive notions of state power espoused by the Progressives came into prominence at the same time as the constraints on the power of eminent domain were loosened.[14] A government that sees the individual rights in property as an obstacle to good government is not one that will be shy about

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("[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." (quoting CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 171 (Thomas Nugent trans., 1748)). It should also be quite clear that liberty and property were seen as coextensive by the Founders. *See, e.g.*, James Madison, *A Property in our Rights*, NAT'L GAZETTE, Mar. 29, 1792, at 174 ("In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.").

12. Thus, for example, President Roosevelt put the "freedom from want" and "freedom from fear" on an equal footing with the freedom of speech and religion. *See* Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941) (transcript available at http://www.americanrhetoric.com/speeches/fdrthefourfreedoms.htm). With that, the freedoms in the Bill of Rights requiring government to refrain from infringing upon our liberties (e.g., "[c]ongress shall make no law," or "the right . . . shall not be infringed," or "nor shall . . .") become mandates for government to provide positive benefits to its people.

13. *See, e.g.*, Abraham, *supra* note 2; KARL MARX & FREDERICK ENGELS, MANIFESTO OF THE COMMUNIST PARTY 22 (1884), *transcribed from* 1 MARK/ENGELS SELECTED WORKS (Samuel Moore trans.,Progress Publishers1969), https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf ("[M]odern bourgeois private property is the final and most complete expression of the system of producing and appropriating products, that is based on class antagonisms, on the exploitation of the many by the few.").

14. *See* Somin, *supra* note 10, at 47–54; Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use"*, 32 SW.U. L. REV. 569, 635 (2003) ("[W]hereas private contracts and private property had once been seen as fundamentally different than projects having a special public nature, like railroads—and consequently, free from government interference—now all behavior was seen as having public ramifications justifying government control, to serve the 'popular will.'").

using the power of eminent domain. That the ideals of progressivism and individual liberty were seen as mutually incompatible can be seen, for example, in the writings of Woodrow Wilson. In 1887, as a professor at Princeton University, he wrote:

> [A]ll idea of a limitation of public authority by individual rights be put out of view, and that the State consider itself bound to stop only at what is unwise or futile in its universal superintendence alike of individual and of public interests. The thesis of the state socialist is, that no line can be drawn between private and public affairs which the State may not cross at will; that omnipotence of legislation is the first postulate of all just political theory.
> . . . .
> . . . must not government lay aside all timid scruple and boldly make itself an agency for social reform as well as for political control?[15]

Later, while campaigning for the presidency, he said, "that property as compared with humanity, as compared with the vital red blood in the American people, must take second place, not first . . . ."[16] With the rise of progressivism in the United States and the concomitant understanding that government should play a much larger role in promoting collective action for the public good, fealty to principles of individual rights, and especially economic and property rights, began to wane.[17]

Under progressive thought of the sort espoused by Wilson, notions of individualism and private property were seen as impediments to social improvement.[18] But the reformers were badly mistaken if they believed that the lessening of restraints on government interference with individual rights and property would inure solely to the benefit of the poor and working classes. The result was quite the opposite. The regulation of property under the Progressives evolved from regulations designed to protect health and safety to regulations designed

15. Woodrow Wilson, Socialism and Democracy (1887) (unpublished essay), http://www.origin.heritage.org/initiatives/first-principles/primary-sources/woodrow-wilson-on-socialism-and-democracy.

16. AUGUST HECKSCHER, WOODROW WILSON: A BIOGRAPHY 260 (1991).

17. *See, e.g.*, Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731 (2004); United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938).

18. This is still thought, apparently, by some today. *See, e.g.*, Abraham, *supra* note 2.

to protect established and privileged neighborhoods from excessive development—and infiltration by the poor. Justice Sutherland's tirade against parasitic apartment buildings in *Euclid v. Ambler* was a harbinger of much more to come.[19]

As private property has become more and more malleable in the hands of government actors, it has become more of a target of the entrenched political class for the benefit of that class. The owners of private property, and the general public, have suffered. And, as will be shown, the property owners who have suffered the most have been those with the least—the working class, the poor, and minorities. Put simply, the erosion of rights in property has hurt those with the least property far more than those with the most.[20]

I. THE RISE OF EMINENT DOMAIN

The use of the sovereign power of eminent domain to condemn private property has been the most visible manifestation of the tendency of government to harness private property for the private good of government-favored special interests. While often couched in terms of improving the lives of the poor, the reality has been a dispossession of the poor from their homes and neighborhoods. Thus, working-class homes are condemned for shopping centers and factories for the ostensible purpose of creating jobs or increasing tax revenues, but in reality condemnation is for the purpose of enriching favored developers and multinational business enterprises.[21] Even today,

19. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926) (upholding zoning laws, noting "the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite").

20. Or, as Professor Kanner puts it, redevelopment means using the "coercive power of government to redistribute wealth from the deserving middle class and the few poor who own modest dwellings . . . to the undeserving rich." Gideon Kanner, *Do We Need to Impair or Strengthen Property Rights in Order to "Fulfill Their Unique Roll"? A Response to Professor Dyal-Chand*, 31 U. Haw. L. Rev. 423, 447 (2009).

21. *See, e.g.*, Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (destruction of working-class neighborhood for General Motors plant); Kelo v. City of New London, 545 U.S. 469 (2005) (The ostensible purpose of the redevelopment (or destruction) of a middle-class neighborhood was to facilitate jobs. In reality, the project was for the benefit of the Pfizer corporation.); *see also* ILYA SOMIN, *supra* note 10, at 6 ("Documents obtained by *The Day* . . . show that the . . . condemnations were undertaken in large part as a result of extensive Pfizer lobbying of state and local officials."). For a longer list of cases where private property has been taken for the benefit of industrial and corporate interests,

middle-class private businesses can be taken for the benefit of other—and wealthier—private businesses. It is the Motel 6 being condemned for the Ritz.[22] And even entire neighborhoods of undesirables—the poor, the ethnic minorities, and those least able to mount meaningful political resistance—can be condemned in order to "revitalize" their neighborhoods. But this sort of "revitalization" simply disperses and displaces the powerless for the benefit of the powerful. The poor are shunted elsewhere, out of sight and out of mind. Once vibrant neighborhoods can become sterile office parks while new highways can tear asunder the social fabric of communities of color.[23] After decades of such marginalization of the poor for the public good, the broader public has had an epiphany: condemnation can happen anywhere to anyone. It is not only the blighted neighborhoods of the urban poor, but also the blight-free neighborhoods like Mrs. Kelo's, that can be targeted.[24]

Of course, "blight" has never really been much of an impediment to any sort of redevelopment taking because just about anything can be declared blighted due to factors as varied as "diversity of ownership" to peeling paint.[25] And even with many post-*Kelo* reforms, not much has changed with blight justifications for eminent domain, because the chasm between what the public considers to be blight and what the takers consider to be blight is vast. After all, if the reader lives in a single family suburban home surrounded by other individually owned homes, there is diversity of ownership. And heaven forbid

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see Kanner, *supra* note 20, at 467 nn.185–203.

22. *Kelo*, 545 U.S. at 503 (O'Connor, J., dissenting) ("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."). For a rare instance of a court beating back such an attempt, see, for example, 99 Cents Only Stores v. Lancaster Redevelopment Agency, 237 F. Supp. 2d 1123, 1130–31 (C.D. Cal. 2001), holding a government condemnation in order to retain Costco and stop "future blight" unlawful.

23. *See, e.g.*, ERIC AVILA, THE FOLKLORE OF THE FREEWAY: RACE AND REVOLT IN THE MODERNIST CITY 14 (2014) ("[I]f future anthropologists want to find the remains of people of color in a postapocalypse America, they will simply have to find the ruins of the nearest freeway."). Avila argues that the growing resistance to urban highways that began in the 1960s still pitted the white elites against poor minority communities.

24. *See* Kelo v. City of New London, 545 U.S. 469 (2005).

25. *See generally* James S. Burling, *Blight Lite*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, January 9–11, 2003, at 3, 43, 2003 WL SH053 ALI-ABA 3, 43 (noting that one of the standard factors for determining blight is "diversity of ownership" and general dilapidation); SOMIN, *supra* note 10, at 84 (discussing expansion of meaning of "blight").

a neighbor has too many leaves on her tennis court, even if that neighbor is a member of Congress from an upscale San Jose neighborhood.[26]

There is in the United States something of a backlash. Once seen as a benevolent tool of social improvement, resistance to eminent domain is growing. Long-simmering resentments by minority communities have become more visible and have spilled into nonminority territory. Judicial and legislative skepticism of the motivations of condemning authorities is growing. With the Supreme Court's decision in *Kelo*, sporadic efforts to contain the abuses of eminent domain became a movement.[27] But will that movement last? Despite reforms, there is an inexorable tendency of condemning authorities and their allies to seek again the power to take.[28] The role of private property as a bulwark of individual liberty is not yet secure.

The Fifth Amendment in the United States Constitution says: "No person . . . shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."[29] In theory, confining the use of condemnation to those projects that serve a public use, combined with the payment of just compensation, should limit the ability and incentives of government actors to abuse the power of eminent domain. In practice, a potent combination of ambitious government actors, politically connected developers, and a willingly complicit judiciary has called into question the effectiveness of these constitutional limitations. As will be shown, the term "public use" has been transformed into a mere aphorism that has little to do with the "public" and sometimes not even much to do with "use." And government condemnors have striven mightily to put the prefix "un-" in front of "just compensation."[30]

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26. *See* RANDAL O'TOOLE, THE BEST-LAID PLANS: HOW GOVERNMENT PLANNING HARMS YOUR QUALITY OF LIFE 80 (2007).

27. *See, e.g.*, SOMIN, *supra* note 10, at 135–80 (summarizes political responses to *Kelo*); *see, e.g.*, Jennifer Zeigler, et al., *50 State Report Card*: *Tracking Eminent Domain Reform Litigation Since Kelo*, INST. FOR JUST. (Aug. 1, 2007), http://www.ij.org/wp-content/uploads/2015/03/50_State_Report.pdf. *But see* Timothy Sandefur, *The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006) (arguing that the legislative response has often been ineffectual and coopted).

28. *See, e.g.*, Brad Kuhn, *It's Baaacckkkk. . . . Redevelopment Returns to California*, CAL. EMINENT DOMAIN REPORT (Sept. 28, 2015), http://www.californiaeminentdomainreport.com/2015/09/articles/redevelopment/its-baaacckkkk-redevelopment-returns-to-california/ (chronicling the return of redevelopment in California).

29. U.S. CONST. amend. V.

30. For numerous examples of undercompensation for taken property, search for blog

The stories are legion of eminent domain being used to destroy working-class neighborhoods to make way for everything from automobile factories to undefined support for a pharmaceutical company to a baseball stadium to a Hollywood museum to a parking area for an upscale casino.[31] Sometimes after the neighborhoods are destroyed, the projects fail or never even get built in the first place.[32] These condemnations lead to a vexing question: where is the public use in privately owned factories, stadia, and museums, especially those that never get built?

II. THE TRANSFORMATION OF "PUBLIC USE" INTO "POLITICALLY USEFUL"

The *Kelo* decision ten years ago did not signal the Supreme Court's evisceration of the "public use" limitation on the power to condemn. That happened many years prior.[33] But it was the most visible

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posts with the title, *Lowball Watch*, in Gideon Kanner's blog, GIDEON'S TRUMPET [hereinafter Kanner, *Lowball Watch*], http://www.gideonstrumpet.info/ (last visited Dec. 19, 2016).

31. Kelo v. City of New London, 545 U.S. 469 (2005) (undefined support facilities for pharmaceutical company); County of Los Angeles v. Anthony, 224 Cal. App. 2d 103, 105, *cert. denied*, 376 U.S. 963 (1964) (Condemnation of homes for Hollywood museum; the landowner tried "to prove that the Hollywood Museum [was] merely a front of some kind under the guise of eminent domain and under the guise of a public body to put up a private enterprise . . ." The proof was not allowed. Although the land was condemned and the owner removed by alleged trickery, the museum was never built.); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d at 459 (Mich. 1981_ (automobile factory); Hector Becerra, *Decades Later, Bitter Memories of Chaves Ravine*, LA TIMES (April 5, 2012), http://www.articles.latimes.com/2012/apr/05/local/la-me-adv-chavez-ravine-20120405 (Mexican-American community removed for public housing that never materialized on the site of a future Dodger Stadium); s*ee* Wendy Horowitz, *Here Lies Liberty: Steve Anthony and His Fight Against Eminent Domain*, CENTRAL LIBRARY BLOG (Apr. 2, 2014), http://www.lapl.org/collections-resources/blogs/central-library/here-lies-liberty-steven-anthonys-fight-against-eminent. Lastly, Vera Coking fought the condemnation of her home by then-real estate mogul, Donald Trump, so it could be razed for a casino limousine parking area. *See* Manuel Roig-Franzia, *The Time Donald Trump's Empire Took on a Stubborn Widow—and Lost,* WASH. POST (Sept. 9, 2015), https://www.washingtonpost.com/lifestyle/style/the-time-donald-trumps-empire-took-on-a-stubborn-widow--and-lost/2015/09/09/f9cb287e-5660-11e5-b8c9-944725fcd3b9_story.html?utm_term=.0a08259f3930; *see also* Kanner, *supra* note 20.

32. *See* Gideon Kanner, *Eminent Domain Projects that Didn't Quite Work Out*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Eminent Domain and Land Valuation Litigation, Jan. 8–10, 2009, at 17, 2009 WL SP006 ALI-ABA 17.

33. *See* Ilya Somin, *Putting Kelo in Perspective*, 48 CONN. L. REV. (forthcoming 2017) (symposium on *Kelo*), https://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2850695##.

manifestation of the phenomenon and one that managed to capture the public's attention when the press discovered the plight of elderly widows and pensioners who were being thrown out of their homes for some vaguely defined benefit of a multinational pharmaceutical conglomerate. The public was justifiably outraged at a practice that many of us in the business of defending landowners have known about for a long time. The public learned that crony capitalism was alive and well in city halls, county offices, and state bureaucracies across the land.[34]

It didn't begin this way. In the early years of the republic, the notion of a forced-government transfer of land from one private owner to another private owner was something of an anathema. Probably the earliest American case dealing with private takings is *Giddings v. Brown*, a Massachusetts decision from 1657, in which the Supreme Court held that "[t]he right of property is . . . a fundamental right. In this case the goods of one man were given to another without the former's consent. This resolve of the town being against the fundamental law is therefore void, and the taking was not justifiable."[35] Beginning with *VanHorne's Lessee v. Dorrance*[36] and *Calder v. Bull*,[37] the Supreme Court routinely criticized the notion of private takings. In *Calder*, Justice Chase wrote:

> [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 . . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.[38]

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34. For a sense of the public outrage, see, for example, Avi Salzman & Laura Mansnerus, *For Homeowners, Frustration and Anger at Court Ruling*, N.Y. TIMES, June 24, 2005, http://www.nytimes.com/2005/06/24/us/for-homeowners-frustration-and-anger-at-court-ruling.html?_r=0; Jonathan V. Last, *The Kelo Backlash: What the Supreme Court Touched Off with Its Eminent Domain Decision*, THE WKLY. STANDARD, Aug. 21, 2006, http://www.weeklystandard.com/the-kelo-backlash/article/13716; SOMIN, *supra* note 10, at 3 ("Polls showed that over 80 percent of the public disapproved of the Court's ruling, and it was also denounced by politicians, activists, and pundits from across the political spectrum.").

35. PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 16 (1899), https://www.archive.org/details/englishcommonla00reingoog.

36. VanHorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304 (1795).

37. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798).

38. *Id.* at 388–89.

Likewise, Justice Story wrote for the Supreme Court in *Wilkinson v. Leland*,[39]

> [t]hat government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. . . . We know of no case in which a legislative act to transfer the property A to B without his consent has ever been held a constitutional exercise of legislative power in any State of the Union. On the contrary, it has been consistently resisted as inconsistent with just principles by every judicial tribunal in which it has been attempted to be enforced.[40]

These early cases involved *uncompensated* takings,[41] a fact which has led some to question whether the "A-to-B" proscription that Judge Chase discussed should apply to *compensated* takings. But the principle against A-to-B transfers was extended to a compensated transfer in the 1848 case of *West River Bridge v. Dix*.[42] In *Dix*, a private bridge was condemned for free public use. Concurring, Justice McLean wrote,

> It is argued, that, if the State may take this bridge, it may transfer it to other individuals, under the same or a different charter. This the State cannot do. It would in effect be taking the property from A to convey it to B. The public purpose for which the power is exerted must be real, not pretended.[43]

However, as the exigencies of industrialization came to the fore, this ethic began to crumble. First came the mills requiring dams for waterpower. And then came the railroads that were to stitch the nation together on steel rails. For these purposes, the mills and railroads needed land; and not just any land, but land in very particular

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39. Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657 (1829).

40. *Id.* at 658. This proscription against private takings is consistent with Blackstone's admonition against a "set of individuals" taking private property even for a public purpose like a road. *See supra* note 3. While he continued that the government, and only the government, may take private property for such purposes, he did not say that government may take from one individual just for the benefit of another individual or set of individuals; to do so would have made his invection nugatory.

41. Or in *Calder*, 3 U.S. (3 Dall.) 386, it involved a legislative incursion in an inheritance dispute.

42. West River Bridge v. Dix,47 U.S. (6 How.) 507, 537 (1848).

43. *Id.* at 537 (McLean, J., concurring).

places. Mills had to be at favorable spots next to rivers. And railroads had to get from point *A* to point *B* with a minimum of deviations. While some mills and railroads made deals and bought land from willing sellers, others were either less patient or less willing to subject themselves to the vicissitudes of market transactions. And governments—which were often controlled by the railroads or other land-hungry industrial concerns—were willing to accommodate those industrialists who wanted other people's land without the bother of free-market transactions. In this era, the prohibition of private A-to-B transfers began to erode and the concept of public use became more elastic. Railroads, after all, were open for *use* by all members of the *public* who could pay the freight. Thus, for example, in *Hairston v. Danville & W. R. Co.*,[44] the Court held:

> The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.[45]

Some states and state courts were more receptive to these private takings by railroads and mills than others. But the trend was towards a more liberal interpretation of the Public Use Clause in order to facilitate industrial development.[46]

The coup de grace for the Public Use Clause as a meaningful check on the government's power to effect A-to-B transfers came in the 1954 decision of *Berman v. Parker*.[47] That case involved an effort at so-called "slum clearance" in Washington, D.C. The plan was to remove the dilapidated tenements and crumbling infrastructure and replace them with a planner's vision of utopia—shiny new office buildings, public squares, and perhaps some new housing for the poor. Well, actually, perhaps not for the last of those three. To accomplish this nirvana on earth, entire city blocks had to be acquired, razed, and rebuilt into new shining city on the hill by private developers. But, the owner of a department store objected. He claimed that his

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44. Hairston v. Danville & W. R. Co., 208 U.S. 598 (1908).

45. *Id.* at 608.

46. *See* Timothy Sandefur, *Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use"*, 32 SW. U. L. REV. 569, 599–609 (2003) (extended historical treatment of eminent domain by mills and railroads).

47. Berman v. Parker, 348 U.S. 26 (1954).

building was a perfectly fine building; it was not a tenement and not a slum.[48] How could the city take his property and turn it over to a private developer and call that "public use"? The case eventually made its way to the Supreme Court.

That was where the Supreme Court manifested its peculiar brand of genius. In a decision written by the very progressive and very liberal Justice William O. Douglas, the Court held that "public use" really meant the "public purpose."[49] In other words, the public did not have to actually "use" the taken property in any literal sense, so long as the public's "purpose" was served by the project. And what could have been more in the public interest than slum clearance? But this was not the only left turn taken by the Court. The Court essentially said that the government's eminent domain power was coterminous with "police power," which is the power to regulate. In other words, whatever the government could regulate, it could take. This was an important conflation of power, because it also meant that the courts should not second-guess decisions to condemn any more than they should second-guess the details of day-to-day regulations. By 1954 it had already been well established that the courts would defer to government decisions pertaining to regulations of economic affairs.[50] This standard of deference meant that a court would overturn an economic regulation in only the most extraordinary of circumstances. And so it was in *Berman*, where Justice Douglas put forward an aphorism that is breathtaking both in its degree of condescension and its surrender to government power:

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48. *See* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010).

> The two cases [that became *Berman v. Parker*] were brought by Max Morris, the owner of a department store, and Goldie Schneider, who owned a hardware store down the street. Both stores were located on 4th Street, which was then a lively commercial area with various shops and stores, and neither of the buildings was considered to be substandard or deteriorating. Fourth Street at the time was a hub of black and Jewish life, and one of the few areas in the city, then segregated, that displayed a measure of racial harmony. It was the site of the city's first integrated parade, and the mostly Jewish stores on 4th Street relied on business from black residents.

Id. at 451–52. Lavine recounts that while there were serious concerns about bad conditions in and around "alleys" that characterized many neighborhoods in Washington, D.C., the twenty-three thousand people living in these areas were not all anxious for their redevelopment.

49. *Berman*, 348 U.S. at 32 (segueing a discussion of the power of eminent domain "executed for a public purpose" to "the application of the police power to municipal affairs").

50. *See, e.g.*, United States v. Carolene Products, 304 U.S. 144, 152 n. 4 (1938).

> 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.*[51]

And to remove any doubt about the degree to which the Court was determined to remove the judicial branch from any meaningful oversight of the Public Use Clause, the Court established a standard of review of extreme deference:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia, . . . or the States legislating concerning local affairs. . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.[52]

With *Berman*, it was all over except for the details. The next time the Court focused on the Public Use Clause was in *Hawaii Housing Authority v. Midkiff*.[53] At a time when "land reform" was all the rage in Latin America and supported there by the United States,[54] the State of Hawaii had its own version of land reform. Rather than helping any landless peasants in Hawaii, this land reform was aimed at

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51. *Berman*, 348 U.S. at 33 (emphasis added).

52. *Id.* at 32.

53. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

54. The previous dalliance with land reform in the United States occurred on Puerto Rico where sugar plantations, already made less viable by a World War II era condemnation for naval purposes, were condemned for redistribution to farmers. *See* Puerto Rico v. E. Sugar Assocs., 156 F.2d 316 (1st Cir. 1946).

helping middle-class homeowners who were leasing the land under their homes from the Hawaiian land trusts. Hawaii's Land Reform Act of 1967 was designed to help these homeowners wrest the underlying fee from the large Hawaiian land trusts—whose purpose was to benefit Native Hawaiians. In fact, as Professor Kanner explains, "The property owner in this case, the Bishop Estate-Kamehameha Schools was a charitable trust (holding the lands of Bernice Pauahi Bishop, the last member of Hawaiian royalty) operating for the benefit of native Hawaiian children educated by the Kamehameha schools."[55] In other words, this was really a sort of antipublic use, taking land from a charitable trust and giving it to the not-so-deserving homeowners with votes. Following the precedent of constitutional minimalism set down in *Berman*, the Court refused to find this private to private land transfer to be unlawful.

And then there was *Kelo*.[56] The condemnees in *Kelo* were not the mere ethnic shop owners of *Berman*. They didn't own department stores. But they were simply middle-class homeowners who lived in ordinary little homes in a very ordinary (and unblighted) neighborhood.[57] But, alas for them, they didn't happen to own a multinational pharmaceutical concern that could dangle politically advantageous dreams of economic revitalization before the politicians of New London, Connecticut.[58] New London undoubtedly was a tired little city that had seen better days. Its unpretentious circumstances clearly didn't match the ambitions of those in charge. It was difficult for the city to resist Pfizer's beguiling promises. After all, all that stood between New London becoming a city headquarters for a major international player and its economically distressed status quo was a neighborhood of some expendable middle-class residents.

The decision in *Kelo* was not any sort of radical change in the doctrine that had evolved from *Van Horne's Lessee* and *Calder* to *Berman* and *Midkiff*. What set *Kelo* apart was that it could no longer be

55. Gideon Kanner, *Is the 'Public Use' Pendulum Reaching the End of Its Swing?*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study, Land Use Institute: Planning, Regulation, Litigation, Eminent Domain, and Compensation 709, 711 (Aug. 22–24, 2002) 2002 WL SH018 ALI-ABA 709.

56. Kelo v. City of New London, 545 U.S. 469 (2005).

57. *Id.* at 475 (homes were unblighted). *See also* SOMIN, *supra* note 10, at 12 (description of neighborhood).

58. *See Kelo*, 545 U.S. at 473–75; SOMIN *supra* note 10, at 16–19 (outlining Pfizer's role in the redevelopment).

denied that the Public Use Clause was worth less than the parchment it was written on. The pretense was gone. And the public was outraged because it was not as familiar as lawyers were with the manner in which the courts can build one small doctrine-eviscerating precedent on top of another to ultimately transform the meaning of one thing to something completely different.[59] And so with *Kelo* the veil was lifted, and everyone knew that "public use" meant "public interest," which meant whatever damn-fool thing the politicians thought was a good idea to do with peoples' homes and lives at the moment.

III. THE "PUBLIC USE" IN REMOVING THE POOR FROM CITIES

It didn't take long before the idealistic notions of *Berman*, that eminent domain could be used to make cities "sanitary" and "spiritual," led to a perverse understanding that the best way to beautify a city was to remove that which was ugly. And not to put too fine a point on it, what was ugly was not white and upper middle class. By the time of *Kelo*, the criticisms of eminent domain were becoming widespread.[60] It finally began to dawn on people that urban redevelopment had turned from a salutary mechanism for societal improvement to something more sinister. In her *Kelo* dissent, Justice O'Connor, the author of *Midkiff*, noted that if eminent domain could be used for mere economic development, then the weak and politically powerless would become victims of progress, not its beneficiaries.[61] Justice Thomas

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59. Of course, the public should know better than to think words mean what the mean. *See* LEWIS CARROL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 124 (1882):

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you *can* make words mean so many different things."

60. *See, e.g.*, MICHAEL MALAMUT, PIONEER INST., THE POWER TO TAKE: THE USE OF EMINENT DOMAIN IN MASSACHUSETTS (2000) (White Paper No. 15); Steven M. Crafton, *Taking The Oakland Raiders: A Theoretical Reconsideration of The Concept of Public Use And Just Compensation*, 32 EMORY L.J. 857 (1983); David Kochan, *"Public Use" And The Independent Judiciary: Condemnation in An Interest-Group Perspective*, 3 TEX. REV. L. & POL. 49 (1998); Peter J. Kulick, *Rolling the Dice: Determining Public Use in Order to Effectuate A "Public-Private Taking": A Proposal to Redefine "Public Use"*, 200 L. REV. MICH. ST. U.-DET. C. LAW 639 (Fall 2000); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 4 (2003); Laura Mansnerus, Note, *Public Use, Private Use, And Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409 (1983); Derek Werner, Note, *The Public Use Clause, Common Sense, and Takings*, 10 B.U. PUB. INT. L.J. 335 (2001).

61. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting).

likewise noted that the poor are unable to "put their lands to the highest and best social use [and] are the least politically powerful."[62]

Moreover, poor and minority communities had borne the brunt of redevelopment pain since *Berman*.[63] In fact, Justice Thomas noted that of the families displaced by the urban renewal rush caused by *Berman* between 1949 and 1963, sixty-three percent were racial minorities.[64] Commentators have noted the same. Wendell Prichett wrote that "[b]light was a facially neutral term infused with racial and ethnic prejudice."[65] Sometimes even in the absence of an intent to remove minorities, it is the inevitable result of supposedly race-neutral redevelopment because today's redevelopment cannot be divorced from the policies that led to urban concentrations of minorities in the first place.[66] Indeed, urban renewal had become pejoratively known as "Negro removal."[67] African-American novelist and social critic James Baldwin criticized urban renewal as nothing more than "move the Negroes out."[68] Thus, whether or not urban redevelopment was a "public use," it certainly had the effect of transferring what little wealth some minority communities had to more politically favored interests.

At least with *Berman* there was the pretense that those removed from the redeveloped neighborhood would be able to move back into new public housing. That, at least, could have been relevant to the

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62. *Id.* at 521 (Thomas, J., dissenting).

63. *Id.* at 522.

64. *Id.*

65. Pritchett, *supra* note 60 at 6.

66. See LELAND T. SAITO, THE POLITICS OF EXCLUSION: THE FAILURE OF RACE-NEUTRAL POLICIES IN URBAN AMERICA 4–5 (2009):

> Economic redevelopment and the demolition of a building or neighborhood take place within a history of explicit racial inequality. This inequality manifested itself as racial exclusion, which created concentrations of racial minorities in residential and commercial areas. . . . urban renewal efforts that disproportionately destroyed minority communities, policies of racial steering by real estate agents that support racial segregation, and historic preservation policies that ignore the social history of minorities. . . . As a result, race-neutral policies are only one part of a long chain of events that contribute to racialized consequences.

67. Pritchett, *supra* note 60, at 47.

68. See James Baldwin, *Negro and the American Promise*, PBS (1963), http://www.pbs.org/wgbh/americanexperience/features/bonus-video/mlk-james-baldwin/, speaking to a teenager who was losing his home:

> They were tearing down his house, because San Francisco is engaging—as most Northern cities now are engaged—in something called urban renewal, which means moving the Negroes out. It means Negro removal, that is what it means. The federal government is an accomplice to this fact.

Court and planners, who figured that only 1,345 families would be displaced, that there was other adequate housing in the city, and that five hundred new units would be built nearby.[69] Lavine notes that of the four thousand residents in one particular area, ninety-seven percent were black and no more than thirty-six hundred were supposed to be housed in the new development.[70] Unfortunately, for the residents, the low-income housing did not materialize.[71] Nor did subsequent redevelopments in a host of cities do anything positive for the residents who were thrown out of their homes.[72]

IV. THE PUBLIC USE IN REDISTRIBUTION

In *Midkiff*, the Court found that there was a public use along with public interest in the redistribution of assets from the land trust to private homeowners with mere land leases.[73] But was there? The legislation applied only to existing homes; it opened up no new land for development. That is, no one other than the private homeowners and land lessees gained a single home from the Hawaii Land Reform Act of 1967. The legislation did not turn the 48.52% of government-owned land (an oligopoly itself) to the citizens for development, although the concentration of land in the *government* was a highly significant factor in the state's high land prices.[74]

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69. *See* Lavine, *supra* note 48, at 449. Lavine also notes that the planners apparently forgot to consider the four thousand families *already* on the waiting list for decent low-cost housing.

70. *Id.* at 448.

71. See Kanner, supra note 30, at 455–56:

> The housing actually built there, instead of bettering the lot of the slum dwellers whose plight figured so prominently in Justice Douglas' opinion as justification for the taking, turned out to be aesthetically sterile and so pricey that by 1969 it inspired a rent strike by affluent tenants.

The residents were instead forced to move into "worse slums elsewhere in the District of Columbia that commanded higher rents." *Id.* at 456. Of the fifty-nine hundred new residences built in the area all of three hundred ten were "affordable." *Id.* at 455 n.127.

72. *See* Kanner, *supra* note 20, at 435 n.48. (citing sources for estimates that 2.38 million urban housing units were destroyed by redevelopment, and by the 1960s, "some 111,000 families and 17,800 businesses were being displaced by urban redevelopment annually.").

73. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984) ("[T]enants living on single-family residential lots within developmental tracts at least five acres in size are entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live."); *id.* at242 ("Regulating oligopoly and the evils associated with it is a classic exercise of a State's police powers.").

74. *See* STATE OF HAW. LEGIS. REFERENCE BUREAU, REPORT NO. 3, PUBLIC LAND POLICY IN HAWAII: MAJOR LANDOWNERS (1967) (basis of the 48.52% figure); *see also* DAVID L. CALLIES,

The drafters of the Hawaii Land Reform Act of 1967 perhaps saw a net value in that the Act called for a compensation scheme that would have paid less than market value for the properties by basing income appraisals on controlled rents and ignoring the reversionary interest in the land.[75] The homeowner and leaseholders would have had an opportunity to purchase the land under their homes at bargain rates. Transferring condemned formerly privately owned interests in land to other private landowners at reduced prices serves a public use only if we accept that there is a public use in A-to-B transfers or if there is a "public use" in the majoritarian politics of robbing Peter to pay Paul.[76]

But, assume for the sake of argument that the Act did result in full payment to the landowning charitable estates as required by the Constitution. If that were the case, all the State would have done here was to buy interests in land and sell them to the homeowners at the same price. This isn't land redistribution, the purported public use endorsed by the Court in *Midkiff*. Instead it's just a complicated real estate transaction facilitated by the coercive power of the State.

But this begets another problem—the scheme didn't work all that well.[77] There was no guarantee that the homeowner-beneficiaries of the scheme could afford the now more valuable property. In reality, some became landlords. Some found it necessary to sell their now

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REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 173–74 (1984) (noting impact of land use controls on land prices); Summer J. La Croix & Louis A. Rose, *Public Use, Just Compensation, and Land Reform in Hawaii*, 17 RES. L. ECON. 47, 48 (1995), http://www.economics.hawaii.edu/sumnerfiles/LaCroix.Public.Use.1995.pdf ("[C]oncentration of ownership was not the cause of land's high prices . . . . Rather, the wholly overlooked causes of the high prices of land were severe natural and governmental restrictions on the supply of residential land.").

75. *See* La Croix & Rose, *supra* note 74, at 49 ("The required compensation was based on below-market controlled lease rents, and excluded the lessor's share of the reversionary interest in site-specific improvements."). The controlling of lease rents, moreover, was motivated by the desire "to reduce the basis for the calculation of leased-fee compensation under the [Land Reform Act]." *Id.* at 66. This undercompensation scheme was declared unconstitutional in 1979. *Id.* at 67.

76. This is essentially what happened. *See* La Croix & Rose, *supra* note 74, at 71 (noting the land reform bills "passage was indeed driven by the economic interests of the lessees as well as by Democrats' ideological opposition to the large estates.").

77. *See* Debra Pogrund Stark, *How Do You Solve A Problem Like in* Kelo*?*, 40 J. Marshall L. Rev. 609, 630 (2007):

> A powerful argument could be made that the public was more harmed by the Land Reform Act as amended than benefited by it. As such, the Court should have found that the Act as amended did not satisfy the public use requirement and was unconstitutional. . . . a closer look at the facts in the *Midkiff* case provides a telling example of the problems with judicial deference . . .

higher-value homes (with the land) and move elsewhere on the island. Indeed, the lure to sell was inescapable when a Japanese investor, later dubbed Honolulu's "worst neighbor," went from house to house from the back of his limousine, with his agents going to the homes with cash offers—whether the homes were for sale or not.[78] As the owners moved elsewhere on Oahu, they in turn pushed up the prices of other island homes. The net result was that land prices more than doubled in the five years after *Midkiff*, with the inflationary spiral reverberating throughout the island.[79] Indeed, the net effect of this eminent domain scheme was not just to transfer wealth from a charitable trust for Hawaiian children to affluent homeowners, but also to transfer wealth from the affluent homeowners and to very wealthy Japanese investors. That may not have been what the Hawaiian legislature intended, but that's what they got. When the power of eminent domain is abused, there can be some very unintended consequences.

V. TIF AND THE PERVERSION OF INCENTIVES

Even assuming that the original motivations of urban planners was benevolent, that state of affairs didn't last. Why not? The planners of the early to mid-twentieth century had an organic view of social improvement. If the "blight" could be removed from a city, that city would prosper, just like a plant could be restored to health if the dead and dying leaves were removed. The problem is that these planners, coming from the upper echelons of society, didn't fully grasp that when they saw blight, others saw functioning neighborhoods with often vibrant communities.[80]Those "blighted" communities may

78. *See* David Thompson, *The Worst Neighbor on the Block: Genshiro Kawamoto*, HAW. MAG., Jan. 9, 2014, http://www.honolulumagazine.com/Honolulu-Magazine/January-2014/The-Worst-Neighbor-on-the-Block-Genshiro-Kawamoto/index.php?cparticle=1&siarticle=0#artanc (noting that Kawamoto's massive cash-based land acquisitions created a "one-man inflationary spiral."); *see also* Kanner, *supra* note 20, at 431 n.33.

79. *See* Annual Residential Resales Data for Oahu, Oahu Historical Data, HONOLULU BOARD OF REALTORS, http://www.hicentral.com/oahu-historical-data.php (last visited Jan. 22, 2017) (showing the average median price of a single family residential home rose from one hundred fifty-eight thousand dollars in 1985 to three hundred fifty-two dollars in 1990; in 2015 the median price was seven hundred thousand dollars).

80. *See, e.g.*, Paul H. Brietzke, *Urban Development and Human Development*, 25 IND. L. REV. 741, 773 (1991) ("Edifice Complex projects have come to be emphasized over those promoting social welfare because elites who pay the planning piper get to call the tune.");

very well have been poor, and dark, and burdened with unfamiliar tongues and strange cultural traditions. But that didn't make them the equivalent of an agricultural blight that must be excised from the community like fungus-infested trees near an apple orchard.[81]

But it takes more than a profound ignorance of the value of poorer communities to explain the headlong conversion of urban redevelopment as a tool for improvement into an instrument of neighborhood destruction. It took Tax Increment Financing, or "TIF." Economic incentives can explain a lot, and in this case TIF is that explanation. Tax Increment Financing draws lines around supposedly blighted neighborhoods and authorizes the local governmental entity in charge of curing the blight to earmark future property tax revenues within the targeted area to pay for the improvement. In other words, any increase in the tax base after redevelopment belongs to the redevelopment agency. Local redevelopment districts are no different from any other corporate, bureaucratic, or governmental enterprise that wants to prosper and grow. So the ostensible mission—"to improve the community" or "build a better tomorrow"—becomes a mission in name only. The real motivation is to increase the tax base.[82] With more money, who knows what great things can be accomplished?

One does not accomplish great things with a shortage of money. And one does not make money by spending money on the poor or overseeing neighborhoods filled with poor people. Bluntly put, if the poor can be replaced with tax-paying businesses and upper-income residents, a redevelopment district's books will look a whole lot better. And no self-respecting, empire-building bureaucracy will prosper if saddled by slums.

Pritchett, *supra* note 60, at 4 ("Several studies have shown how urban elites promoted redevelopment to reorganize urban areas and to protect and enhance their real estate investments. These scholars have studied the rise of 'growth coalitions'—groups of business and political leaders that promoted renewal—and they have examined the political debates over postwar housing policy. Other works have documented the impact of urban renewal in intensifying racial segregation and limiting the mobility of African-Americans."(footnotes omitted)).

81. For more on property rights and blight eradication see *Miller v. Schoene*, 276 U.S. 272 (1928), holding that the removal of cedar trees to save the apple trees was not a taking.

82. *See, e.g.*, George Lefcoe, *After* Kelo*, Curbing Opportunistic TIF-Driven Economic Development: Forgoing Ineffectual Blight Tests; Empowering Property Owners and School Districts*, 83 TUL. L. REV. 45, 71 (2008) ("TIF financing is most attractive to communities where property values are rising rapidly so that any investment is likely to pay off and least attractive to communities where property values are flat or declining since the public investment might not be able to generate enough increment in the way of increased property taxes to amortize it.").

With the incentive of increasing the tax base, it was inevitable that the redevelopment districts would give birth to the redevelopment industry—builders and developers that specialize in acquiring "underutilized" property on the cheap (i.e., property inhabited by the poor in single-family homes or apartments) and converting them into thriving tax-generating concerns. Since it's not easy to alleviate the suffering of the poor, why even suffer the poor if you can have office complexes, high-end housing, shopping malls, and automobile factories? And if you throw into the mix the efficacy of routing highways through inner-city slums at behest of the highway-building lobby, it only makes sense that poor, urban neighborhoods are targeted for saving through destruction.

For better or worse, however, these projects often failed. The landscapes of American cities are littered by failed redevelopment projects, defunct shopping centers, empty office buildings, and rusting hulks where factories once loomed.[83] And no landscape is more littered by failure than the very heart of the New London experiment: today, Pfizer has abandoned New London, and where the homes once stood is not a field of dreams but a field of weeds inhabited by feral cats.[84] This is not surprising. Developments built by experienced business owners whose own capital is at risk should intuitively be more likely to succeed than those businesses built around the dreams of a planning department and financed by other people's money, e.g., taxpayer dollars. The redevelopers make their money, the poor are gone, and the cities are left with less than they had before.

But not to worry. Sometimes these failed projects are just the fodder for a new round of redevelopment.[85] The problem here is that projects conceived of and built by redevelopment agencies and their symbiotic developers are not necessarily projects that the free market would consider building. For private developers not subsidized by the mechanics of redevelopment, it might not make a lot of sense to build a shopping center or office complex in a former slum based on "build it and they will come" optimism or assurances of "build it and they will subsidize." Private unsubsidized developers

83. *See, e.g.*, Kanner, *supra* note 20

84. *See* SOMIN, *supra* note 10, at 235; *see also*, Kanner, *supra* note 20.

85. *See, e.g.*, Kaufmann's Carousel v. City of Syracuse Indus. Dev. Agency, 301 A.D.2d 292, 294 (N.Y. App. Div. 4th Dep't 2002) (condemnation of a business that was originally started on an older round of condemnation and redevelopment).

generally don't like to lose money.[86] Moreover, no sane redeveloper actually *guarantees* the success of a project developed with other people's money. The pretty drawings and scale renderings can be all that it takes to launch a redevelopment project. Reality can wait.

To be fair, even without the redevelopment agencies, poor neighborhoods are often attractive targets for infrastructure projects simply because the land is cheap and the projects can be accomplished before the displaced residents figure out how to mount a challenge—or even pay for the challenge. After all, why even try to build a highway through a collection of stately upper-class homes when the same highway can plow through a slum, giving rise to a project that both clears a slum and builds a highway, a power plant, or a dump?[87]

But even if the Public Use Clause has been stretched, even if condemnation serves an uglier side of America's toleration of the poor, and even if there are economic incentives to displace the poor, then at least there is the requirement to pay "just compensation" to make everybody whole again. But being made whole is in the eyes of the beholder.

VI. THE UNDERCOMPENSATION GAMBIT

Exactly what is just compensation? We can be pretty sure we know what compensation is. But what is "just"? Compensation is a real and pressing concern for a legion of condemnees across the land. No government wants to pay more for property than it is worth, nor should it. And more than a few seem happy to "save taxpayer money" and pay less for property than it is worth.[88]

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86. This is generally the case unless they employ the Trump model of business by bankruptcy.

87. *See, e.g.*, Naikang Tsao, *Ameliorating Environmental Racism: A Citizens' Guide to Combatting the Discriminatory Siting of Toxic Waste Dumps*, 67 N.Y.U. L. REV. 366, 366 (1992) (noting prevalence of toxic waste sites in minority neighborhoods).

88. *See, e.g.*, C. Jarrett Dieterle, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*, 17 FEDERALIST SOC'Y REV. 38, 38–39 (2016) ("In other words, governments attempt to dissuade landowners from holding out for more compensation by punishing those that do so, which results in governments getting away with systematic undercompensation in eminent domain proceedings. In essence, a sandbagging government says to landowners, 'if you think our initial appraisal is too low, just see how low we'll go if you take it to court!'"); Kanner, *Lowball Watch*, *supra* note 30; *see also* United States v. Norwood, 602 F.3d 830, 834 (7th Cir. 2010) ("The fact that 'just compensation' tends

The Supreme Court put compensation in terms of "fair market value," and what a "willing buyer would pay to a willing seller."[89] But these aphorisms give rise to more questions. What is "fair"? What does "willing" exactly mean? And why should "justice" always be defined by the "market"?[90]

To many owners, their homes have great intrinsic value that cannot be reflected by comparative sales of like properties. Emotional attachment, intrinsic value, and other purely subjective measures of worth cannot be completely divorced from justice. While it may not be realistic that all manifestations of emotional attachment can be given value, the failure to make any attempt can be dispiriting when property is condemned—and especially so when it is condemned solely for the purpose of making someone else rich. At oral argument in *Kelo*, Justice Scalia put it this way:

> What this lady wants is not more money. No amount of money is going to satisfy her. She is living in this house, you know, her whole life and she does not want to move. She said I'll move if it's being taken for a public use, but by God, you're just giving it to some other private individual because that individual is going to pay more taxes. I—it seems to me that's, that's an objection in principle, and an objection in principle that the public use requirement of the Constitution seems to be addressed to.[91]

But under the current regime of valuing properties in condemnation actions, appraisers must assiduously ignore any such subjective manifestations of value. But do they? Following *Kelo*, there has been considerable debate over whether home-owning condemnees have been undercompensated. Some argue that because appraisers must look only at "fair market value," such intrinsic value is ignored and

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systematically to undercompensate the owners of property taken by eminent domain underscores the fact that such a taking is not a wrongful act.").

89. *See, e.g.*, Olson v. United States, 292 U.S. 246, 257 (1934) (It is the "amount that in all probability would have been arrived at by fair negotiations between an owner willing to sell and a purchaser desiring to buy." Likewise, the Court held that a condemnee is "entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more. It is the property and not the cost of it that is safeguarded by state and federal constitutions.").

90. *Id.* at 257 (eminent domain fair market value and value of speculation).

91. Transcript of Oral Argument at 34–35, Kelo v. City of New London, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 529436.

landowners are undercompensated.[92] Others argue that data suggests that undercompensation is not widespread[93] or that proposed solutions of premium payments are misguided.[94] So while there may be debate over whether there is undercompensation and how significant it may be, the fact is that many people like Mrs. Kelo do not want to sell. Period. Clearly, their subjective wants are not being met.

Moreover, it is not just investment in new infrastructure that can raise the value of land. The mere act of taking individual parcels and assembling them into a larger whole can add tremendous value apart from any spending on new infrastructure. After all, why would a TIF-incentivized redevelopment agency take a neighborhood and turn it into some corporate cash cow if they don't expect to profit handsomely from all their hard work?

Thus, each home in a neighborhood of single-family homes may have a certain discrete value if bought and sold as a single-family home. Add all these homes together, and the neighborhood will have an identifiable value. But when the parcels are assembled together and made susceptible to a more productive economic use, the total value of the former neighborhood can be greatly enhanced. It can be many times more valuable as assembled raw land than as a collection of single-family homes.[95] Yet, when such a neighborhood is condemned, the individual homeowners are paid only what the home is supposedly worth as a single-family home in a neighborhood of single-family homes. In other words, if the assemblage could only be accomplished via eminent domain, it is discounted for valuation

92. *See, e.g.*, Gideon Kanner, *"Fairness and Equity," or Judicial Bait and Switch? It's Time to Reform the Law of "Just" Compensation*, 4 ALB. GOV'T L. REV. 38, 42 (2011) ("While fair market value of the taken property is certainly a proper element of compensation, standing alone it ignores a variety of incidental economic losses that are inevitably inflicted by forcible displacement of people from their homes and businesses, and thus falls short of being genuinely just compensation.").

93. *See, e.g.*, Brian Angelo Lee, *Just Undercompensation: The Idiosyncratic Premium in Eminent Domain*, 113 COLUM. L. REV. 593, 648 (2013) (arguing that it is not true that owners are unfairly undercompensated on intrinsic value and that state attempts to remedy undercompensation with bonuses are themselves unjust to the poor).

94. *See* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101 (2006) (criticizes compensation-based solutions to constrain eminent domain because they may undermine political resistance to questionable projects and private takings may generate unique dignitary harms).

95. *See* John Gavin, *Estimating Assemblage Value to Help Buyers and Sellers*, NEREJ, Aug. 16–22, 2013, http://www.nerej.com/65220.

purposes.[96] Thus, the condemned owners get none of the assemblage value. That, of course, comports with the aphorism that compensation is measured by what the owner has lost, not what the taker has gained.[97] Because the individual homeowner is unlikely to obtain consent from all the neighbors to assemble the parcels together on a voluntary basis, such an assemblage value may be too speculative to factor into a calculation of fair market value.[98] But the condemning authority—and related private developer—will reap the benefit of such assembly. This breaks the social contract. Private beneficiaries of the condemnation get far more out of the condemnation than the home-owning condemnees, and it is not for the obvious benefit of the public as when land is taken for a road or school but for the private benefit of the redevelopers.

But this is not the worst of it. Government condemnors are notorious for simply paying as little as they can get away with, recognizing, correctly, that most small landowners lack the wherewithal to fight back. Indeed, Professor Gideon Kanner has been publishing a "lowball watch" for decades.[99] Professor Kanner catalogs numerous examples where condemning agencies have offered to landowners only a fraction of what those landowners were able to acquire after trial.[100] But most small landowners cannot afford a trial. After all, only a few states will reimburse landowners for their attorneys' fees, and then only if the landowner prevails by obtaining a significant increase over the government's offer. And there's more. There is a practice prevalent in some jurisdictions for condemning authorities to make one lowball offer, then threaten to withdraw that offer and replace it with a lower one if the landowners resist.[101]

One of the more egregious tactics was employed by the federal government in a massive acquisition of private property used to

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96. *See, e.g.*, Santa Clara Cty. v. Ogata, 240 Cal. App. 2d 262, 268 (Cal. Dist. Ct. App. 1966) ("The possibility of integrating parcels is a factor which may be considered in determining market value, provided such integration would have been reasonably practicable without the exercise of the power of eminent domain.").

97. United States v. Powelson, 319 U.S. 266, 281 (1943).

98. *Id.* at 275–76.

99. *See supra* note 30.

100. And, of course, the over legislative attempts to underpay cannot be ignored. See, for example, Hawaii's Land Reform Act of 1967 as described by La Croix & Rose, *supra* note 74.

101. *See generally* Jarrett Dieterl, *The Sandbagging Phenomenon: How Governments Lower Eminent Domain Appraisals to Punish Landowners*, 17 FEDERALIST SOC'Y REV., Nov. 10, 2016, at 38, http://www.fed-soc.org/library/doclib/20161110_DieterleSandbagging.pdf.

expand the Everglades National Park. There were hundreds of rural landowners, almost all of modest means, whose property was slated for condemnation for inclusion in an expanded park. The U.S. National Park Service and U.S. Department of Justice employed a multipronged approach in condemning these lands.[102] First, the Park Service went to the various local towns with property slated for condemnation and persuaded the towns to downzone the desired properties. So instead of being able to build one home on a half-acre, the zoning now would allow only one home per ten acres, or only an agricultural use on the same property. This, of course, caused a drastic reduction in fair market value.

Next, the Park Service grouped the condemnees together so it could condemn multiple properties before a commissioner at once. (Unlike condemnations by state and local authorities, there is no right to a jury trial when the federal government condemns land.[103]) Most of the rural landowners were unrepresented. And, in fact, if any landowner hired an attorney, the federal government would drop the condemnation case with respect to that landowner. As a result, scores of landowners had their properties condemned without the benefit of an attorney. They were not sophisticated enough to know how to object to faulty appraisals, properly raise legal objections (such as the downzoning gambit), or hire independent appraisers. So these landowners were uniformly underpaid.

But the real kicker came next. After the federal government finished condemning the landowners who were unrepresented, it then went after those landowners who had hired attorneys. But by this time there were scores of valuations established with the unrepresented landowners. And these values were determined to be conclusive with respect to everybody else. In other words, everybody was allegedly shortchanged.

In other circumstances, landowners often are drastically undercompensated when an ongoing and successful business is condemned for one purpose or another. Most states simply refuse to compensate for business goodwill.[104] For example, a business person with a

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102. These allegations were made in *United States v. 480.00 Acres of Land*, 557 F.3d 1297 (11th Cir. 2009), *cert. denied*, 558 U.S. 1113 (2010).

103. This procedure is currently being challenged at the Sixth Circuit. *See* Brief of Plaintiffs-Appellants, Brott v. United States, No. 16-1466 (6th Cir. 2016), 2016 WL 3538863.

104. Darius W. Dynkowski, *Preparing a Business Damage Claim*, American Law Institute-American Bar Association Continuing Legal Education, ALI-ABA Course of Study,

successful bakery, automobile repair service, or tax preparation service may have built up a strong following in the neighborhood. This business goodwill can be of great value, and is often taken into account when a business is sold. Although business goodwill is often relevant to the dissolution of assets in the context of family law,[105] it is usually different when the government has to pay when it takes business goodwill. In many jurisdictions, the business owner is simply paid what the land and building is worth, disregarding the profitability and goodwill.[106] This can be devastating for the small business owner unable to find or utilize available property in the same neighborhood.

In one particularly egregious recent example, the owner of a successful soil excavation business was condemned in order to improve the levee system. That may well be a legitimate public use. But the landowner was being compensated only for the raw value of the land, not for its business value.[107] Even more galling, the landowner was charged by the levee district for dirt that had been excavated before

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Condemnation 101: How To Prepare and Present an Eminent Domain Case 251, 253 (Jan. 8–10, 2009), Westlaw SH018 ("Many jurisdictions do not permit compensation for business damages and the determination of whether business damages are compensable in a particular jurisdiction depends mainly on legislative grace or a broad interpretation of the jurisdiction's common law definition of just compensation. Moreover, in jurisdictions that allow business damages only certain elements of business losses are compensable."); *see* Note, *The Nature of Business Goodwill*, 16 HARV. L. REV. 135 (1902) (discussing "business goodwill" as definable property interest).

105. *See, e.g.*, Alicia Brokers Kelly, *Sharing a Piece of the Future Post-Divorce: Toward a More Equitable Distribution of Professional Goodwill*, 51 RUTGERS L. REV. 569 (1999); *see also* Helga White, *Professional Goodwill: Is It a Settled Question or Is There 'Value' in Discussing It?*, 15 J. AM. ACAD. MATRIM. L. 495 (1998).

106. *See* Lynda J. Oswald, *Goodwill and Going Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. REV. 283, 284 (1991) ("A number of state courts and legislatures have begun to recognize that losses of goodwill, going-concern value, or profits are real losses for which the property owners should be compensated."); *see also* Gideon Kanner, *(Un)equal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Taking Cases*, 40 LOY. L.A. L. REV. 1065, 1090 n.110 (2007) ("Before the legislature made loss of goodwill compensable in eminent domain under some circumstances, the court got around that inconvenient statutory scheme by simply asserting that business goodwill, though incontestably property, is not 'the form of property' that is protected by the Constitution in eminent domain, implicitly suggesting that property, sort of like ice cream, comes in different flavors, some more and others less appealing to the courts.").

107. S. Lafourche Levee Dist. v. Jarreau, 192 So. 3d 214, 226 (La. Ct. App.), *writ granted*, No. 2016-00904 (La. Sept. 6, 2016), 2016 WL 4991620, and *writ granted*, No. 2016-0788 (La. Sept. 6, 2016), 2016 WL 5001347 (reversing "trial court determin[ation] that just compensation for the Jarreau tract included the fair market value of the property plus economic/business losses for lost profits associated with the value of the excavated dirt").

the condemnation but not removed until after. In other words, the district took the property so it could become the sole beneficiary of the business—without paying the business what it was worth.

This state of things is a long way from any recognizable measure of justice. But even if the landowners were paid more, with less cheating by condemnors and with some factors that take into account both the intrinsic value of property, its business value, and its assemblage, would that be enough? After all, if property is a fundamental right, the sense of dominion and autonomy represented by ownership cannot necessarily be cured by shoving a fistful of dollars into the homeowner's hands as the public enters his castle in order to demolish it for a Walmart or Costco.

VII. REFORM AT THE STATE LEVEL

The reaction to *Kelo* was swift. A number of states enacted reforms that attempted to limit the power of redevelopment. Some states actually adopted meaningful reforms.[108] Florida, for example, banned all economic-redevelopment takings of private property without a three-fifths vote of each house.[109] California, however, had a series of failures from ill-conceived reforms. An early attempt at reform was a ballot initiative brought by an individual who was unfamiliar with California law and that was written, for all practical purposes, for the State of Nevada. Another effort tried to package eminent domain reform with a ban on rent control.[110]Finally, by the time the reform advocates got their act together, the redevelopment industry mustered their own countermeasure, a "reform" that contained a few cosmetic but meaningless protections of homeowners while at the same time enhancing the power of redevelopment agencies.[111] In something of an "only-in-California" move, Governor Jerry Brown then proceeded to abolish redevelopment agencies in order to grab the TIF money to help solve one of the state's periodic

108. *See* SOMIN, *supra* note 10, at 141 (on legislative reform).

109. FLA. CONST. art. X, § 6(c) ("Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.").

110. *See* Sandefur, *supra* note 27, at 751.

111. *See* SOMIN, *supra* note 10, at 159, 175.

fiscal crises.[112] But be assured, the power is being restored, one measure at a time.[113]

State supreme courts have done better. Even before *Kelo*, the supreme court of Michigan reversed *Poletown*, a case where the same court previously upheld the condemnation of a working-class neighborhood to make way for an eventually-to-fail General Motors factory:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. Poletown's [economic development] rationale would validate practically any exercise of the power of eminent domain on behalf of a private entity. After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.[114]

And after *Kelo*, there was a spate of state court decisions taking reform seriously.[115] Yet, so long as the Supreme Court of the United States fails to reverse *Kelo*, the temptation of states to backslide will be strong.

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112. *See* California Redevelopment Ass'n v. Matosantos, 53 Cal. 4th 231 (Cal. 2011) (statutes requiring windup and dissolution of redevelopment agencies do not violate constitutional provision limiting State's ability to require payments from redevelopment agencies); Maura Dolan, et al., *California High Court Puts Redevelopment Agencies out of Business*, L.A. TIMES (Dec. 29, 2011), http://www.articles.latimes.com/2011/dec/29/local/la-me-redevelopment-20111230 (noting political and tax reasons for abolition).

113. *See* Kuhn, *supra* note 28.

114. Hathcock v. Wayne City, 684 N.W.2d 765, 786 (Mich. 2004).

115. *See, e.g.*, City of Norwood v. Horney, 853 N.E.2d 1115, 1141 (Ohio 2006) (citing Hathcock's criticism of economic development positively). Kentucky and Illinois's supreme courts have also pointed out that the economic development rationale provides no logical limits. The Kentucky Supreme Court noted that every new legal business provides some sort of benefit that could be described as economic development. City of Owensboro v. McCormick, 581 S.W.2d 3, 8 (Ky. 1979) (quoting 26 AM. JUR. 2D *Eminent Domain* § 34, at 684–85 (1966)). Thus, if mere economic development is a public purpose, "there is no limit that can be drawn." *Id.* The Illinois Supreme Court dismissed the economic development rationale by explaining: "'If property ownership is to remain what our forefathers intended it to be, if it is to remain a part of the liberty we cherish, the economic by-products of [an interest group's] ability to develop land cannot justify a surrender of ownership to eminent domain.'" Sw. Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 10 (Ill. 2002) (quoting lower court decision).

CONCLUSION

The constitutional limitations on the government's power of eminent domain, when adhered to, redound to the benefit of all classes of Americans. As both Locke and Hobbs posited, a society without government will lead to the powerful taking advantage of the powerless.[116] Government serves to mediate that "war as is of every man against every man"[117] by controlling the instincts and abilities of some to take advantage of others. Remove that government mediation, and the result is war on the powerless. Make government an ally of some people in their war against other people, and the oppression becomes palpable. Nowhere is this more evident than when the limits on eminent domain are lifted.

The American experience has been that when the power of eminent domain is unchained, it will attack the most vulnerable: the poor, the working class, and minorities. The advantage will go to those who are rich, powerful, politically connected, and white.

The ability to use the political process for self-advantage lies with those with the strongest economic incentive to drive the politics. Redevelopment agencies and aligned developers have much to gain from private takings of the politically less organized. It is but one more classic example of rent-seeking, where laws can be crafted to favor those with a definable and large economic advantage in a political outcome (such as redevelopers) at the expense of those small, unorganized individuals with small, individual stakes such as working-class homeowners.[118]

As a result of the transmogrification of the late "Public Use Clause" into the "Politically Useful Clause," of the concomitant embrace of judicial abdication masked as "deference", and of the impetus to undercompensate, the constitutional limits on the taking of private property for private gain have been eviscerated. And it has not been the rich who have suffered. Post-*Kelo* reform has given hope to some. But unless and until the underlying causes of eminent domain abuse are rooted out, any respite may be but a temporary pause.

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116. Man "seeks out, and is willing to joyn [sic] 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*." JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 123. (P. Laslett rev. ed., 1988).

117. THOMAS HOBBES, THE LEVIATHAN ch. 14 (1651).

118. *See, e.g.*, GORDON TULLOCK, *The Rent-Seeking Society*, *in* 5 THE SELECTED WORKS OF GORDON TULLOCK (2005).

ARE EMINENT DOMAIN AND CONFISCATION VEHICLES FOR WEALTH REDISTRIBUTION? A SKEPTICAL VIEW

JAMES W. ELY, JR.*

Wealth redistribution, at least rhetorically, is back in vogue in the United States. A number of scholars have called for a redistribution of economic resources.[1] During the 2016 presidential election campaign, Democratic Party candidates echoed this assault on concentrated wealth. This, of course, was not the first episode of redistributive fervor to appear over the course of American history. Sporadic complaints about wealth distribution in the United States have been a recurring feature of political life. One thinks of the Populist Movement of the 1890s[2] and the New Deal years of the 1930s. But in fact these outbursts produced little change in wealth patterns. For example, despite talk of soak-the-rich policies, the New Deal 1935 tax law neither significantly altered the distribution of income nor broke up accumulated wealth.[3] Whether the present clamor will result in

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1. *See, e.g.*, THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014). *But see* Michael D. Tanner, *Five Myths about Economic Inequality in America*, CATO INST. POLICY ANALYSIS NO. 797, Sept. 7, 2016 (noting that some scholars have questioned Piketty's methodology and conclusions). *See generally* GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION: WHY ECONOMIC INEQUALITY THREATENS OUR REPUBLIC (2017) (arguing that income inequality undermines constitutional government); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Equality*, 94 TEX. L. REV. 1287 (2016).

2. The People's Party platform of 1892 colorfully proclaimed:

> The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn despise the Republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes—tramps and millionaires.

1 NATIONAL PARTY PLATFORMS, 1840–1972, at 89-91 (Donald Bruce Johnson & Kirk Harold Porter eds., 1973).

3. W. ELLIOTT BROWNLEE, FEDERAL TAXATION IN AMERICA: A HISTORY 135 (3d ed. 2016) ("Overall, the tax reforms did not redistribute income through taxation to any great extent, but the tax system had become more progressive."); MARK H. LEFF, THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939, 92 (1984) (concluding that "Franklin Roosevelt's fleeting onslaughts against 'economic royalists' produced minimal revenues and

meaningful change remains to be seen, but there is reason to be doubtful. Americans have never demonstrated a sustained national commitment to economic equality.[4]

I. THE ANTI-REDISTRIBUTION PRINCIPLE

Before 1900 much constitutional thought in the United States was concerned with curtailing state redistribution of wealth.[5] Since the founding era a cardinal tenet in constitutional doctrine questioned the legitimacy of government-mandated alteration of privately owned resources. Consider a revealing incident that arose from the drafting of the Pennsylvania Constitution of 1776. This was the most radically democratic state constitution adopted during the Revolutionary era. In response to concerns that wealth disparities could undermine political liberty, a committee proposed an unusual provision to limit the accumulation of wealth: "An enormous Proportion of Property rested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property." This wording was entirely deleted from the final document, as the Pennsylvania constitution framers refused to restrict the amount of property that individuals could acquire.[6] No other state even debated such a striking proposal. On

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thus were of negligible assistance in redistributing income to the nation's poor."). It bears emphasis that the federal income tax in the 1930s only applied to about five percent of the population. LEFF, *supra*, at 96.

4. J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 426, 434 (2d ed. 1993) (asserting that the American understanding of equality "did not imply equality in the distribution of material resources," and noting that over the course of United States political history "the question of the distribution of wealth seldom figured for long, or for large numbers, as a national problem").

5. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 10–27 (1992) [hereinafter HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960] (tracing the evolution of the anti-redistribution principle in constitutional doctrine).

6. WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA 192 (Expanded Edition, Rita & Robert Kimber trans., 2001); *see also* ELISHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION 146 (1955) (concluding "rarely, if ever, did even the most radical question the right of the wealthy to enjoy their possessions undisturbed"); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution*

the contrary, a number of states, including Virginia and Massachusetts, affirmed in their constitutions the rights of individuals to acquire and possess property.

Prominent members of the Constitutional Convention of 1787 made clear their rejection of redistributive policies. Writing in the *Federalist*, James Madison characterized "[a] rage for paper money, for an abolition of debts, for an equal division of property" as "improper or wicked."[7] Similarly, Alexander Hamilton, in 1789, assailed attacks on property owners, declaring: "There is no stronger sign of combinations unfriendly to the general good, than when the partisans of those in power raise an indiscriminate cry against men of property. . . . Such a cry is neither just nor wise . . . ."[8] As Jean Yarbrough pointed out, Thomas Jefferson, although a proponent of a wide distribution of property, did not favor involving government "in any radical scheme of redistribution, for this would have violated Jefferson's principle of limited government, and run contrary to the purposes for which civil society was instituted." She concluded that Jefferson "was not seriously troubled by the inequality of wealth in republican America."[9]

As is well-known, the Constitution and Bill of Rights contain numerous provisions designed to protect property owners against governmental redistribution of their property. The Contract Clause, for example, was driven in large part by the sour experience with state legislatures following the Revolution. They in effect attempted to transfer wealth by interfering in contracts in order to aid debtors at the expense of creditors.[10] The Contract Clause protected the

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and Its Influence on American Constitutionalism, 62 TEMP. L. REV. 541, 557–58 (1989).

7. THE FEDERALIST NO.10 (James Madison); *see also* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 268 (1990) ("[P]art of the purpose of private property for Madison was to make clear that redistribution could never be an acceptable public objective; it could never be part of a coherent vision of the public good. The rights of property defined redistribution as an illegitimate exercise of political power to promote private interests.").

8. From Alexander Hamilton to the Electors of the State of New York (April 7, 1789), *in* THE PAPERS OF ALEXANDER HAMILTON (Harold C. Syrett, ed., 1962).

9. Jean Yarbrough, *Jefferson and Property Rights*, *in* LIBERTY, PROPERTY, AND THE FOUNDATIONS OF THE AMERICAN CONSTITUTION, 71–72 (Ellen Frankel Paul & Howard Dickman, eds., 1989); *see also* Stanley N. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. AND ECON. 467, 480–81 (1976) (pointing out that Jefferson never endorsed redistributive policies that would impact existing property holdings).

10. U.S. CONST. art I, § 10, cl. 1 provides in part: "No State shall . . . pass any . . . Law

stability of agreements by barring states from abridging such arrangements. The Fifth Amendment, and its state counterparts, curtailed the authority of government to seize private property by eminent domain in two significant respects. Property could only be taken for "a public use" and upon payment of "just compensation."[11] The Fifth Amendment did not prevent governmental acquisition of property but sought to confine any redistributive impact. In theory, assuming payment of a monetary equivalent for the property taken, the owner would suffer no economic loss. Hence the redistributive impact on the property owner would be modest. Moreover, at least in the nineteenth century, a number of courts invoked the "public use" limitation to confine the taking of property to governmental purposes or situations in which the public had a right to use the property.[12]

To be sure, health and safety regulations had some modest and incidental redistributive consequences. Significantly, however, there was no broad consensus during the nineteenth century favoring governmental action to alter the market-driven distribution of wealth.

By the end of the nineteenth century the anti-redistributive principle was increasingly articulated in connection with proposals to use taxation as a vehicle to alter the existing distribution of wealth.[13]

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impairing the Obligation of Contracts." For an analysis of this provision over the course of United States history, see JAMES W. ELY, JR., THE CONTRACT CLAUSE: A CONSTITUTIONAL HISTORY (2016) [hereinafter ELY, JR., THE CONTRACT CLAUSE].

11. U.S. CONST. amend. V provides in part: "[N]or shall private property be taken for public use, without just compensation." The explicit guarantee of just compensation in the Fifth Amendment reflected the long-standing practice in both England and the American colonies of awarding compensation when government acquired property from individual owners. James W. Ely, Jr, *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 1–18 (1992); *see also* SUSAN REYNOLDS, BEFORE EMINENT DOMAIN: TOWARD A HISTORY OF EXPROPRIATION OF LAND FOR THE COMMON GOOD 77–83 (2010) (finding widespread acceptance in the American colonies of the norm that property could be taken from individual owners upon payment of compensation); William B. Stoebuck, A *General Theory of Eminent Domain*, 47 WASH. L. REV. 533, 579–83 (1972) (pointing out that granting compensation was extensively practiced during the colonial period before the Revolution).

12. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960, *supra* note 5, at 11 ("In the eminent domain cases, the public purpose doctrine was explicitly designed to prevent state redistribution of wealth."); *see also* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 43–49 (2015) (concluding that during the nineteenth century most state courts interpreted "public use" to confine the taking of property by government).

13. ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 97 (1987) ("The income tax was seen by proponents and opponents alike as primarily an instrument of redistribution; in the parlance of the time it was 'class legislation.'").

John F. Dillon, a leading jurist, forcefully captured this sentiment in 1895:

> But when taxes, so-called, are imposed, not as mere revenue measures, but for the real purpose of reaching the accumulated fruits of industry, and are not equal and reasonable, but designed as a forced contribution from the rich for the benefit of the poor, and as a means of distributing the rich man's property among the rest of the community—this is class legislation of the most pronounced and vicious type; is, in a word, confiscation and not taxation.[14]

Dillon's rejection of the legitimacy of a progressive income tax found expression in the Supreme Court's decision in *Pollock v. Farmers' Loan and Trust Company* (1895), striking down the 1894 income tax as a "direct tax" not apportioned among the states according to population as required by the Constitution.[15] Justice Stephen J. Field, in a concurring opinion, focused squarely on the redistributive potential of the federal income tax. He darkly warned: "The present assault upon capital is but the beginning. It will be the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich . . . ."[16]

Notwithstanding this time-honored constitutional tradition of skepticism of redistribution, Progressive legal thought in the early decades of the twentieth century did much to undercut the security of property and contractual rights in order to promote active governmental intervention in the economy. Progressives looked unfavorably upon judicial protection of the rights of property owners.[17] The

14. John F. Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 173 (1895).

15. Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 158 U.S. 601 (1895). For a discussion of *Pollock*, see JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888–1910, 117–23 (1995).

16. *Pollock*, 157 U.S. at 607; *see also* 8 OWEN M. FISS, THE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, 77 (1993) (observing that the fundamental question in *Pollock* concerned "the permissibility of using federal power to alter the market distribution of wealth").

17. James W. Ely, Jr., *The Progressive Era Assault on Individualism and Property Rights*, 29 SOC. PHIL. & POL'Y 255, 264–77, 287 (2012); *see also* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 8 (2006) (concluding that Progressives "thought that ever greater inequalities of wealth justified overriding constitutionally protected rights of liberty, property, and contract").

once-potent Contract Clause, for example, was drained of much efficacy.[18] Even more important was a change in tax policy. Anxious to revamp the tax system and place more of the burden on the wealthy, Progressives championed a federal income tax. The adoption of the Sixteenth Amendment in 1913, which authorized Congress to levy an income tax, seemingly reflected a popular willingness to enact redistributive schemes. Under the influence of the Progressive movement, notions of the proper role of government began to shift.

This transformation was brought to fruition following the political triumph of the New Deal in the 1930s. New Deal constitutionalism, which built upon the Progressive initiatives, relegated the rights of property owners to a secondary place in the constitutional order.[19] Consequently, the Constitution was no longer construed to preclude some forms of redistribution. The New Deal Supreme Court eliminated most of the constitutional obstacles to wealth redistribution, and simply punted the matter to the political arena. It bears emphasis that today there are redistributive dimensions to various public policies associated with the welfare state.[20] A few examples must suffice. The income tax, largely paid by the more affluent due to its progressive rate structure, in effect compels wealth transfers to fund the modern welfare state.[21] Rent controls can be characterized as an effort to transfer wealth from landlords to tenants.[22] Minimum wage laws have been viewed in the same light.

But my inquiry lies elsewhere—to what extent does the exercise of eminent domain to acquire private property for "public use" or the

18. ELY, JR., THE CONTRACT CLAUSE, *supra* note 10, at 192–237.

19. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 134–41 (3d ed. 2008) [hereinafter ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT].

20. GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970, 374 (1997) ("Redistributing wealth to provide welfare benefits for some inevitably requires that the state interfere with the putatively vested property rights of others.").

21. RICHARD PIPES, PROPERTY AND FREEDOM 239 (1999) ("The regular direct and progressive tax on income is a by-product of the welfare state: it came into being concurrently and has been justified as necessary to finance the large outlays which social services demand."); *see also* Tanner, *supra* note 1, at 7 (contending that "the U.S. tax and transfer system is already highly redistributive").

22. Pennell v. San Jose, 485 U.S. 1, 21–24 (1988) (Scalia, J., & O'Connor, J., dissenting in part) (finding tenant hardship provision in local rent control ordinance amounted to a compelled wealth transfer to tenants in violation of the Fifth Amendment); *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 186–88 (1985) [hereinafter EPSTEIN, TAKINGS].

occasional reliance on outright confiscation serve to redistribute wealth?[23] If there is a redistributive effect, who benefits?

II. EMINENT DOMAIN

I will first briefly consider eminent domain. Unquestionably the potential for redistribution of wealth is implicit in the power of eminent domain. Morton J. Horwitz, for instance, has argued that during the antebellum era eminent domain was often employed to assist fledging enterprises, such as canals and railroads, at the expense of individual owners, usually farmers. Indeed, Horwitz promulgated a controversial subsidy thesis, contending that, in effect, land was taken at low cost and transferred to more powerful economic interests.[24] This thesis is arguably overdrawn, but it reminds us that property transfers can and do operate in a manner to concentrate rather than disperse wealth. I suggest that the pattern detected by Horwitz has quite frequently continued until the present.

The tendency to utilize eminent domain to benefit the wealthy and politically influential institutions was facilitated in the twentieth century by two constitutional developments. First, the Supreme Court virtually eviscerated "public use" as a meaningful restraint on eminent domain, at least at the federal level. Since then, pretty much anything goes, as the federal courts broadly defer to legislative determinations of "public use."[25] Those with political clout can readily manipulate eminent domain to serve their ends. Second, it is highly unlikely that those whose property is condemned in fact receive a monetary equivalent for their loss. Indeed, there is vast literature detailing the inadequacy of prevailing compensation norms

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23. A word about terminology is in order. The taking of property by government for public use upon payment of compensation is called "eminent domain" in the United States and "compulsory purchase" in the United Kingdom. In the civil law tradition, on the other hand, such a taking of property is termed "expropriation." Uncompensated seizure of property is characterized as "confiscation." *See* REYNOLDS, *supra* note 11, at 1–2, 7–9. Yet, to complicate matters, the term "expropriation" is sometimes employed by scholars in the United States to denote an uncompensated confiscation of property. To minimize confusion, I will use the word "confiscation" rather than "expropriation" to refer to uncompensated seizures.

24. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1869, 63–67, 259–61 (1977).

25. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT, *supra* note 19, at 156–57; SOMIN, *supra* note 12, at 55–61.

in eminent domain proceedings.[26] The award of only partial compensation encourages excessive use of eminent domain and compounds the redistribution of wealth to commercial enterprises and developers typically at the expense of the middle class and poor.

Recent exercises of eminent domain underscore the conclusion that this power has regularly been employed to promote the interests of the politically connected rather than the downtrodden.[27] Beneficiaries of eminent domain have included General Motors,[28] Otis Elevator,[29] owners of professional sports franchises,[30] Best Buy,[31] and casinos.[32] This is hardly a list of the poor. In reverse–Robin Hood style, the effect of taking property in these cases—even assuming that "just compensation" was paid—was to further enrich the already wealthy.

In the same vein, urban renewal projects, ostensibly designed to clear slums and improve housing conditions for the poor, too often in reality displaced the poor in favor of upscale housing and middle-class amenities. As one scholar noted, condemnations of blighted areas "have typically been part of development or redevelopment efforts that remove poor occupants and replace them with wealthier, often less-likely-to-be-minority occupants."[33]

Similarly, the Hawaiian land redistribution scheme at issue in *Hawaii Housing Authority v. Midkiff* failed to achieve its announced goals of encouraging widespread ownership and reducing housing

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26. *See, e.g.*, James Geoffrey Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985); Thomas W. Merrill, *Incomplete Compensation for Takings*, 11 N.Y.U. ENVTL. L.J. 110 (2002).

27. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) ("The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.").

28. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981), *overruled by* Cty. of Wayne v. Hathcock, 471 Mich. 445 (2004).

29. Yonkers Cmty. Development Agency v. Morris, 37 N.Y.2d 478, 335 N.E.2d 327 (1975).

30. Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008).

31. Hous. & Redevelopment Auth. v. Walser Auto Sales, Inc., 641 N.W.2d 885 (Minn. 2002).

32. L.V. Downtown Redevelopment Agency v. Pappas, 119 Nev. 429, 76 P.3d 1 (2003).

33. David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365, 379 (2007); *see also* Kelo v. City of New London, 545 U.S. 469, 521 (2005) (Thomas, J., dissenting) (warning that "extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities").

costs. At issue was a law that authorized residential tenants under long-term leases to acquire by eminent domain the landlord's title to the land, upon payment of compensation. The Supreme Court upheld this far-reaching exercise of eminent domain, finding that the program satisfied the "public use" requirement although the beneficiaries were private parties.[34] The key point for our purpose, however, is that the beneficiaries were wealthy tenants, and the scheme did nothing to reduce the cost of purchasing a home.[35] It scarcely amounted to a redistribution in favor of the disadvantaged.[36]

III. CONFISCATION

I would like to consider in more detail the question of confiscation as a feature of American constitutional history. We do not often think of the outright seizure of property without compensation as part of our past.[37] In fact, the Takings Clause of the Fifth Amendment, and its counterparts in state constitutions, have often been pictured as a rejection of naked confiscation as an acceptable policy in the United States.[38] Nonetheless, there have been several episodes of property despoliation over the course of American history. I will explore two such events, the confiscation of Loyalist property during the Revolution and the prohibition of alcoholic beverages in

34. Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984). For an analysis of Justice Sandra Day O'Connor's opinion in *Midkiff*, see James W. Ely, Jr., *Two Cheers for Justice O'Connor*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 149, 169–71 (2012).

35. *See, e.g.*, 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); Debra Pogrund Stark, *How Do You Solve a Program Like in* Kelo*?*, 40 J. MARSHALL L. REV. 609, 624–30 (2007).

36. *But see* Gia L. Cincone, Note, *Land Reform and Corporate Redistribution: The Republican Legacy*, 39 STAN. L. REV. 1229, 1242–46 (1987) (picturing the Hawaii law as a land reform program designed to break up concentrated land ownership, but not addressing the question of compensation or considering the impact in terms of wealth redistribution).

37. *But see* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 23–24 (1927) ("Of greatest significance is the fact that in all civilized legal systems there is a great deal of just expropriation or confiscation without any direct compensation."); Carol M. Rose, *Property and Expropriation: Themes and Variations in American Law*, 2000 UTAH L. REV. 1 (2000) (asserting that "far from being unknown or highly unusual, expropriations have been very much a part of our property law—so much so that we generally do not even notice them as such").

38. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 714 (1985) (observing that the takings clause of the Fifth Amendment "served an educative role. It inculcated the belief that an uncompensated taking was a violation of a fundamental right.").

the late nineteenth century, with attention to their impact on the distribution of wealth.

A. Loyalist Property

There was nothing novel about the confiscation laws enacted during the Revolutionary era. Over the course of English history, disloyal persons were executed and their property seized. William Blackstone asserted the "natural justice of forfeiture or confiscation of property, for treason."[39]

In 1777 the Continental Congress "earnestly recommended" that the states enact legislation "to confiscate and make sale of all the real and personal estate" of those persons supporting Great Britain.[40] Each state adopted a confiscation program, often based on bills of attainder. Such legislation declared certain Loyalists to be traitors and directed seizure and sale of their property. There was either no, or a very circumscribed, provision for a trial in court. This confiscation policy was driven by two motives: to punish Loyalists and to raise funds for the Revolutionary War. Redistribution was not a prime rationale. As Richard B. Morris concluded, "In America these confiscations were carried out not to create a peasant freeholding class . . . ."[41]

Although not all states pursued confiscation aggressively, a large amount of land and personal property was seized pursuant to these statutes.[42] Typically the confiscated property was vested in state commissioners, who were charged to sell the property at public auction. Clearly some individual Loyalists suffered a substantial loss, but studies of the Revolutionary confiscations demonstrate that there was little redistributive effect. There was no dramatic change

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39. 4 WILLIAM BLACKSTONE, COMMENTARIES *383.

40. Continental Congress (Nov. 27, 1777), *in* 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, 971 (Worthington C. Ford ed., 1907).

41. Richard B. Morris, *Class Struggle and the American Revolution,* 19 WM. & MARY Q. 3, 22 (1962) [hereinafter Morris, *Class Struggle*]; *see also* Anne M. Ousterhout, *Pennsylvania Land Confiscations during the Revolution*, 102 PA. MAG. OF HIST. & BIOGRAPHY 328, 340 (1978) ("The confiscation of the estates was not intended to help landless individuals acquire property.").

42. WALLACE BROWN, THE GOOD AMERICANS: THE LOYALISTS IN THE AMERICAN REVOLUTION 129 (1969) [hereinafter BROWN, THE GOOD AMERICANS] (noting variations in the severity of state confiscation policies).

in the pattern of land ownership.[43] Indeed, most of the purchasers of confiscated property were already landowners who simply enlarged their estates.[44] In addition, the confiscation sales did not yield a financial bonanza for the states, as proceeds from the sales were used primarily to pay the creditors of the dispossessed Loyalists.[45]

Why did this potentially radical program produce such modest results? Part of the answer is that the overriding objective of the states was to raise money quickly. Confiscated property was not given away to the destitute. Rather, it was sold to the highest bidder, who was frequently required to complete the purchase in cash or post a bond for future payment. As a practical matter, these conditions precluded anyone not moderately wealthy from acquiring confiscated land.[46] Moreover, commissioners did not always advertise sales properly or follow statutory procedures. Consequently, there is evidence

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43. It is important to keep in mind that confiscations encompassed personal property, such as farm implements, furniture, and animals, as well as land. *See* Howard Pashman, *The People's Property Law: A Step Toward Building a New Legal Order in Revolutionary New York*, 31 L. & HIST. REV. 587 (2013) (stressing the impact of New York's confiscation laws on personal property).

44. HARRY B. YOSHPE, THE DISPOSITION OF LOYALIST ESTATES IN THE SOUTHERN DISTRICT OF THE STATE OF NEW YORK 60–61 (1939) ("While it is true that the disposal of the loyalist estates effected a greater diffusion of ownership, it is questionable whether it went far toward a radical redistribution of landed wealth and a new social and economic order. Motivated by the desire for profit and by the feeling that the possession of landed estates was the firmest pillar on which the social distinction of their families could rest, the leaders of the Revolution, powerful politicians, rich merchants, landowners, and speculators, many already possessed of substantial land holdings, contrived to get a large part of the loyalist estates into their own hands."); Richard D. Brown, *The Confiscation and Disposition of Loyalists' Estates in Suffolk County, Massachusetts*, 21 WM. & MARY Q. 534, 547 (1964) [hereinafter Brown, *The Confiscation and Disposition of Loyalists' Estates*] (finding that sales of confiscated land in Massachusetts "represent no actual diffusion of ownership, but rather a division of loyalist property among people who already owned land"); Robert S. Lambert, *The Confiscation of Loyalist Property in Georgia, 1782–1786*, 20 WM. & MARY Q. 80, 92 (1963) ("In any case the confiscation policy does not seem to have resulted in any substantial redistribution of property from wealthy Loyalists to poor landless Whigs . . . ."); Morris, *Class Struggle*, *supra* note 41, at 23 ("When estates were broken up they often went to enlarge the holdings of adjacent farmers and led to a concentration rather than a breakup of holdings.").

45. Ousterhout, *supra* note 41, at 333; Lambert, *supra* note 44, at 91 ("Certainly the confiscation of Loyalist estates did not prove to be the fiscal panacea that many had hoped for."); Brown, *Confiscation and Disposition of Loyalists' Estates*, *supra* note 44, at 543 ("Proceeds from sales went primarily to the creditors of the loyalists . . . ."); *see also* BROWN, THE GOOD AMERICANS, *supra* note 42, at 128 ("Also the device of trying partially to finance the war with traitors' wealth was naturally very popular, if of limited success.").

46. Ousterhout, *supra* note 41, at 334, 340; Brown, *Confiscation and Disposition of Loyalists' Estates*, *supra* note 44, at 547; Morris, *Class Struggle*, *supra* note 41, at 38.

that confiscation sales were sometimes manipulated to enrich a clique of insiders who obtained land at prices below market value.[47]

It is important to bear in mind that the confiscation of Loyalist property, although undoubtedly popular, aroused opposition. Some were concerned that the expropriation of Loyalist property might portend a broader assault on private property generally.[48] Others favored a policy of conciliation toward Loyalists, arguing that a continuation of seizures only prolonged bitterness and undercut reconciliation. After the end of the Revolutionary War, prominent political leaders, such as Hamilton and Madison, sought to moderate confiscation policy, worked to repeal the confiscation laws, and represented Loyalists seeking to reclaim their property in judicial proceedings.[49] Moreover, John Adams, in Paris to negotiate a treaty of independence, grudgingly expressed his support for compensation for confiscated property.[50]

The 1783 Treaty of Paris ended the Revolutionary War and recognized the independence of the United States. It did not, however, offer

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47. FORREST MCDONALD, *NOVUS ORDO SECLORUM*: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 91 (1985) ("Thus, in practice, sales of confiscated property had often been colossal boondoggles, carried out to enrich political insiders."); Isaac S. Harrell, *North Carolina Loyalists*, 3 N.C. HIST. REV. 575, 583–84 (1926) (noting that confiscation sales were "conducted with flagrant disregard for honesty, justice and public welfare," and that commissioners often purchased estates themselves); Richard C. Haskett, *Prosecuting the Revolution*, 59 AM. HIST. REV. 578, 585–86 (1954) (finding evidence of improper sales in New Jersey and concluding that favored buyers could obtain confiscated property at bargain prices); Ousterhout, *supra* note 41, at 336–38 (noting allegations of improper sales and evidence that individuals conducting sales bid for themselves).

48. MCDONALD, *supra* note 47, at 90–93; Brown, *Confiscation and Disposition of Loyalists' Estates*, *supra* note 44, at 536.

49. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT, *supra* note 19, at 36; BROWN, THE GOOD AMERICANS, *supra* note 42, at 177–79. For instance, in 1784 Hamilton criticized reliance on bills of attainder to punish Loyalists, stressed that the Treaty of Paris barred further confiscations, and decried a vindictive spirit toward Loyalists. Letter from Phocion to the Considerate Citizens of New York (Jan. 27, 1784), *in* 3 PAPERS OF ALEXANDER HAMILTON 483–97 (Harold C. Syrett & Jacob E. Cooke eds., 1962). Hamilton also represented Loyalists in a number of legal actions pertaining to their property, most notably *Rutgers v. Waddington* (unreported) (Mayor's Court of New York City 1784); *see* Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI-KENT L. REV. 825, 844–48 (2006).

50. Letter from John Adams to Jonathan Jackson (Nov. 17, 1782), *in* JOHN ADAMS, 9 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES: WITH A LIFE OF THE AUTHOR, NOTES AND ILLUSTRATIONS 516 (Charles Francis Adams ed., 1856). ("I would compensate the [w]retches, how little [s]oever they deserve it, nay how much soever they deserve the [c]ontrary."). This opinion by Adams would appear to be driven more by the desire to reach a treaty with Great Britain than by considerations of justice for Loyalists.

much comfort to Loyalists whose property was seized. The Treaty forbad further confiscations, but some states disregarded this provision. North Carolina continued to sell Loyalist estates until 1790.[51] With respect to already forfeited property, the Treaty only required Congress to recommend that the states make restitution of such property.[52] There was, as might be expected, no wholesale restitution of property or offer of compensation. Lawsuits by Loyalists to reclaim property also proved fruitless. In 1800 the Supreme Court upheld a Georgia bill of attainder enacted during the Revolutionary War. Justice William Cushing declared: "The right to confiscate and banish, in the case of an offending citizen, must belong to every government."[53] Still, it should be noted that some states granted petitions by individual Loyalists for relief from confiscation, steps which further diluted the redistributive aspect of Revolutionary policy toward the Loyalists.[54]

Quite apart from its meagre impact on wealth distribution, the wave of Loyalist property confiscations left a lasting sour taste. As early as 1780 the new Constitution of Massachusetts prohibited bills of attainder.[55] This move anticipated developments at the national level. The framers of the Constitution in 1787, as discussed above, included various provisions designed to prevent the state legislatures from redistributing property. Among other restrictions, the Constitution expressly bars both Congress and the states from enacting bills of attainder, the principal vehicle employed to seize Loyalist property.[56] As a prominent historian has explained, the prohibitions on bills of attainder "were aimed more at protecting property rights (recall the wartime confiscations) than at protecting liberty."[57]

During the nineteenth century prominent scholars severely criticized reliance on bills of attainder. Justice Joseph Story pictured such legislation in a dark light, declaring:

> The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of

51. Harrell, *supra* note 47, at 588.

52. Treaty of Paris, Gr. Brit.-U.S., arts. 5, 6, Sept. 3, 1783.

53. Cooper v. Telfair, 4 U.S. 14, 19 (1800).

54. Lambert, *supra* note 44, at 88–91.

55. MASS. CONST. pt. I, art. XXV ("No subject ought, in any case, or in any time, to be declared guilty of treason or felony by the legislature.").

56. U.S. CONST. art. I, §§ 9, 10.

57. MCDONALD, *supra* note 47, at 270.

> proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power.[58]

Commenting directly on the treatment of Loyalists, Story added: "During the revolutionary war, bills of attainder, and *ex post facto* acts of confiscation were passed to a wide extent; and the evils resulting therefrom were supposed, in times of more cool reflection, to have far outweighed any imagined good."[59] In the same vein, Thomas M. Cooley explained, "the power to repeat such acts under any possible circumstances in which the country could be placed again was felt to be too dangerous to be left in legislative hands."[60]

B. Confiscation Repudiated: The Civil War Experience

That the Loyalist confiscation experience left its mark became apparent when the United States again considered the confiscation of property during the Civil War. In 1862 Congress passed the Second Confiscation Act. Among other provisions, this measure authorized the federal government to seize all the real and personal property of those persons aiding or abetting the Confederacy. The Confiscation Act, however, differed sharply from the bills of attainder directed against Loyalists during the Revolution. Instead of a legislative declaration of guilt, it required an in rem judicial determination that the owner had given support to the Confederacy by a federal court where the property was located.[61] Most of the property liable to confiscation was situated in the South and under Confederate control. Consequently, the property could not be reached and judicial proceedings could not be commenced until the end of hostilities. President Abraham Lincoln doubted both the wisdom and constitutionality of the Act. He insisted that Congress adopt a resolution which provided that no punishment under the Act should be construed "as to work a forfeiture of the real estate of the offender beyond

58. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 485 (1833, reprint 1987).

59. *Id.* at 497.

60. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 262 (1868, reprint 2002).

61. Second Confiscation Act, 12 Stat. 589, §§ 5–8 (1862).

his natural life."[62] Although confined to land, the proviso minimized the impact of the law. Neither Lincoln nor his successor, Andrew Johnson, did much to implement confiscation.[63] Moreover, in a series of decisions the Supreme Court narrowly construed the power of confiscation. Significantly, following Lincoln's analysis, it ruled that the United States could confiscate property only for the "life of the person for whose act it had been seized."[64] Confiscation, therefore, could only last for the life of the offender and did not bind the offender's heirs, a conclusion that reduced the value of confiscated property in the marketplace and undercut the efficacy of the confiscation policy. Not surprisingly, relatively little property was in fact seized under the Second Confiscation Act.

During the Reconstruction era, a number of radical Republicans continued to agitate for aggressive land confiscation and redistribution as part of schemes to fundamentally overhaul southern society and destroy the power of large planters. Congressman Thaddeus Stevens, a radical from Pennsylvania, set forth a sweeping land confiscation plan in September of 1865.[65] He proposed "to confiscate all the estate of every rebel belligerent whose estate was worth $10,000, or whose land exceeded two hundred acres in quantity."[66] Stevens further proposed distributing part of the land in forty-acre lots to each adult male former slave. The remainder would be divided into farms and sold, with the proceeds being used to indemnify losses to loyal citizens and reduce the war debt.[67] The House of Representatives rejected the Stevens proposal by a decisive vote of 126 to 37.[68]

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62. Joint Resolution Explanatory of "An Act to Suppress Insurrection, to Punish Treason and Rebellion, to Seize and Confiscate the Property of Rebels, and for Other Purposes,"12 Stat. 627 (1862).

63. For a discussion of the 1862 Confiscation Act, see DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND CONFEDERACY DURING THE CIVIL WAR (2007) [hereinafter HAMILTON, THE LIMITS OF SOVEREIGNTY].

64. Bigelow v. Forrest, 76 U.S. 339, 350 (1870) (Strong, J.).

65. For Stevens's confiscation plans, see MICHAEL LES BENEDICT, A COMPROMISE OF PRINCIPLE: CONGRESSIONAL REPUBLICANS AND RECONSTRUCTION 1863–1869, 149–50, 258–60 (1974); RALPH KORNGOLD, THADDEUS STEVENS: A BEING DARKLY WISE AND RUDELY GREAT, 281–90 (1955); JAMES ALBERT WOODBURN, THE LIFE OF THADDEUS STEVENS, 521–35 (1913).

66. Thaddeus Stevens, Land Confiscation Plan Speech to Pennsylvanians (Sept. 6, 1865), http://history.furman.edu/benson/hst41/red/stevens2.htm.

67. *Id.*

68. CONG. GLOBE, 39th Cong., 1st Sess., 688 (1865).

Undaunted, in March of 1867 Stevens renewed his proposal, calling for the immediate enforcement of the 1862 Confiscation Act and distribution of part of the seized land to former slaves.[69] Perhaps sensing that his call for confiscation would fall upon deaf ears, Stevens moved to delay consideration of this proposal until December. In the end his plan went nowhere. President Johnson issued a series of amnesty proclamations restoring the property rights of certain ex-Confederates, and effectively barred any future confiscations with his 1868 Christmas general amnesty to all former Confederates.[70] By the end of the Civil War and Reconstruction, Americans had seemingly closed the door on sweeping confiscations of property as a penalty for disloyalty. The *Hartford Daily Courant* enthusiastically declared that "the savage calls for general confiscation made by a very few have never found even an echo."[71]

It remains to consider why, after a bitter and costly Civil War, calls for the confiscation of Confederate-owned property gained so little traction. In other words, why was northern opinion so hostile to the seizure of land held by wealthy planters in the South? Critics raised a number of objections to confiscation. They repeatedly pictured confiscation as a partisan scheme to attract the vote of newly freed slaves.[72] Opponents also expressed concern that confiscation would retard the return of economic growth and prosperity in an impoverished South. A confiscation policy, according to the *New York Times*, "introduces a new element of uncertainty into the South, intensifies its industrial paralysis, and heightens the distrust which already deters capitalists from embarking in its enterprises."[73]

More telling for our purposes, however, was opposition to governmental redistribution of property in principle, and fear that a radical redistribution would not be confined to the defeated southern states.[74] Senator Benjamin F. Wade of Ohio fueled this concern. In June of 1867 he assailed the distinctions between capital and labor, and boldly declared: "Property is not equally divided, and a more

69. CONG. GLOBE, 40th Cong., 1st Sess., 203–08 (1867).

70. HAMILTON, THE LIMITS OF SOVEREIGNTY, *supra* note 63, at 159–60.

71. HARTFORD DAILY COURANT, Dec. 10, 1867.

72. *The Republican Party and Schemes of Agrarianism*, N.Y. TIMES, June 13, 1867, at 4.

73. Editorial, *Confiscation—The Extremists and Their Threats*, N.Y. TIMES, April 10, 1867, at 4.

74. Cincone, *supra* note 36, at 1239 ("[T]he threat to private property that opponents of the Stevens bill perceived it to be outweighed the republican rhetoric.").

equal distribution of capital must be wrought out."[75] As might be expected, northern opinion was extremely antagonistic to any suggestion of a general redistribution of property. The *Times* reacted to Wade's speech in a fiery blast.

> It seemed scarcely credible that any man occupying his position would arraign the inequality of wealth as a wrong to be remedied by legislation. We were not willing to believe that doctrine of dividing property, and adding to the rewards of labor by a legislative inroad upon the hoard of the capitalist, is to be imported into our politics and made the groundwork of future agitation.

The *Times* denounced Wade's remarks as "destructive, leveling, and utterly anarchical propositions."[76] Amplifying this theme, it denounced all "projects of confiscation, extermination and the distribution of property or of profits" as "the work of dreamers or demagogues." The *Times* bluntly concluded: "Unless the right of holding property is to be abolished, there is no possible way of equalizing its possession."[77] Likewise, the *Nation* pictured confiscation proposals as "looking toward special favors for special classes of people," and denounced then as "simply schemes of robbery."[78] Clearly the anti-redistribution principle carried the day with respect to land confiscation in the Civil War Era.[79]

C. Prohibition

This did not mean, however, the legislatures would not attempt to destroy other types of previously lawful property as public sentiment

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75. As quoted in ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED BUSINESS, 1863–1877, 309 (1988); *see also* William Frank Zornow, *"Bluff Ben" Wade in Lawrence, Kansas: The Issue of Class Conflict*, 66 OHIO HIST. J. 44–52 (1956).

76. Editorial, *Labor and Capital—Mr. Wade's "Jump Forward,"* N.Y. TIMES, June 20, 1867, at 4 [hereinafter N.Y. TIMES, *Labor and Capital*].

77. Editorial, *The Republican Party and Schemes of* Agrarianism, N.Y. TIMES, June 13, 1867, at 4.

78. Editorial, *True Radicalism*, THE NATION, July 18, 1867.

79. Interestingly, the *Times* expressed confidence that the American people would reject redistribution of property. "Nowhere in the world," it observed, "is property so universally diffused as in this country, and nowhere, therefore, will the protest against every scheme for violating its rights be uttered with such heartiness and effect." N.Y. TIMES, *Labor and Capital*, *supra* note 76, at 4; *see also* Editorial, *Future Political Issues*, THE NATION, June 27, 1867 ("A community in which property is so widely spread as it is in our Northern States cannot be led into any hare-brained plans for its redistribution.").

shifted. A case in point was the periodic emergence of statutes outlawing the manufacture and sale of alcoholic beverages during the nineteenth century. We tend to think of Prohibition in terms of the Eighteenth Amendment and the 1920s, but my focus will be on earlier episodes which highlighted the clash between prohibition laws and property rights. Maine enacted the first statewide prohibition law in 1851, and a number of other states followed suit in the 1850s.[80] Prohibitionists maintained that a ban on alcoholic beverages would safeguard public health and discourage crime and pauperism. Unlike eminent domain cases, here there was no transfer of property from one party to another. With prohibition laws the possession and use of property rights in alcoholic beverages was destroyed for the perceived public benefit. The early prohibition cases, then, presented the fundamental issue of whether statutes, although couched in terms of regulation, in actuality served to expropriate a species of hitherto lawful private property. To be sure, courts in the nineteenth century were generally disposed to conclude that a ban on alcoholic beverages was a valid exercise of the police power to safeguard the health and morals of the public.[81] Some endorsed the view that alcoholic beverages, although long considered as a legitimate form of private property, could be defined as a nuisance by the legislature and were thus subject to forfeiture without compensation.[82]

Still, some jurists and commentators expressed concern that the prohibition laws amounted to an uncompensated destruction of property. At issue in the important case of *Wynehamer v. People* (1856) was a New York statute banning the sale or gift of alcoholic beverages and authorizing the destruction of alcohol as a public nuisance.[83] The New York Court of Appeals invalidated the measure with respect

80. IAN R. TYRRELL, SOBERING UP: FROM TEMPERANCE TO PROHIBITION IN ANTEBELLUM AMERICA, 1800–1860, 252–82 (1979).

81. HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW; NEOCLASSICAL LEGAL THOUGHT, 1870–1970, 258–59 (2015); MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 512–14 (1977).

82. Fisher v. McGirr, 67 Mass. 1, 41 (1854) (insisting that because liquor "is so noxious and declared to be such by law, the owner's right of property is divested by the judgement, and he can have no claim to compensation"); *see also The License Cases*, 46 U.S. 504, 589 (1847) (McLean, J.) ("The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Every thing [sic] prejudicial to the health or morals of a city may be removed.").

83. Wynehamer v. People, 13 N.Y. 378 (1856). This decision did much to undermine enforcement of the prohibition law in New York; TYRRELL, *supra* note 80, at 291.

to alcoholic beverages owned when the law was enacted as a deprivation of property without due process.[84] In the lead opinion, Judge George F. Comstock ruled that alcoholic beverages had long been treated as property and were entitled to the same level of constitutional protection as other forms of property. He framed the fundamental question as to whether the legislature can "confiscate and destroy property lawfully acquired by the citizen in intoxicating liquors."[85] Insisting that the right of property ownership encompassed the power of disposition and sale as well as enjoyment, Comstock maintained that a law which eliminated these attributes destroyed the notion of property even if the thing itself was physically untouched. He conceded that it was difficult to draw a precise line between regulation of property and destruction, but he concluded that "the legislature cannot totally annihilate commerce in any species of property, and so condemn the property itself to extinction."[86] Although he was clearly bothered by the statutory provision inviting physical destruction of alcoholic beverages, Comstock's analysis turned upon the statutory elimination of commerce in alcoholic beverages already owned by individuals when the law took effect. Nevertheless, the court intimated that the legislature could bar the future manufacture or importation of such beverages after the law became effective.

Along the same lines as *Wynehamer*, three members of the Supreme Court in 1873 took the position that a state prohibition law could not interfere with rights to alcoholic beverages existing at the date of passage without payment of compensation.[87] Justice Stephen J. Field proclaimed:

> I have no doubt of the power of the State to regulate the sale of intoxicating liquors when such regulation does not amount to the destruction of the right of property in them. The right of property in an article involves the power to sell and dispose of such article as well as to use and enjoy it. Any act which declares that the

84. *Wynehamer*, 13 N.Y. at 384–98. For a discussion of *Wynehamer* as a milestone in the evolution of the due process guarantee, see James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMM. 315, 338–41 (1999).

85. *Wynehamer*, 13 N.Y. at 384.

86. *Id.* at 399.

87. Bartemeyer v. Iowa, 85 U.S. 129, 135–41 (1873) (Bradley, J., Swayne, J., and Field, J., concurring).

> owner shall neither sell it nor dispose of it, nor use and enjoy it, confiscates it, depriving him of his property without due process of law.[88]

More complex questions concerned the impact of prohibitory liquor laws on the value of property employed to manufacture alcoholic beverages. Cooley raised this point in 1868:

> Perhaps there is no instance in which the power of the legislature to make such regulations as may destroy the value of property, without compensation to the owner, appears in a more striking light than in the case of these statutes. The trade in alcoholic drinks being lawful, and the capital employed in it being fully protected by law, the legislature then steps in, and, by an enactment based on general reasons of public utility, annihilates the traffic, destroys altogether the employment, and reduces to a nominal value the property on hand.[89]

This issue was squarely presented when Kansas adopted a constitutional provision in 1880 barring the manufacture and sale of "intoxicating liquors" except for medical and scientific purposes. A year later the legislature enacted a statute to carry out this mandate.[90] Peter Mugler had opened a brewery before the prohibition amendment was adopted and continued to sell beer in violation of the law. In a criminal proceeding to enforce the law, Mugler alleged that his property was worth ten thousand dollars as a brewery but only twenty-five hundred dollars for any other purpose. He asserted that this reduction in value amounted to an unconstitutional deprivation of his property without due process of law.[91] Brushing aside this contention, the Supreme Court of Kansas in 1883 nonetheless observed: "The legislature has probably gone a long way in destroying the values of such kinds of property as the defendant owned, and has possibly gone to the utmost verge of constitutional authority."[92] The court emphasized that Mugler had not been deprived of

88. *Id.* at 137.

89. COOLEY, *supra* note 60, at 583–84.

90. For a treatment of the adoption of the 1881 law, see ROBERT SMITH BADER, PROHIBITION IN KANSAS: A HISTORY 63–71 (1986).

91. State v. Mugler, 29 Kan. 252 (1883).

92. *Id.* at 269.

his brewery or any tangible property, only his ability to use the property to manufacture and sell beer. Concurring, David J. Brewer, later appointed to the Supreme Court, cut to the heart of the matter, asking: "Is this not taking private property for public use without any compensation? If the public good requires the destruction of the value of this property, is not prior compensation indispensable?"[93]

Brewer amplified his reasoning in an 1886 federal circuit court opinion. The facts were similar to those in the Mugler case. The defendant had invested fifty thousand dollars for land, buildings, and fixtures for the purpose of producing beer at a time when selling beer was lawful in Kansas. He charged that the prohibition law reduced the value of his property to five thousand dollars, and that this loss constituted an unconstitutional deprivation of property. Brewer agreed, ruling that a prohibition law could not interfere with already existing property rights without payment of compensation. He acknowledged that a state could ban the future manufacture and sale of alcoholic beverages, but drew the line at retrospective application of the law to property in existence when the measure was enacted.[94]

Brewer's efforts to secure some compensation for the owners of shut breweries ultimately came to naught. In *Mugler v. Kansas* (1887) the Supreme Court invoked the police power to protect the health and morals of the community, firmly closing the door on claims for compensation by breweries operating at the time the prohibition law was enacted and thereby suffering a material diminishment in value. Justice John Marshall Harlan, speaking for the Court, observed:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his

93. *Id.* at 274.

94. State v. Walruff, 26 F. 178 (C.C.D. Kan. 1886). In an 1891 address Brewer reiterated his belief that the law outlawing the manufacture and sale of intoxicating liquors in Kansas should have provided compensation to the owners of breweries. He stated that "it was fitting for the majority not to destroy without compensation; and to share with the few the burden of that change in public sentiment"). David J. Brewer, *Protection to Private Property from Public Attack*, 55 NEW ENGLANDER & YALE REV. 97, 104 (1891).

> right to dispose of it, but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.[95]

Commentators recognized the confiscatory dimension of prohibition legislation. Surveying such laws in 1904, Ernst Freund pointed out that prohibition could "destroy the entire value of breweries" and that "it can hardly be denied that for every practical purpose the owner is deprived of his property."[96] Two decades later Morris R. Cohen, speaking of the Eighteenth Amendment, revealingly stated: "In our own day, we have seen the confiscation of many millions of dollars' worth of property through prohibition. Were the distillers and brewers entitled to compensation for their losses?"[97]

There was no change in patterns of wealth ownership as a result of the state prohibition laws in the nineteenth century. To be sure, as Cohen correctly noted, many small breweries and distilleries were wiped out, but neither the purpose nor the effect of prohibition was redistributive. The owners simply suffered their losses.

CONCLUSION

Contrary to the image of the United States as a property-protective nation, there have been drastic interferences with property rights in times of crisis or in response to public clamor. One might also include the abolition of slave property in this category.[98] But if confiscation cannot be banished from American constitutional history, neither should its presence or impact be exaggerated. The redistributive effect of the two episodes considered here—Loyalist property

95. Mugler v. Kansas, 123 U.S. 623, 688 (1887); *see* EPSTEIN, TAKINGS, *supra* note 22, at 130–31 (pointing out that the Court's opinion failed to link the police power justification of controlling poverty and crime to a ban on the production of alcoholic beverages, and concluding that if the state "must justify its undisputed taking of property, then the decision seems wrong").

96. ERNST FREUND, THE POLICE POWER; PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 568 (1904).

97. Cohen, *supra* note 37, at 25; *see also* HERMAN FELDMAN, PROHIBITION: ITS ECONOMIC AND INDUSTRIAL ASPECTS 306–29 (1930) (commenting that "no law passed in this country since the abolition of slavery affected so vast an investment of tangible property as did the Volstead Act," and pointing out that unused brewery and distillery property usually depreciated sharply in value and was often dismantled or sold at bargain prices to other industries).

98. Rose, *supra* note 37, at 24–25 ("A third extraordinary disruption was the emancipation of the slaves in the aftermath of the Civil War in the 1860s. . . . But with the Civil War and the post-War amendments to the Constitution, slavery was simply abolished, and all the capital invested in slaves wiped out.").

confiscation during the Revolutionary era and prohibition of alcoholic beverages in the nineteenth century—was limited at best. Moreover, as the Civil War experience demonstrated, Americans have generally been reluctant to employ wholesale confiscation to compel redistribution of wealth. This perhaps reflects an unarticulated understanding that government-forced wealth redistributions undermine the right of private property, which in turn weakens the historic significance of property as a bulwark of personal and political freedom.[99] Moreover, it is questionable that a fixation on inequality is the best approach to eliminate poverty.[100] For the most part, Americans have preferred economic growth over redistributive policies. There is a close link between guarantees of private property and national prosperity.[101] As John Marshall pointed out, rendering property insecure destroys inducements to industry. "Marshall," Charles Hobson has explained, was convinced "that strong protection for property and investment capital would promote national prosperity."[102] Marshall's vision has generally held sway over the course of United States history.

In short, the record indicates that neither eminent domain nor outright expropriation have proven to be meaningful vehicles for the transfer of wealth from the affluent to the poor in the United States.[103] Indeed, as noted above, eminent domain has often been employed to benefit established and politically connected enterprises. To the extent that wealth inequality is perceived as a problem, one must seek elsewhere for a solution.

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99. PIPES, *supra* note 21, at xiii (asserting that "there is an intimate connection between public guarantees of ownership and individual liberty: that while property in some form is possible without liberty, the contrary is inconceivable").

100. Deirdre N. McCloskey, *Growth, Not Forced Equality, Saves the Poor*, N.Y. TIMES, Dec. 25, 2016, at BU6 (maintaining that redistributive policies are less effective than economic growth in improving conditions for the poor).

101. DAVID S. LANDES, THE WEALTH AND POVERTY OF NATIONS: WHY SOME NATIONS ARE SO RICH AND SOME SO POOR 217–18 (1998) (concluding that a society "best suited to pursue material progress" would have standards which, among other things, "[s]ecure rights of private property, the better to encourage savings and investment" and "[e]nforce rights of contract, explicit and implicit").

102. CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 74 (1996); *see also* James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 J. MARSHALL L. REV. 1023, 1026–27 (2000).

103. *But compare* Jessica A. Clark, Note, *Eminent Domain and Expropiacion: Comparison Between Fifth Amendment Precedent and Latin American Land Redistribution*, 28 REGENT UNIV. L. REV. 319, 329–49 (2016) (noting that expropriation as part of land reform programs in certain Latin American nations expressly sought to redistribute land to the rural poor).

OWNERSHIP OF DATA: THE NUMERUS CLAUSUS OF LEGAL OBJECTS

SJEF VAN ERP*

INTRODUCTION

From a comparative viewpoint, "ownership" at a formal level (i.e., technical-terminological), but even more so at a substantive level, already has a wide variety of meanings. It ranges from the fullest right possible with regard to tangibles (thus excluding intangibles as in German law) to the fullest right possible with regard to both tangibles and intangibles (as in French law) to an exclusive right to possession (as in common law, where we should, furthermore, distinguish between "estates" in land and "titles" to personal property).[1] What has hardly been noticed is that the description of what is meant by ownership, although primarily aimed at delineating the content of that right, also characterizes the object of the right. The object of the right is thus a part of the right's content. In other words, the right (ownership) and the object (tangible/intangible) have traditionally been connected; the object is a qualifier of the property right. This intersects with the civilian idea of a *numerus clausus* of property rights, which is thus buttressed by a *numerus clausus* of legal objects. The type of property rights is seen as limited, both with regard to number and content, and so is the type of objects related to those property rights. The digital revolution, with its rapid growth of digital data and incredibly fast expansion of interconnectedness and interoperability, thus makes us question both what can be recognised as a legal object (can it include "digital data" and if so, under which

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1. *See* Bram Akkermans & William Swadling, *in* IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE: CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL PROPERTY LAW 211 ff (Sjef van Erp & Bram Akkermans eds., 2012); *cf.* Caroline Lebon, *Property Rights In Respect Of Claims*, *in* IUS COMMUNE CASEBOOKS FOR THE COMMON LAW OF EUROPE: CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL PROPERTY LAW 365 ff (Sjef van Erp & Bram Akkermans eds., 2012).

conditions?) and what the impact of the recognition of digital data as a legal object means for our understanding of ownership. Ownership of digital data seems very different from ownership of, for example, land. This will require a rethinking of existing traditional concepts, not only on an intrasystemic scale (e.g., only focussing on the common law or the civil law traditions) but also on a trans- and even supra-systemic scale, given that these developments are of a global nature. This rethinking may need to find a globally shared approach.[2]

I. SUBJECTS, OBJECTS AND RIGHTS

In a recent article in the *European Property Law Journal,* the South African property law scholar Jean Sonnekus wrote that for a legal scientist it is "tantamount to mental laziness" if license, copyright, and ownership are all seen as assets "bundled under the same nomenclature as 'property.'"[3] Is this really the case?

Let us first start by analysing what, from a comparative viewpoint, is meant when lawyers refer to a particular problem as belonging to the law of property. Generally speaking, they are discussing the legal relations between a subject vis-à-vis a considerable number of other subjects, regarding an object. These legal relations can be distinguished from relations between two or more specific subjects, arising from a contractual agreement or tort. In civil law the distinction is fairly strict: a property right must be *erga omnes*, that is, "against all" or "against the world." The common law is more flexible and also calls the legal relation a property right if someone has the "better title;" in other words, if a person in her relation with another person has the stronger right to an object.

Traditionally, the focus of property lawyers (and comparative property lawyers) has been on the various types of relationships, their structure, and content. In the United States, the best example of such an approach was the famous analysis by Wesley Newcomb Hohfeld of property rights as an amalgam of rights, powers, privileges, and immunities, which was even taken as the foundation upon which the

2. *Cf.* Sjef van Erp, *Teaching Law in Europe: From an Intra-Systemic, Via a Trans-Systemic to a Supra-Systemic Approach*, *in* EDUCATING EUROPEAN LAWYERS 79 (A.W. Heringa & Bram Akkermans eds., 2011).

3. JC Sonnekus, *The Fundamental Differences in the Principles Governing Property Law and Succession from a South African Law Perspective*, 3 EUR. PROP. L.J. 130, 136 (2014).

Restatement Property was built.[4] However, the questions of who could be a subject of property law and what could be an object of property law were not asked. It was, so it seems, not really considered to be a problem.[5]

Traditionally, subjects of property rights could be natural and legal persons. Legal persons could be corporations, but also entities of public international law or entities of State. Ownerless property rights arising in a trust structure, such as exists in the Canadian province of Québec and—based upon the Québec model—the Czech Republic, were unknown.[6] It was even unthinkable that "virtual" subjects might own something, as is the case with avatars in the virtual world of *Second Life*, or that objects might become autonomous through self-learning attributes—hence, "robots" with legal capacity.[7] Also from a traditional viewpoint, objects of property were, first of all, physical things; particularly land, but also movables. It took some time before non-physical things ("intangibles") were accepted as objects of economic value, such as monetary claims, which could be transferred and used as security for repayment of a loan. Questions concerning digital data were inconceivable. Information was seen as something which was so fluent that it could not be owned. Even in the United States it took some time before privacy, in the sense of information that was "yours," was seen as something to which you could be "entitled" and that such an entitlement could be violated.[8] To summarise and

4. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913); Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV 681, 683 ff (2014).

5. *See* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 ff (1980) (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 ff (1964)).

6. *Cf.* Alexandra Popovice, *Trust in Quebec and Czech Law: Autonomous Patrimonies?*, 6 EUR. REV. PRIV. L. 929 ff (2016) (Neth.).

7. Compare the recent intriguing report on robotics published by the European Parliament: Nathalie Nevejans, *European Civil Law Rules in Robotics*, Study for The European Parliament's Legal Affairs Committee, PE 571.379 (2016); and the European Parliament Resolution of 16 February 2017 with Recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)). *See also Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Building a European Data Economy"*, COM (2017) 9 final (Oct. 1, 2017).

8. Daniel J. Solove, *A Brief History of Information Privacy Law*, *in* PROSKAUER ON PRIVACY: A GUIDE TO PRIVACY AND DATA SECURITY IN THE INFORMATION AGE, ch. 1 (2006), http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2076&context=faculty_publications.

put it differently, the type and the content of objects in which a person could have a property right were closed. Property law was based on a numerus clausus of objects.

This rather static model of property law, as just described, is part of a nineteenth-century approach to private law that is frequently described as the "classical" model. From a property law perspective, it is aimed at creating ex ante secure legal relations, both from a retrospective viewpoint (what happened in the past should be accepted) and a prospective viewpoint (any future changes should follow established rules). I examined this classical property law model in a series of articles.[9] This classical model of property law was developed in a period when the law was in the process of being (or had just been) codified on the continent of Europe, and the doctrine of stare decisis was developed in England. Both developments, at least initially, had the same background and the same effect. In a period of growing nationalism, the law was made an expression of a nation's self-identity, with the effect that lawyers became more introvert by only discussing legal questions within a relatively small group made up of the same nationality or spoken language. Furthermore, petrification of the law took place because the legal mind began to close itself to new ideas from outside national sources and even ceased to reevaluate existing legal concepts in light of social and economic changes.[10]

That makes it understandable why this classical model was based on a rather close-fitting view of what could be an object of property law. It also explains why intellectual property law developed (and had to develop) into a separate legal area next to general property law. The creative products of the human mind just did not fit in the world of "real" things. Property lawyers seemed inclined to forget how their conceptualisation of ownership was influenced by their focus

9. SJEF VAN ERP, EUROPEAN AND NATIONAL PROPERTY LAW: OSMOSIS OR GROWING ANTAGONISM? (Wouter Devroe et al. eds.,g 2006); *cf.* Sjef van Erp, *European Property Law: A Methodology for the Future*, *in* EUROPEAN PRIVATE LAW: CURRENT STATUS AND PERSPECTIVES 227 ff (Reiner Schulze & Hans Schulte-Nölke eds., 2011); Sjef van Erp, *Can European Property Law Be Codified? Towards the Development of Property Notions*, *in* TOWARDS A CHINESE CIVIL CODE: COMPARATIVE AND HISTORICAL PERSPECTIVES 153 ff (Lei Chen & C.H. Van Rhee eds., 2012); Sjef van Erp, *Lex rei sitae: The Territorial Side of Classical Property Law*, *in* REGULATORY PROPERTY RIGHTS: THE TRANSFORMING NOTION OF PROPERTY IN TRANSNATIONAL BUSINESS REGULATION 61 ff (Christine Godt ed., 2016).

10. *Cf.* Stephen Jacobson, *Law and Nationalism in Nineteenth-Century Europe: The Case of Catalonia in Comparative Perspective*, 20 LAW & HIST. REV. 307 ff (2002).

on particular (especially tangible) objects. They concentrated on their own niche in the web of relations, governed by private law. General property lawyers declared property law to be fundamentally different and therefore separate from intellectual property law, thus enabling them to maintain thought patterns that were sometimes ages old and based on societies in which land was the most valuable asset a person could have. Intellectual property lawyers, on the other hand, did exactly the same by assuming that their legal area focused on immaterial things and therefore could and should be analysed independently from general property law. Of course, the two legal areas were never wholly separate (certainly not in legal practice), but the attitude of both general and intellectual property lawyers seemed to be inclined towards separation. As an unfortunate result the awareness at an overall level that a connection exists between object and right has been lost. Let me elaborate on this somewhat further.

In the classical model of property law, the default position is that a right is in personam, unless it qualifies as a right in rem. It can only qualify as a right in rem if it passes two tests: the numerus clausus test and the transparency test. The numerus clausus test implies that only a limited number of rights can be recognised as rights in rem. The creation, content, transfer, and extinguishment of those rights is governed by strict rules of a mandatory nature, leaving only limited freedom to the parties who must be directly involved. The transparency test concerns the interests of third parties, who should have an adequate possibility of finding out whether any property rights exist for a given object and what the impact might be for that particular third party. Transparency implies that the object of a property right is clearly described (principle of specificity) and that any property rights regarding the clearly described object are accessible at least for those who have a legitimate interest in being informed about such rights (principle of publicity). The nature and types of object to which a property right can be claimed are, as defined, part of what constitutes a property right, particularly the right of ownership.

Let me take as an example the still fairly recent Netherlands Civil Code (the *Burgerlijk Wetboek*). By defining ownership as the "most comprehensive right which a person can have in a thing" and defining "things" as "corporeal objects susceptible of human control," the Netherlands Civil Code at the same time limits the number of objects

that can be owned and, by doing so, the scope and ambit of the right of ownership.[11] Only physical things can have an owner. However, next to things the Netherlands Civil Code also accepts other objects in which a property right (such as usufruct) can exist. A person's estate is comprised of all physical things and all patrimonial rights.[12] However, a patrimonial right (e.g., a right arising from a contract) cannot be "owned." A person can only be "entitled" to it, although "entitlement" in economic terms comes very close to ownership.

The system of the Netherlands Civil Code shows, in fact, the importance of what the law considers to be a legal "object." Next to defining who can be subjects of private law, it is the foundation upon which the Code is built. The Code begins by answering the question of who can be subjects of private law (Book 1 on family law and Book 2 on legal persons); then continues by deciding which objects are a part of a person's legal patrimony (Book 3 on patrimonial rights, the first part containing general provisions); follows with rules regarding the passing of a whole patrimony (Book 4 on succession), ownership (Book 5), the creation of voluntary and involuntary duties (Book 6 on obligations, Book 7 on special contracts, and Book 8 on transport). The Code finally ends with rules on the application of Dutch private law in an international case (Book 10 on private international law).[13] Interestingly enough, Book 9 (intellectual property) still has to be enacted. This structure makes it clear that, after having established

11. Art. 5:1 Burgerlijk Wetboek [BW] [Civil Code](Neth.); Art. 3:2 BW (Neth.). I refer to the English translation of the NETHERLANDS CIVIL CODE: PETER HAANAPPEL & EJAN MACKAAY, NETHERLANDS CIVIL CODE—BOOK 3, PATRIMONIAL LAW IN GENERAL (English-French) (1990), [hereinafter HAANAPPEL & MACKAAY, PATRIMONIAL LAW IN GENERAL], https://ssrn.com/abstract=1737823; and PETER HAANAPPEL & EJAN MACKAAY, NETHERLANDS CIVIL CODE—BOOK 5, REAL RIGHTS (English-French) (1990) [hereinafter HAANAPPEL & MACKAAY, REAL RIGHTS], https://ssrn.com/abstract=1708925.

12. Art. 3:1 BW (Neth.).

13. Books 1– 8, 10, BW (Neth.). For the English translation of Books 3, 5, 6, 7, and 8, see HAANAPPEL & MACKAAY, PATRIMONIAL RIGHTS IN GENERAL, *supra* note 11; HAANAPPEL & MACKAAY, REAL RIGHTS, *supra* note 11; PETER HAANAPPEL & EJAN MACKAAY, NETHERLANDS CIVIL CODE—BOOK 6, GENERAL PART OF THE LAW OF OBLIGATIONS (English-French) (1990), https://ssrn.com/abstract=1737848; PETER HAANAPPEL & EJAN MACKAAY, NETHERLANDS CIVIL CODE—BOOK 7, SPECIAL CONTRACTS (English-French) (1990), https://ssrn.com/abstract=1737849; and PETER HAANAPPEL & EJAN MACKAAY, NETHERLANDS CIVIL CODE—BOOK 8, TRANSPORT LAW (English-French) (1990), https://ssrn.com/abstract=1778425 or http://dx.doi.org/10.2139/ssrn.1778425. For an English translation of all Books (including Book 4, Succession, and Book 10, Private International Law), see DUTCH CIVIL LAW, http://www.dutchcivillaw.com/civilcodegeneral.htm (last visited Aug. 16, 2017).

who the subjects of private law are, the immediate follow-up question is, what can be an object of private law? Only after these two questions have been resolved , can a legal system deal with the question of which legal relations may exist between subjects regarding these objects. These relations can then exist both between two or more specific subjects, rights in personam, or between a person and a considerable group of third persons, rights in rem.

It is important to realise that legal systems, before they can deal with the legal relations between people regarding the objects in the world around them, must first focus on the questions of who can be a legal subject and what can be a legal object. Under Dutch civil law, if the object is of a physical nature (a "thing," particularly land), a right of ownership can exist regarding such object. However, concerning objects of an intangible nature ("patrimonial rights"), only certain property rights can exist but ownership cannot. With regard to the results of a person's creative work, I already remarked that the rights concerning this type of object were separated from general property law to avoid disturbing the general framework of the classical property law model.

From the perspective of today's society, in which the virtual economy is almost becoming more important than the "real" economy, the classical approach to property law must be revisited and re-evaluated for digital assets. Otherwise, we are creating a lawless virtual reality where the rule of technology governs instead of the rule of law.[14] What I am wondering about is how, following Jean Sonnekus's call for academic clarity and precision in legal analysis,[15] we should revisit the classical conception of private-law objects in light of the digital revolution. Can we adapt the existing numerus clausus of objects to fit the new virtual reality, or should we create a separate area of property law (very much as intellectual property law was created next to traditional property law) focussing only on digital assets?[16]

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14. *See* Sjef van Erp, *Ownership of Digital Assets?*, J.EUROPEAN CONSUMER & MKT. L. 73, 74 (2016).

15. Sonnekus, *supra* note 3.

16. I leave aside the question of whether we should even consider creating a whole new area of general private law, dealing not only with the property aspects of the digital revolution, but also the contractual and extracontractual aspects of virtual reality.

II. DIGITAL ASSETS: A NEW CATEGORY IN THE NUMERUS CLAUSUS OF LEGAL OBJECTS?

A. Introductory Remarks

Before we can begin analysing the impact that the digital revolution has on current property law, we need first to examine which new, possible objects of property law have already been distinguished. In 1980, a then young academic legal researcher, Kenneth J. Vandevelde, wrote a challenging article on "new property," building upon a seminal article from 1964 by Charles Reich.[17] Reich had advanced the argument that in a society in which government plays an ever-increasing role, government benefits create new forms of wealth ("new property"). In his article, Vandevelde took a legal-historical approach, focussing on the nineteenth and beginning of the twentieth centuries, and argued that with regard to older types of new property (e.g., business goodwill and trade secrets) the "protection of value rather than things—the dephysicalization of property—greatly broadened the purview of property law."[18] His conclusion was somewhat bitter:

> From [the jurisprudent's] perspective, the process of expansion and transformation of the concept of property accomplished two things. First, it demonstrated that there was nothing inevitable about the definition of property. That is, property law could not be logically deduced from the nature of things. Second, the broad and variable nature of the new property destroyed the fixed meaning of the concept, so the results of cases could no longer be deduced from the nature of the property rights.[19]

Vandevelde's analysis shows that dephysicalisation or dematerialisation is a development that has taken place over several centuries and that, I would add, is now culminating because of the ever broadening and deepening of the Internet's virtual reality as well as the still-increasing impact of digitalisation. His warning, however, should be heeded. We should not, too soon, abandon existing property law without first having tested whether it can withstand the stress of

17. Vandevelde, *supra* note 5, at 325 ff.
18. *Id.* at 329 ff.
19. *Id.* at 366 ff.

having to deal with digital assets. This is why in a position paper on digital content as a "thing," which I co-authored and also presented during the 2016 annual meeting of the Netherlands Royal Society of Notaries, I kept looking for footholds in existing law. My co-author and I took the view that, at least from a theoretical-analytical viewpoint, an analogy could be drawn between digital content and the existing law on physical things—but the analogous application of the rules on ownership should be very carefully considered.[20] We, therefore, advised against adding a provision introducing ownership of digital content to the Netherlands Civil Code because the impact of such a decision would be too uncertain. It is this careful, searching approach that I now explain.

B. Uncertainty of Terminology: Data, or Digital Assets?

First of all, a preliminary remark about terminology has to be made. Which new objects are we discussing? In both legal literature and draft legislation various terms can be found, such as "data," "digital data," "digital content," "virtual property," and "digital assets."[21] All of these terms relate, in one form or another, to information. What can be said from the outset is that pure information will not find protection easily.[22] Cases that show this are *Your Response Ltd. v. Datateam Business Media*, decided by the Court of Appeal of England and Wales, and *Jonathan Dixon v. The Queen*, decided by the Supreme Court of New Zealand (quashing the decision by the New Zealand Court of Appeal).[23] I am, therefore, focussing on those data types that can be specified (and therefore can be more easily equated with

20. J.H.M. van Erp & Willem Loof, *Eigendom in Het Algemeen: Eigendom Van Digitale Inhoud (titel 1). Over Digitale Inhoud Als Zaak*, *in* BOEK 5 BW VAN DE TOEKOMST: OVER VERNIEUWINGEN IN HET ZAKENRECHT 23 ff (L.C.A Verstappen ed., 2017) (Neth.).

21. *Cf. also* W. Erlank, *Finding Property in New Places—Property in Cyber and Outer Space*, 18 POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD [POTCHEFSTROOM ELEC. L.J.] [PER/PELJ] 1760 (2015) (S. Afr.), http://www.ajol.info/index.php/pelj/article/view/130767; W Erlank, *Introduction to Virtual Property: Lex virtualis res ipsa loquitur*, 18 PER/PELJ 2525 (2015), http://www.ajol.info/index.php/pelj/article/view/131481.

22. For a rare example in which (so it seems) pure information was protected (concerning investment advice in a column written for *The Wall Street Journal*), see *Carpenter v. United States*, decided by the U.S. Supreme Court on November 16, 1987, 484 U.S. 19.

23. Your Response Ltd. v. Datateam Business Media Ltd. [2014] EWCA (Civ) 281 (Eng.), http://www.bailii.org/ew/cases/EWCA/Civ/2014/281.html; *Jonathan Dixon v. The Queen* [2014] NZCA 329 (CA516/2013) (N.Z) and [2015] NZSC 147 (SC 82/2014) (N.Z.), http://www.nzlii.org/nz/cases/NZCA/2014/329.html.

nonrivalrous objects) and that have economic value separate from their carriers—such that in economic life these data are treated as tradable assets (albeit digital or virtual). Let me, first of all, discuss in greater detail the two cases just mentioned, which will make clear that data, in as far as it is pure information, can never be given legal (including proprietary) protection.

C. Your Response Ltd. v. Datateam Business Media

In *Your Response Ltd. v. Datateam Business Media*, the facts were as follows. Your Response was a publisher of magazines. Data concerning the subscribers (name, address, and publication subscriptions) was held in electronic form. In March 2010 the publisher agreed with Datateam Business Media that it would hold and maintain Your Response's database. The essence of the agreement was laid down in an email. The email did not specify what to do with the database when the contract came to an end. During the summer of 2011 the business relationship was terminated by the publisher, giving the database manager one month's notice. Then, the database manager sent the publisher an invoice for fees due. An impasse followed, with the database manager refusing to release the database to the publisher, and the publisher refusing to pay the fees.

One of the questions that needed to be decided was whether the database manager could exercise a possessory lien over the database. The Court of Appeal of England and Wales denied this. It might be instructive to quote from the decision by L.J. Moore-Bick:

> 23. Although an analogy can be drawn between control of a database and possession of a chattel, I am unable to accept Mr. Cogley's (the barrister representing Datateam Business Media, SvE) argument. It is true that practical control goes hand in hand with possession, but in my view the two are not the same. Possession is concerned with the physical control of tangible objects; practical control is a broader concept, capable of extending to intangible assets and to things which the law would not regard as property at all. The case of goods stored in a warehouse, the only key to which is held by the bailee, does not in my view undermine that distinction, because the holder of the key has physical control over physical objects. In the present case the data manager was entitled, subject to the terms of the contract, to exercise

> practical control over the information constituting the database, but it could not exercise physical control over that information, which was intangible in nature. For the same reason the withholding of the database by the data manager could not, even if wrongful, constitute the tort of conversion.
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> . . . .
>
> 31. Before he can exercise a lien at common law a bailee must have obtained a continuing right of possession which he is entitled to exercise against the bailor. Thus a racehorse trainer cannot exercise a lien over a racehorse for his fees if the contract reserves to the owner (expressly or by implication) the right to decide the places at which and the jockeys by whom it is to be raced: see *Forth v Simpson* (1849) 13 Q.B. 680. Likewise, one reason given for denying to a keeper of livery stables the right to exercise a lien for his charges is that he is obliged to give possession of the horse to the bailor whenever requested: see *Scarfe v Morgan* (1838) 4 M. & W. 270. (Another is that feeding and stabling does not improve the horse: see *Judson v. Etheridge* (1833) 1 Cromp. & M. 743 and *In re Southern Livestock Producers Ltd.* [1964] 1 W.L.R. 24.) Although the contract in the present case contained no express provision for the publisher to have access to the data, neither did it contain any provision, express or implied, excluding him from it and the fact that the data manager did in fact make access to it freely available by the provision of a password is in my view inconsistent with the conclusion that he was in fact exercising the kind of exclusive control that would equate to the continuing possession required for the exercise of a lien. In view of the other conclusions to which I have come it is not necessary to reach a final decision on this point, but if necessary I would hold that in this case the data manager did not exercise the degree of control necessary to entitle it to exercise a lien.[24]

The argument used to deny the database manager the ability to exercise a lien was, therefore, that control over a database is not the same as possession of a physical asset and that the control of Your Response's database was not to the full exclusion of the publisher. It shows how difficult it is to analyse problems in this digital era, with legal concepts inherited over centuries and dating back to societies

24. *Your Response Ltd.* [2014] EWCA (Civ) 281 [23], [31] (Eng.).

where land (not even personal property) was the most valuable legal object. In this case, it was the object that created problems for the court. As the object was problematic, the court felt unable to apply traditional property concepts, such as possession. The court used the wide open term "control," which is then considered to be of a non-legal nature. The court's reasoning suggests that the object in this case had already been qualified as not belonging to the numerus clausus of property law objects. Thus, any rights regarding this object might be of an economic, social, or even psychological nature, but could not be given protection under the law. Digital assets, however, do have economic value, do play an increasingly important role in our society, and are seen by people as things which belong to you and are therefore "yours." The law, however, is caught up in looking at the reality around us as a physical reality, despite recognizing the rights of monetary claims arising from contracts and despite accepting intellectual property rights. Courts who understand all this clearly face a dilemma, but they do not know how to develop the laws to embrace virtual reality.

This feeling of being confronted by a dilemma can be found in L.J. Floyd's opinion in *Your Response Ltd. v. Datateam Business Media*:

> 42. I would add only one observation in connection with the wider implications of Mr. Cogley's submission that the electronic database was a type of intangible property which, unlike choses in action, was capable of possession and thus of being subject to a lien. An electronic database consists of structured information. Although information may give rise to intellectual property rights, such as database right and copyright, the law has been reluctant to treat information itself as property. When information is created and recorded there are sharp distinctions between the information itself, the physical medium on which the information is recorded and the rights to which the information gives rise. Whilst the physical medium and the rights are treated as property, the information itself has never been. As to this, see most recently per Lord Walker in *OBG Ltd. v. Allan* [2007] UKHL 21, [2008] 1 A.C. 1 at [275], where he is dealing with the appeal in *Douglas v Hello*, and the discussion of this topic in *Green & Randall, The Tort of Conversion* at pages 141–144. If Mr. Cogley were right that the database could be possessed and could be the subject of a lien and that its possession could be withheld until payment

> and released or transferred upon payment, one would be coming close to treating information as property. That observation further underlines the significance of the step we were invited to take.[25]

The basic problem for the Court of Appeal was whether data in a database should be seen as "pure" information (and consequently, too broad a category to be accepted as a legal object) or instead as separate enough from other data that it could fit within the specificity requirements of property law. The court ruled that it was pure information. As we shall see later, a very different conclusion could also have been drawn.

D. Jonathan Dixon v. The Queen

Although this is a criminal case, the considerations of the court are still highly revealing. Can digital assets be stolen? This is a question that the Netherlands Supreme Court decided in the 2012 *RuneScape* case.[26] In that case a boy was forced to release a virtual amulet and mask, part of the Internet game *RuneScape*, to another boy, under the threat of physical violence. The supreme court ruled that such a virtual amulet and mask can come under the de facto and exclusive control of one person and can therefore qualify as property that can be stolen. The virtual amulet and mask had real value, which had been created by spending time and effort in game play.

However, this approach was not taken by the New Zealand Court of Appeal in *Jonathan Dixon v. The Queen*. In that case a security guard ("bouncer") heard that in the bar where he worked an incident had taken place between the captain of the English rugby team, Mike Tindall, and a female patron. The security guard, Jonathan Dixon, knew that Mr. Tindall had married Queen Elizabeth II's granddaughter, Zara Phillips. He realised that the incident between Mr. Tindall and the female patron must have been recorded on the closed circuit

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25. *Id.* at [42].

26. Netherlands Supreme Court [HR] 31 januari 2012, NJ 2012/536. The Netherlands Supreme Court also decided that when standard software is being transferred for an unlimited period and against payment this must be seen as sale of property, irrespective of whether the software is delivered on a data carrier or by downloading it: HR 27 April 2012, NJ 2012/293 (*Beeldbrigade* case). The court also accepted the seizure of digital assets in order to preserve evidence in HR 13 September 2013, NJ 2014/455. All cases can be found in electronic format on https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken.

television ("CCTV") of the bar and asked a receptionist to download the footage onto the computer in the reception area, which she did, thinking that Mr. Dixon was requesting this in his capacity as a security guard. Mr. Dixon then copied the footage on a USB stick and tried to sell it. When this failed he uploaded it to a video-sharing site. As a result the footage received wide publicity in New Zealand and the United Kingdom. Could this incident qualify as breaking into a computer to "obtain any property"?[27] The court of appeal answered this question negatively, and I am including a somewhat lengthy quote to show how the court struggled with the question. After having discussed the legal nature of confidential information and agreeing with the orthodox view that such information is not property, the court considered whether digital footage may be seen as different from confidential information. The court ruled:

> [31] After careful consideration, however, we have reached the view that electronic footage stored on a computer is indistinguishable in principle from pure information. It is problematic to treat computer data as being analogous to information recorded in physical form. A computer file is essentially just a stored sequence of bytes that is available to a computer program or operating system. Those bytes cannot meaningfully be distinguished from pure information. A Microsoft Word document, for example, may appear to us to be the same as a physical sheet of paper containing text, but in fact is simply a stored sequence of bytes used by the Microsoft Word software to present the image that appears on the monitor.
>
> [32] Accordingly, we consider that if confidential information is not property digital footage also cannot be.
>
> [33] That leaves the question of whether we should depart from the orthodoxy that confidential information cannot be property. It is true that the confidential information cases have attracted some criticism. In particular, the distinction drawn between the information itself (not property) and the medium on which it is contained (property) has been said to be illogical and unprincipled.
>
> [34] However, the courts have essentially taken the view that any illogicality is outweighed by the strong policy reasons that militate

27. Crimes Act 1961, sch 249, cl 2 (N.Z.), http://www.legislation.govt.nz/act/public/1961/0043/latest/DLM330422.html.

> against recognition of information (whether confidential or otherwise) as property. The concern is that if the law were to recognise confidential information as property and so afford it the full protection of property law, that would be likely to have a damaging effect on the free flow of information and freedom of speech.
>
> [35] We accept that legal concepts of property are constantly evolving to reflect societal changes and new developments. We acknowledge too that at the same time as it created new computer-related offences (including the one with which Mr Dixon was charged), the New Zealand Parliament amended the definition of property. However, as noted above, the amendment was limited. It consisted only of the addition of money and electricity. Parliament must be taken to be aware of the large body of authority regarding the status of information and in our view had it intended to change the legal position, it would have expressly said so by including a specific reference to computer-stored data.[28]

It seems to me that the court is mistaken when it uses free-flow-of-information arguments in a property law discourse. Free flow of information has to do with freedom of speech and freedom of the press. This case instead involves the question of whether information can qualify as an object to which property rights can attach if exclusive control can be exercised. A journalist is given the freedom, albeit within certain limits, to write. He may gather and disseminate information. However, the article he writes is protected by copyright, and the file containing his article can be stolen, irrespective of whether it is on a (hard) disk, USB stick, or stored on a cloud server. It can therefore, in my view, not come as surprise that, on appeal, the New Zealand Supreme Court quashed the decision by the New Zealand Court of Appeal. It said:

> [49] . . . . In *Your Response Ltd. v. Datateam Business Media Ltd.* the Court of Appeal held that it was not possible to exercise a common law possessory lien over an electronic database. While the Court did not rule out the possibility that such a database might be property, it said that it was at best intangible property and so, on the authorities (*OBG Ltd. v. Allan* in particular), did not represent "tangible property of a kind that is capable of

28. *Jonathan Dixon v. The Queen* [2014] NZCA 329 (CA516/2013) at [31]–[35] (N.Z.) (footnotes omitted).

> forming the subject matter of the torts that are concerned with an interference with possession".[50] The key question for us is whether the digital files are "property" for the purposes of s [§] 249(1)(a) [of the Crimes Act 1961] rather than whether they are tangible or intangible property, given that the definition of "property" in s [§] 2 includes both tangible and intangible property. What emerges from our brief discussion of the United States authorities is that although they differ as to whether software is tangible or intangible, they are in general agreement that software is "property". There seems no reason to treat data files differently from software in this respect. Even though the English Court of Appeal considered that an electronic database was not tangible property capable of being converted, it acknowledged that it might be property.
>
> . . . .
>
> [51] . . . . We consider that interpreting the word "property" as we have is not only required by the statutory purpose and context but is also consistent with the common conception of "property".[29]

The New Zealand Supreme Court limits its decision, above, to the interpretation of a particular statute. However, it cannot be denied that the New Zealand Supreme Court seems to show more willingness than the New Zealand Court of Appeal to accept that data, if contained on a file, can be considered an object of property law.

E. The Failed Attempt to Reify Data

A clear problem regarding data is its so-called "nonrivalrous" nature: it can be copied infinitely, making it difficult to specify which data, which is a fundamental requirement for anything to qualify as an object of property law.[30] The statement "I own" is meaningless if not followed by a description of what you own. This is what is meant by the requirement that any object of property law must be specific (or at least sufficiently specifiable). To solve this problem, sometimes a court may resort to reify data. An example of this is a decision by

29. *Jonathan Dixon v. The Queen*, [2015] NZSC 147 (SC 82/2014) at [49]–[50], [51] (N.Z.) (footnotes omitted).

30. *Cf.* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1057 ff (2005); Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137 ff (2006).

the Louisiana Supreme Court, which ruled in the tax case *South Central Bell Telephone Co. v. Barthelemy* that software was tangible personal property.[31] The court, under Justice Pike Hall, stated, "In sum, once the 'information' or 'knowledge' is transformed into physical existence and recorded in physical form, it is corporeal property. The physical recordation of this software is not an incorporeal right to be comprehended."[32]

This does not actually solve the problem, as all data needs a carrier. By approaching the problem of the nonrivalrous nature of data in this way, the court attempts to connect data, as an object, to the existing category of tangible objects. The question, however, remains whether data can be seen as an object separate from its carrier.[33]

F. The Qualification of "Data" as "Digital Assets"

From the above analysis of the decisions in *Your Response Ltd. v. Datateam Business* and *Jonathan Dixon v. The Queen*, it is becoming clear that, although pure information will not find immediate protection in the law, we should not be too quick in qualifying "data" as pure information. Follow-up questions will have to be asked. Is the data in electronic (digital or virtual) format? If so, the argument that pure information cannot receive protection no longer conclusively answers the questions whether data can be the object of a lien or whether data can be stolen. If the data is in an electronic format, we will have to distinguish the information contained in the digital format from the digital format itself and its information carrier. If an electronic file is stored on a hard disk or USB stick, the disk or USB stick are physical objects and, as such, fall within the traditionally accepted categories of the numerus clausus of legal objects. Does possession of the USB stick also imply possession of the files on that stick and, as a consequence, possession of the information in those files? Or does the word "possession" have too many connotations

31. S. Cent. Bell Tel. Co. v. Barthelemy, 94-0499 (La. 10/17/94), 643 So. 2d 1240.

32. *Id.* at 1250.

33. See further on this decision in Suzanne Bagert, *Recent Development:* South Central Bell v. Barthelemy*: The Louisiana Supreme Court Determines that Computer Software is Tangible Personal Property*, 69 TUL. L. REV. 1327, 1367 ff (1995); and Ruhama Dankner Goldman, *From Gaius to Gates: Can Civilian Concepts Survive the Age of Technology?*, 42 LOY. L. REV. 147, 149 ff (1996). For a more general comparison, see Ken Moon, *The Nature Of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?*, 31 EUR. INTELL. PROP. REV. 396 ff (2009).

with physical things, and should we use the word "control"? If so, we should no doubt define the term "control" more precisely so it can be used as a term of art to avoid, as when it is used too quickly to discard the whole debate on the application of property law concepts in the virtual world.

These are hard questions to ask and a simple answer cannot be given. From the perspective of the numerus clausus of legal objects, what results is a complicated "whole" comprised of the physical information carrier (e.g., a hard disk, USB stick, or server), the electronic format (the bits and bytes such as in a document), and the information created in that format (e.g., a deed of transfer). But the complexity does not stop there. We also have to distinguish the value from the amalgam of contracts and activities in the virtual world. Examples of the latter include domain names, email accounts, social media accounts, and statuses in Internet games. I would propose to use the term "digital assets" as an overarching concept to define economically valuable data, sufficiently specific to be qualified as a legal object, and as recently defined by the U.S. Uniform Law Commission in its Uniform Fiduciary Access to Digital Assets Act ("UFADAA"). This model act allows fiduciaries the right to manage digital assets as if they were tangible assets and financial accounts; it allows custodians of such assets to deal with fiduciaries. Section 2 of UFADAA gives the following definitions:

> (10) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.
>
> (11) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.[34]

Other definitions can also be found elsewhere, but given that this model Act is now being considered for enactment by several states in the United States it might be a good starting point for further analysis.

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34. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 2 (UNIF. LAW COMM'N 2015), http://www.uniformlaws.org/shared/docs/Fiduciary%20Access%20to%20Digital%20Assets/2015_RUFADAA_Final%20Act_2016mar8.pdf.

G. Is the Civil Law More Accommodating than the Common Law?

It is interesting to note that the civil law tradition, perhaps remarkably enough, is sometimes even more willing to adapt to the new virtual reality than common law practitioners might expect. The civil law with its tradition of legal dogmatic scholarship and codified law (the main exceptions being South Africa and Scotland where uncodified civil law applies) is often seen by common lawyers as unable to react flexibly to societal changes.[35] A good example of how civil law is very well able to reconsider its approach to the numerus clausus of legal objects is the law of Luxembourg. In 2013 the Luxembourg legislature considered whether one should be able to revindicate (claim as owner) data from a cloud server. For example, should a business whose financial administration is only available in an electronic format stored on a cloud server be able to revindicate its financial administration from its insolvent bookkeeper? It seems that the English Court of Appeal would deny this, looking at its decision in *Your Response Ltd. v. Datateam Business Media*. The Luxemburg legislature, however, saw no problem and enacted a new version of article 567, paragraph 2 of the Luxembourg Commercial Code, which now states:

> Les biens meubles incorporels non fongibles en possession du failli ou détenus par lui peuvent être revendiqués par celui qui les a confiés au failli ou par leur propriétaire, à condition qu'ils soient séparables de tous autres biens meubles incorporels non fongibles au moment de l'ouverture de la procédure, les frais afférents étant à charge du revendiquant.[36]

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35. On the relative value of distinguishing between common law and civil law, compare: Jean-François Gaudreault-DesBiens, De la pertinence relative de la dichotomie droit civil/common law dans la réflexion sur les rapports entre le droit comparé, le droit du développement et le droit vivant. Quelques observations à partir du cas de l'Afrique, 4 REVUE DE LA RECHERCHE JURIDIQUE, DROIT PROSPECTIF 2095 (2014) (Fr.), *translated in On the Relative Pertinence of the Civil Law/Common Law Dichotomy When Reflecting on the Relationship Between Comparative Law, Development Law and Living Law. Some Observations in the African Context* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948564.

36. Loi du 9 juillet 2013 portant modification de l'article 567 du Code de commerce [Law of 9 July 2013 Amending Article 567 of the Commercial Code] (Lux.).The text can be found electronically at http://eli.legilux.public.lu/eli/etat/leg/loi/2013/07/09/n2 [http://data.legilux.public.lu/eli/etat/leg/loi/2013/07/09/n2/jo].

The English translation follows:

> Incorporeal, non-fungible movables, which are in possession of or held by a person who is insolvent, can be revindicated by the person who has entrusted them to the insolvent party or who is their owner, provided that these movables are separable from all other incorporeal, non-fungible movables at the moment of opening the procedure; applicable costs to be charged to the person who revindicates.[37]

The Official Comment accompanying this new provision explicitly refers to problems encountered in situations where data has to be recovered from cloud servers during insolvency.[38]

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37. I have provided my translation of Paragraph 2, article 567 of the Luxembourg Commercial Code.

38. The *Exposé des Motifs* states (NO. 6485, CHAMBRE DES DÉPUTÉS, SESSION ORDINAIRE 2011–2012, PROJET DE LOI PORTANT MODIFICATION DE L'ARTICLE 567 DU CODE DE COMMERCE, at 2–3):

> Le nouvel alinéa 2 de l'article 567 proposé traite du cas des biens meubles incorporels non fongibles. Il a été jugé utile de traiter ce cas à part, dans une nouvelle disposition, étant donné que la revendication en matière incorporelle ne saurait être limitée aux cas du dépôt et de vente pour compte du propriétaire, comme elle l'est en matière corporelle.
>
> Il existe en effet aujourd'hui des hypothèses auxquelles le législateur n'a pas pensé il y a 10 ans et qui sont plus que de simples cas d'école. Ceci est le cas notamment dans le cadre des prestations offertes de façon de plus en plus large, à la fois au public en général et aux professionnels en particulier, en matière d'outsourcing ou d'informatique dématérialisée, appelée communément informatique dans le nuage (*Cloud-computing*). Pour continuer avec l'exemple du Cloud, l'une des applications du *Cloud computing* consiste par exemple pour une entreprise, une association ou une personne privée à ne plus conserver ses données et fichiers voire logiciels sur son propre système informatique, mais de les faire stocker sur des infrastructures informatiques externes accessibles via Internet. Or, il faut faire en sorte que celui qui a recours à de tels services puisse en cas de faillite du prestataire récupérer les données et fichiers afférents, en ce inclus les traitements qui auront été effectués par le failli ainsi que les résultats de ces mêmes traitements.
>
> Quant à la recevabilité d'une action en revendication, le texte ouvre le droit à la revendication tant à celui qui a confié les données au failli qu'au propriétaire des données lui-même. Dans certains cas, il s'agira de la même personne; dans d'autres cas il peut s'agir de deux personnes différentes, chacune d'entre-elles disposant dans ce cas d'une action en revendication.

My English translation of the *Exposé des Motifs* is as follows:

> The new proposed paragraph 2 of article 567 concerns non-fungible, incorporeal movables. It has been considered useful to deal with this situation separately,

What is also interesting to note is that the subject of the right to revindicate can be both the owner of the data or the person who entrusted the data to the cloud server. What we see here is that the acceptance of data on a cloud server as a new legal object raises not only the question whether traditional property remedies can be applied here, either directly or by analogy, but also the question of the capacity in which legal subjects can act. It may be obvious that revindication in traditional civil law is only possible by an owner of a physical thing. The Luxemburg legislation seems to allow a non-owner, someone who entrusts the storage of data on a cloud server, to revindicate. In other words, the civil law, with its systematic and robust structure, shows an intriguing strength and confidence in dealing with the new virtual reality by accepting digital assets as a new category in the numerus clausus of legal objects.

CONCLUDING REMARKS

Traditionally, property law systems have accepted physical things (land and personal property) and certain categories of intangibles (such as rights to payment) as legal objects. The objects which result from human creativity ("intellectual property"), although accepted as legal objects, were classified as being outside traditional property

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in a new provision, given that revindication regarding incorporeals could not be limited to cases of bailment and sale at the account of the owner, as is the case with regard to corporeals.

Today, in fact, cases exist that ten years ago the legislator did not think of and that are more than simple textbook cases. This is particularly so within the framework of services, more and more offered to the general public and especially professionals, concerning "outsourcing" or dematerialised computing services, generally called "cloud computing." To continue with the example of the cloud, one of the cloud-computing applications for an enterprise, association, or a private person consists of not storing data, files, or even software on their own computer systems but storing these on external computer systems accessible via the Internet. Well, we must ensure that someone who has access to such services can, in case of insolvency of the service provider, get these data and files back, including the—results of—data processing by the insolvent.

As to the admissibility of revindication, the text creates the right of revindication both for him who has entrusted the data to the insolvent and for the owner of the data himself. In certain cases, this will be the same person; in other cases, these could be two different persons, any of whom could avail himself of the action of revindication.

law. New property law objects do not seem to get accepted easily. An example is emission rights, a public law license to pollute that can be traded on an exchange as commodity. With the astoundingly fast development of the Internet and electronic data exchange (in other words, the digital revolution), we are now confronted with the question, can we accept data (and more specifically, digital assets) as a new category within the numerus clausus of legal objects? Legislation is slow, courts hesitate, and legal scholars ponder, but technology does not wait for lawyers, who find it difficult to understand this new virtual world in which they live and seem more inclined to look backwards than forward. Of course, we should be careful when adapting the law to the new virtual reality. The warning of Kenneth Vandevelde, against making the concept of ownership meaningless with the acceptance of new forms of property, should not be ignored. At the same time we should not be afraid to develop the law further than what we inherited. Next to the "real" world, we now have the "virtual" world, which is just as realistic as the physical world around us. This virtual world demands a rethinking of classical property law, particularly the numerus clausus of legal objects.

The outcome of such a process of revisiting well-established concepts, notions, and principles of property law will probably depend on the legal area that we are discussing, the type of object, and the person claiming to have a property right. Unlike property law, contract law has always been very open to accepting what the parties want as a valid object. Even future activity can be the object of a contract, such as a labour agreement. Property law has been far more strict, although even there things are changing, especially in what is now called constitutional property law.[39] What belongs to the category of objects that a government cannot take without proper justification and reasonable compensation (in other words, due process of law) does not, as a consequence, have to be an accepted object of property law outside the constitutional realm. Whether we can accept new objects as private property will most likely depend upon weighing a whole variety of factors: the personal nature of data and the privacy protection flowing from that personal nature, the economic value and transferability of data (particularly when we talk about anonymized "big" data), the setting in which data has been provided (private communication or a requirement for getting access to a website), and the

39. *Cf.* AJ VAN DER WALT, CONSTITUTIONAL PROPERTY LAW (3d ed.2011).

person claiming entitlement to the data (a private person, a social media corporation, or the government). It will, no doubt, take some time before definite answers can be given, but we cannot wait too long. Developments simply move too fast to sit back and wait for guidance by courts or legislators. Comparative legal scholarship can play a pivotal role here also, given the global nature of the problems to be solved.

PROPERTY IN THE ANTHROPOCENE

J. PETER BYRNE*

Human-induced climate change threatens perilous risks for our physical homes. It also poses a serious challenge to our legal institutions. Several scholars already have remarked on the disruption climate change has brought to specific legal areas, such as tort, standing, and national security. This essay argues that climate change will also disrupt fundamental ideas about real property. Prior work has explored the need for fresh approaches to land use regulation and a shift in regulatory takings law. This essay looks at the more fundamental assumptions and principles of property law. It maintains that the growing need for human management of dynamic natural forces, distorted by greenhouse gas emissions, will erode the foundations of physical stability and owner autonomy that shape basic doctrines of property law.

A firm scientific consensus holds that human-induced emissions of greenhouse gases, such as carbon dioxide and methane, into the atmosphere have been, and will continue, working unprecedented changes in our climate.[1] The effects of such emissions are apparent in phenomena such as global warming, rising sea levels, aggravated drought and wildfires, and more extreme storms and flooding.[2] Legislative efforts to reduce emissions and rationally address these threats have been stymied at the national level and in many states by a combination of entrenched interests, discounting of future risks, conceptual complexity, and existential fear. Nonetheless, some states and many local governments have begun planning and have even taken significant steps to reduce emissions and prepare for inevitable environmental changes.[3]

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1. *See, e.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2014), http://www.ipcc.ch/report/ar5/syr/.

2. *See, e.g.*, Svetlana Jevrejeva et al., *Coastal Sea Level Rise with Warming Above 2 °C*, 113 PROC. NAT'L ACAD. SCI. 13342 (2016), http://www.pnas.org/content/113/47/13342.abstract; John T. Abatzoglou et al., *Impact of Anthropogenic Climate Change on Wildfire Across Western US Forests*, 113 PROC. NAT'L ACAD. SCI. 11770 (2016), http://www.pnas.org/content/113/42/11770; Aslak Grinsted et al., *Projected Atlantic Hurricane Surge Threat from Rising Temperatures*, 110 PROC. NAT'L ACAD. SCI. 5369 (2013), http://www.pnas.org/content/110/14/5369.abstract.

3. *See, e.g.*, S.B. 32, 2015–16 Leg., Reg. Sess. (Cal. 2016), *amending* CAL. HEALTH AND

Courts, too, have begun to alter legal doctrines to address or accommodate the effects of climate change. The Supreme Court arguably expanded its approach to standing in order to allow a state to sue the Environmental Protection Agency ("EPA") for failing to regulate greenhouse gas emissions,[4] and a federal district court recently surely did the same by allowing a group of minors to sue the United States for failing to address climate change.[5] Legal scholars have noted that climate change has disrupted established doctrines in other areas of law. Douglas Kysar, for example, has written about tort law:

> Built as it is on a paradigm of harm in which *A* wrongfully, directly, and exclusively injures *B*, tort law seems fundamentally ill-equipped to address the causes and impacts of climate change . . . . courts in all likelihood will agree with commentators that nuisance and other traditional tort theories are overwhelmed by the magnitude and the complexity of the climate change conundrum.[6]

Many statutory areas are straining to meet the challenges of climate change as well.[7]

It stands to reason that property law, which deals directly with the rights and duties of ownership of elements of the natural world, also will be disrupted by climate change.[8] This essay will focus on real property law, which historically has assumed stability in the

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SAF. CODE § 38566 (2017). On the many efforts at adaptation see GEORGETOWN CLIMATE CENTER, ADAPTATION CLEARING HOUSE, http://www.adaptationclearinghouse.org/ (last visited Feb. 11, 2017).

4. Massachusetts v. EPA, 549 U.S. 497 (2007).

5. Juliana v. United States, No. 6:15-CV-01517-TC, 2016 WL 6661146 (D. Or. Nov. 10, 2016).

6. Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENV'T L. REP. 1, 3–4 (2011). Kysar went on to observe: "[T]he effort to fit the mother of all collective action problems into the traditional paradigm of tort reveals much about how that paradigm more generally needs to shift." *Id.* at 44.

7. *See, e.g.*, J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV'T L. REP. 363, 401 (2010); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009).

8. *See* Holly Doremus, *Climate Change and the Evolution of Property Rules*, 1 U.C. IRVINE L. REV. 1091 (2011). Professor Doremus gives a thoughtful account of how property rules evolve and what forces can delay or prevent change. This essay takes the simple-minded view that courts will eventually change doctrines when physical, social, and economic changes make inherited legal approaches seem nonsensical. Also, it avoids the important question whether changes in property doctrine are better accomplished by courts or legislatures.

physical world and the capacity of an owner to exercise effective dominion over land.[9] Climate change calls both these assumptions into question because many parcels of land will teeter on physical convulsions, and government help will more frequently be needed to keep such forces at bay. The essay considers three types of changes in property law principles: growth of publicly as opposed to privately owned land, greater scope for land use regulation, and government liability for management mistakes. The changes will not occur immediately; the effects of climate change have begun to show themselves, but more dramatic changes lie in the future. Property law is a conservative field, guarding reliance. But over time its tenets adapt to a changing physical and social environment.[10] This essay is, frankly, speculative, aiming to stimulate discussion and further research.

First, changes in property law will be brought about because sea-level rise, enhanced storms, and fire will physically destroy or degrade many parcels of land and their improvements. Some coastal areas will simply sink beneath the waves, engulfing the homes built upon them. More properties will be destroyed by intense storms, such as hurricanes strengthened by climate change—as happened in Hurricane Sandy—or by growing wild fires in the increasingly arid west. Market forces have not yet seriously guarded against these losses.[11] The National Flood Insurance Program,[12] although insolvent without the backing of the U.S. government,[13] continues to provide assistance where the premiums do not cover the risk. Developers build and sell new homes along the shore within shorter time frames than the timeline for losses from climate change, perhaps even aggravating their incentives to develop coastal land in the fastest possible schedule. Sellers of existing coastal buildings and realtors compensated by a percentage of the sales price retain every incentive to

9. Water law, another key element of property law, also will need to adapt because climate change will cause regional shortages. *See* Robin Kundis Craig, *Adapting Water Law to Public Necessity: Reframing Climate Change Adaptation as Emergency Response and Preparedness*, 11 VT. J. ENVTL. L. 709, 724 (2010).

10. *See, e.g.*, Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1446 (1993).

11. *See* J.E. Neumann et al., *Joint Effects of Storm Surge and Sea-Level Rise on US Coasts: New Economic Estimates of Impacts, Adaptation, and Benefits of Mitigation Policy*, 129 CLIMATIC CHANGE 337 (2015).

12. 42 U.S.C. § 4001 *et seq.*

13. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-290, HIGH RISK SERIES: FEBRUARY 2015 UPDATE 385–90 (2015), http://www.gao.gov/assets/670/668415.pdf.

remain silent about the risks of sea-level rise. Mortgage lenders who bundle and sell mortgage-debt packages to investors collect fees and retain no continued exposure to loss. The investors in bundled mortgage-debt instruments have their risks diluted by the scale of other mortgages making up their exposure. Local governments at the coast typically rely on real property taxes and probably hesitate to require warnings that could crash property values. Buyers should attend to risk but often are distracted by more immediate concerns such as securing mortgage funds or keeping insurance premiums low.[14] Thus, without strong regulatory intervention, much development could be destroyed, yet regulation has been slow to evolve.

This reality will drive changes in property rules that may have made sense on the assumption that nature was stable but seem absurd in the dynamic context of climate change. Climate change will not amount to a move from one relatively stable state to another; change at a rate faster than historic norms will continue for the foreseeable future, regardless of when emissions of greenhouse gases can be significantly reduced. Moreover, even the rate of change will not be constant but probably will continue to accelerate, as scientists have observed in recent years.[15] Thus, rules about land use will exist in a state of physical flux, even though historically land law has assumed, even relied upon, perpetual stability. The entire edifice of estates in land, future interests, and perpetuities, for example, assumes practically that the land lasts forever as, to differing degrees, do the laws of mortgages, prescription, and conservation easements.

Some aspects of land law will not be able to survive the changes. One example is the significant but obscure principle that a property owner enjoys a right of access to the public highway system, and government action eliminating such access amounts to a taking requiring the payment of compensation for the reduction in value of the marooned land.[16] Recently, this rule has been found appropriate

14. Ian Urbina, *Perils of Climate Change Could Swamp Coastal Real Estate*, N.Y. TIMES, Nov. 24, 2016, http://www.nytimes.com/2016/11/24/science/global-warming-coastal-real-estate.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news.

15. *See* Chris Mooney, *U.S. Scientists Officially Declare 2016 the Hottest Year On Record. That Makes Three in a Row*, WASH. POST., Jan. 18, 2017, https://www.washingtonpost.com/news/energy-environment/wp/2017/01/18/u-s-scientists-officially-declare-2016-the-hottest-year-on-record-that-makes-three-in-a-row/?utm_term=.f9305c433622.

16. *See, e.g.*, Jordan v. Town of Canton, 265 A.2d 96 (Me. 1970).

to support a takings action against a local government based upon its failure to maintain a road connecting a barrier island that had repeatedly flooded.[17] As seas rise and floods increase, however, the burden that such a rule places on the public fisc becomes irrational; no government constructs roads and bridges on the assumption that the facilities would have to be continually rebuilt to higher elevations and mounting costs. Also, the traditional rule creates perverse incentives for coastal homeowners who may rationally seek to recover the value of their flooding homes by pursuing takings claims. While it may be that courts, appalled by the prospect of sea-level rise, may grow more rigid and formalistic in their application of this rule in the short run, they will need to revise it as cases and costs multiply with losses. Doctrinal change could be applied either to the easement of access or to the takings analysis.[18]

Not only will sea-level rise physically destroy or damage land and improvements, but private property rights themselves will be terminated. Pursuant to the public trust doctrine, the public owns the beds of tidelands seaward of the mean-high-tide line. As the tide line moves landward, the doctrine of accretion will transform private dry land into public subsurface, wetland, or tideland.[19] No taking requiring the payment of compensation is effected, because the transformation is considered to have been accomplished by nature not by the government.[20] Then, if the government steps in to restore the sunken land, as when the government rebuilds a beach with dredged sand, the restored beach usually is considered public property.[21] This result stems from the doctrine of avulsion, whereby a sudden change in the tide line, even if purposefully brought about by a government agency, does not change the boundary line—though a gradual change would under the doctrine of accretion. The justification for the result under avulsion, however, may be due to the public resources used to rebuild the beach. Pertinently, Professor Flourney has recently inquired whether

17. Jordan v. St. Johns Cty., 63 So. 3d 835 (Fla. Dist. Ct. App. 2011).

18. There are internal complexities in the law of abandonment of public access, such as whether a private easement of access survives public renunciation. *See, e.g.*, Luf v. Town of Southbury, 449 A.2d 1001, 1006 (Conn. 1982).

19. *See* Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENVTL. L.J. 305 (2010).

20. J. Peter Byrne, *The Cathedral Engulfed: Sea Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 80 (2012) [hereinafter Byrne, *The Cathedral Engulfed*].

21. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot., 560 U.S. 702 (2010); City of Long Branch v. Jui Yung Liu, 4 A.3d 542 (N.J. 2010).

sea-level rise should change the application of the accretion/avulsion approach. Historically, the justice of this rule was based upon the bidirectional and unpredictable movement of the tide line, but now sea-level rise will push the tide line inexorably inland.[22] Professor Flourney persuasively shows that both the physical assumptions and policy justifications for the traditional approach have changed significantly because of sea-level rise and argues generally for greater protection for free-access submerged and tidal lands subject to the public trust.

Second, large-scale government investments in protecting private property from the effects of climate change likely will increase the scope and weight of the public interest, justifying regulation of private land use. Sea-level rise again provides the clearest instance of this. There are three categories of regulatory responses to adapt to sea-level rise: fight, accommodate, and retreat.[23] Fighting involves the public or private construction of physical barriers or drains to keep sea waters away from private property. Thus, sea walls, levees, dune and wetland construction, pumps, and drains can forestall inundation or storm surges (up to a point).[24] This approach has obvious attractions, especially if the public will pay for the new infrastructure, because it preserves the current boundaries of the lot and extant buildings and generally allows established land uses to continue. Public infrastructure has an additional crucial advantage over private efforts because it can be constructed across property lines according to the physical characteristics of the site. But there are engineering, environmental, and economic limits to the capacity of government to build such protections.[25]

Such large-scale public investments, both of money and expertise, must expand the scope of regulatory power that government may exercise over the protected private property. When government has built sophisticated infrastructure at public expense to protect private property, its interest in that property must grow. One cannot consider

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22. Alyson C. Flourney, *Beach Law Clean-Up: How Sea-Level Rise Has Displaced the Accretion/Erosion/Avulsion Framework*, 42 VT. L. REV. (forthcoming).

23. *See* J. Peter Byrne & Jessica Grannis, *Coastal Retreat Measures*, *in* THE LAW OF ADAPTATION TO CLIMATE CHANGE 267, 269 (Michael B. Gerrard & Katrina Fischer Kuh eds., 2012).

24. *See* Robert R.M. Verchick & Joel D. Scheraga, *Protecting the Coast*, *in* THE LAW OF ADAPTATION TO CLIMATE CHANGE, *supra* note 23, at 235, 242–44. Recent legislation strives to make such new infrastructure as cost effective and environmentally friendly as possible.

25. *See, e.g.*, Elizabeth Kolbert, *The Siege of Miami*, NEW YORKER, Dec. 21 & 28, 2015.

the private owner as enjoying "sole and despotic dominion"[26] when her property would be destroyed without public expenditure and management. One might argue that from an economic perspective, the public has put equity into the protected property to preserve its market value. Moreover, to the extent that government has prevented the tide line from moving landward, it has suspended its future ownership rights over the private land it is now protecting. The public's right to regulate the use of protected private land for environmental benefits or to mandate forms of public access surely will grow. Of course, it always has been the case that government action has been necessary to secure property rights through judicial and executive enforcement of such rights, but the financing, construction, and maintenance of physical barriers to natural destruction of private property go far beyond any "night watchman" type of state action and toward a persistent "control of nature."[27]

Some indication of how courts may reshape property doctrines may be gleaned from the unanimous post–Hurricane Sandy decision of the New Jersey Supreme Court in *Borough of Harvey Cedars v. Karan*.[28] The Borough condemned a perpetual easement over a portion of the Karan's shorefront lot for the U.S. Army Corps of Engineers to construct, largely at federal expense, a dune barrier to storms and erosions. In calculating the compensation to be paid, the trial court permitted the jury to consider the obstruction of the view from the house but not the benefit accruing from increased storm and erosion protection, on the ground that such protection was general to many protected properties. The New Jersey Supreme Court reversed this decision and held that any "reasonably calculable benefits—regardless of whether those benefits are enjoyed to some lesser or greater degree by others in the community—that increase the value of property at the time of the taking should be discounted from the condemnation award."[29] The court rejected as outdated the traditional distinction between specific benefits to the retained property, which can be considered, and benefits general to the community, which cannot.[30]

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26. 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (facsimile ed., 1979).

27. The phrase comes from JOHN MCPHEE, THE CONTROL OF NATURE (1989).

28. Borough of Harvey Cedars v. Karan, 70 A.3d 524 (2013).

29. *Id.* at 543.

30. Bianca Iozzia, *Putting a Price Tag on an Ocean View: The Impact of* Borough of Harvey Cedars v. Karan *on Partial-Taking Valuations*, 25 VILL. ENVTL. L.J. 501, 521 (2014).

Harvey Cedars found absurd the traditional approach, which considers offsetting benefits in compensation calculations, when faced with a large government project to protect private homes from the sea. The Court did not abandon protection of private property; it presumed the right of the owners to compensation for the easement and affirmed the propriety of compensation for impairment of their ocean view. But mandating consideration of off benefits may practically eliminate and certainly will radically reduce payment of compensation for such a project.[31] The State of New Jersey is aggressively using *Harvey Cedars* as a point in negotiating the donation of easements for dune construction. The increase in sea-level rise caused by climate change will greatly increase the risk to shorefront property and the pressure for protective public works, while rendering less persuasive the claims of property owners' recognition of the niceties of their rights. None of this means that New Jersey's dune construction project or any particular government property protection scheme is a sensible or fair response to climate risks. But the logic of such public protection will be to make property more amenable to public control.

There are many things that may be required of protected property owners: public access on dry sand beaches, public access for maintenance of works, owner maintenance of habitats or wetlands, water management, protection of viewsheds, and the like. At a minimum, government's physical protection of private property against sea-level rise should, as a constitutional matter, authorize any regulation or public access reasonably necessary to realize public benefits from managing sea-level rise.

Government regulations to require property-owner accommodations to climate change could lead to extensive additions to building codes and site plans, but they do not seem constitutionally or conceptually difficult. New houses on lots threatened by sea-level rise may be required to be elevated or placed upon high ground; landscaping or water engineering may be mandated for those threatened by wildfires.[32] While these may increase costs, courts are unlikely to

31. The Karans eventually settled for $1 in compensation, and subsequently a jury awarded another couple three hundred dollars for a similar taking to construct a protective dune. Press Release, N.J. Att'y Gen., Acting Attorney General Hoffman Announces Legal Victory for Beachfront Easement Acquisition Efforts in Harvey Cedars: Owner Sought Hundreds of Thousands of Dollars; Jury Awards $300 (June 30, 2014), http://nj.gov/oag/newsreleases14/pr20140630b.html.

32. On building codes requiring freeboard and other measures to accommodate to sea-level

take seriously due process or regulatory takings challenges to a wide range of accommodation regulations.

More problematic are regulations requiring retreat. From an environmental perspective, the best response to sea-level rise, drought, and fire threat would be to simply prohibit new development in the areas most at risk. The reasons to mandate retreat from areas at risk from climate change include protection of residents from harm, avoidance of dangerous and expensive rescue efforts, coordination of cessations of public services, and minimization of damage to ecosystem services.[33] But the economic effects of such bans could be devastating for investors and even for local government finances. More immediately, they risk triggering the per se rule of *Lucas v. South Carolina Coastal Council*, that land use regulations that eliminate all the economic value of a parcel constitute regulatory takings.[34] The peculiar threat of *Lucas* is that it requires compensation unless the use of the land would constitute a nuisance at common law. In the case of sea-level rise or other environmental threats, however, traditional nuisance law is inapplicable. According to the Restatement, a nuisance arises from an owner's unreasonable use of his land that causes harm to another landowner or to the public at large.[35] Nuisance law can (imperfectly) address environmental harm when the defendant is polluting neighbors from his own land. But it would seem not to address situations where the risk stems from changes in nature that are caused by human activity throughout the industrialized world. In *Lucas*, where a taking was found from a prohibition of building within a flood zone, Justice Scalia noted derisively that construction of a single-family house does not constitute a nuisance.[36] In practice, retreat has been limited to generous voluntary buyouts of homes after destruction from floods or fires.[37]

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rise, see *Adaptation Toolkit: Sea Level Rise and Coastal Land Use*, GEO. CLIMATE CTR. (Feb. 11, 2016), http://www.georgetownclimate.org/adaptation/toolkits/adaptation-tool-kit-sea-level-rise-and-coastal-land-use/building-codes.html.

33. *See* Byrne & Grannis, *supra* note 23, at 268–70.

34. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

35. RESTATEMENT (SECOND) OF TORTS § 826 (1979).

36. "It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land; they rarely support prohibition of the 'essential use' of land." *Lucas*, 505 U.S. at 1033 (quoting Curtin v. Benson, 222 U.S. 78, 82 (1911)).

37. GOVERNOR'S OFFICE OF STORM RECOVERY ET AL., NY RISING BUYOUT AND ACQUISITION PROGRAM POLICY MANUAL 15 (2015).

So to mandate retreat through legislation, the *Lucas* facts must be avoided, the doctrine must bend, or nuisance law must expand. In a prior article, I discussed avoiding the factual premise of *Lucas* through rolling-development restrictions, which permit development for time but then prohibit it when the sea rises to within a certain distance of a dwelling or building site.[38] In another article, I have described climate exactions, which might permit such development but at a price that reflects the environmental or public costs it generates.[39] Here, I briefly want to suggest that at some point maintaining a house in the face of sea-level rise or other increasing climate risks may be considered a public nuisance.

A public nuisance would be the unreasonable use of property that imposes significant harm on the public generally.[40] In the era before comprehensive land use regulation, local governments enacted ordinances identifying certain uses in certain locations as public nuisances; public authorities such as attorney generals or corporation councils would bring actions to enforce such ordinances through injunctions.[41] In some cases, land uses thought reasonable at one time came to be seen as nuisances when the environs around them had changed. For example, a cement plant in Los Angeles was unobjectionable when settlement was sparse but was deemed a nuisance when a neighborhood of houses grew up around it.[42] People building or living in houses could come to be considered nuisances when the risk of inundation, storm surges, or fire reaches a threshold where disaster assistance would become too dangerous or costly, when they threaten failure of septic or sewer systems, or when construction prevents migration inland of environmental systems providing the community with important ecological services. Of course, the actual factual circumstances and the normative meanings that the public attaches to nuisances in the future would be determinative, but climate change could so change which land uses are considered reasonable that such "essential uses" as building a house could become nuisances in many locations.[43]

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38. Byrne, *The Cathedral Engulfed*, *supra* note 20, at 109–12.

39. J. Peter Byrne & Kathryn A. Zyla, *Climate Exactions*, 75 MD. L. REV. 758 (2016).

40. RESTATEMENT (SECOND) OF TORTS § 821 (1979).

41. *See* John E. Bryson & Angus Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241 (1972).

42. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

43. The plausibility of this prediction may be enhanced when one recalls that the essential

The third category of property law change to be expected from climate change would be an increase in government liability for losses resulting from its environmental management. Currently losses from extreme natural events, such as hurricanes, generally are considered "acts of God," for which no entity is primarily responsible. If government has no authority and makes no effort to control the forces of nature, there is no legal basis to hold it accountable for natural disasters.[44] But when government comes to manage the effects of climate change, through construction of levees, for example, courts may come to hold the government responsible for its mistakes or inadequate precautions. Thus, if reconstructed sand dunes erode faster than estimated and a storm surge destroys houses in the locality, or forests thinned of overgrown or dead vegetation still host raging wildfires that consume homes, the government may be blamed. Lawyers for private owners bearing such losses may seek to hold the government liable.

This tendency is evident in recent court decisions using the Takings Clause to facilitate liability on the United States for its management of flooding on the Mississippi River. Since the 1920s the U.S. Army Corps of Engineers has been tasked with reducing flooding as well as aiding navigation on the river. The legislation authorizing their flood control efforts also contained a statutory exemption from government tort liability arising from such efforts.[45] But flooding of private land near the river still results from the enormity of the task, whether from inadequate water management or from agency choices among competing constituents. In recent years, courts have expanded the basis upon which the Corps can be held liable for flooding under the Takings Clause, which cannot be limited by statute. In *Arkansas Fish and Game*, the Supreme Court departed from prior law in holding that a takings claim can be based upon a single or

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use of land protected against regulation in the case cited by Justice Scalia in *Lucas* was the driving of cattle over roads through Yosemite National Park and grazing them on a private enclosure within the park. *See* Curtin v. Benson, 222 U.S. 78, 86 (1911) ("The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship."). No one could doubt that the National Park Service today has authority to prohibit driving cattle through and grazing them on private land within a national park.

44. Government does provide assistance to affected persons and businesses under disaster relief statutes and through ad hoc legislation. The Stafford Act provides the statutory authority for most Federal disaster response. 42 U.S.C. 5121 *et seq*. (2016).

45. 33 U.S.C. §§ 701–709b (2016).

finite series of flooding events.[46] Subsequently, the U.S. Claims Court held that the Corps effected a taking by its construction and negligent management of the Mississippi River Gulf Outlet, which enhanced the flooding in St. Bernard Parish from Hurricane Katrina.[47]

Of course, the government has never managed coastlines with the thoroughness that the Corps has managed the Mississippi River. But the vulnerability of coastal property to sea-level rise suggests that government may play a much larger role in defending against rising seas to preserve private property values. In doing so, it would seem to take on a duty to perform its many protective functions without negligence. Because the government would be choosing structures to prevent the risks foreseen by sophisticated scientific analyses, it seems inevitable that sometimes the government would be wrong in its predictions or would engineer inadequately based on mistakes, inadequate findings, or the sheer difficulty of the task. To be sure, government can find some defense in the discretionary function immunity to the Federal Tort Claims Act, but generally speaking this immunity extends only to intentional and not negligent acts of government employees.[48]

Government will also be threatened with liability for its intentional decisions about protection from climate effects through takings claims. The scale of climate effects and the immensity of affected areas means that government will protect some areas and not others.[49] Choices will need to be made about limited resources and know-how, and likely will be based on the value of protecting different places.[50] For example, urban areas are more likely to be protected than rural. Physical characteristics of some places, such as land subsidence or porous bedrock, may make some places much more difficult or expensive to protect. Politics also inevitably will play a role. Thus,

46. Ark. Fish & Game Comm'n v. United States, 133 S. Ct. 511 (2012).

47. St. Bernard Parish Gov't v. United States, 121 Fed. Cl. 687 (2015).

48. Amy M. Hackman, *The Discretionary Function Exception to the Federal Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411, 413 (1997).

49. The public needs to have the authority to regulate or prohibit the private construction of sea walls to protect neighboring properties as well as tidelands. Byrne, *The Cathedral Engulfed*, *supra* note 20, at 100–04. A common law rule, already weakened, that sea-level rise should eliminate is the "common enemy" rule permitting landowners to fend off flood waters in any direction without liability to neighbors injured by the redirected waters. *See generally* Daniel H. Cole, *Liability Rules for Surface Water Drainage: A Simple Economic Analysis*, 12 GEO. MASON L. REV. 35 (1990).

50. *See* MCPHEE, *supra* note 27.

government will make imperfect and unpopular decisions about which localities will be protected from flooding, which will be allowed to flood, and which the government will intentionally flood in order to divert flood waters. Losers will seek compensation. Such cases will be brought as takings because the decisions to flood or not protect from flooding will be characterized as intentional implementations of policies.

The structure of such a problem can be seen in the *Quebedeaux* case.[51] There the Corps estimated that high water descending from the Mississippi would overflow levees in Baton Rouge and New Orleans, so it opened the Morganza Spillway, diverting floodwaters into the Atchafalaya River basin and destroying numerous farms, homes, and businesses. Affected landowners sued, claiming a taking. The Court of Federal Claims denied the government's motion to dismiss for failure to state a claim. Judge Allegra relied on the recent decision in *Arkansas Fish and Game*[52] to hold that a single instance of intentional flooding could be found to be a taking and also rejected the government's argument that a flooding victim who benefited from a flood control project could not recover unless he showed that the cost of the flooding exceeded the benefits from the project as a whole.[53] Thus, flood victims who would have had to bear their own losses if the government had taken no action could obtain compensation if the government chose to flood them in order to avoid a greater disaster downstream.

Government engineering may never reach the level of control over coastal flooding that the Corps has reached on the Mississippi, but one can easily imagine that government choices over which areas it will protect against ocean storm surges may result in similar takings claims—for example, government construction or permitting of a seawall to protect residences in one location along the Gulf Coast, knowing that such a seawall may increase the likelihood of erosion or flooding on nearby farmland. There may be subtle issues of causation raised regarding the extent to which the government or nature caused the loss,[54] but the breadth of government control we

51. Quebedeaux v. United States, 112 Fed. Cl. 317 (2013).

52. *Id.* at 324–25 (discussing Arkansas Fish & Game Comm'n v. United States, 133 S. Ct. 511 (2012)).

53. *Id.* at 321.

54. *See* Teegarden v. United States, 42 Fed. Cl. 252 (1998) (rejecting takings claim on the

can anticipate to protect owners from the effects of climate change suggests that at some point losses may be attributed to the government. Professor Serkin has put this scenario at the center of his theory of passive takings: "Whether the government prohibits or builds sea walls, its near-total control over the allocation of the inevitable harm serves as a doctrinal hook for passive takings liability."[55]

Thus, we can anticipate that government will be entrusted with the choice over which private property will be protected at great government expense and which will be flooded. Several property doctrines may protect the government from takings liability in such circumstances. In *Miller v. Schoene*, the Supreme Court held that a Virginia statute mandating the destruction of cedar trees to protect the state's apple trees from a contagious plant disease did not amount to a taking because the government had to act to prevent harm in circumstances where the failure to act would have caused more harm.[56] From one view, the decision increases the probability that government failure to protect an owner could amount to a taking because the Court seems to treat government action and inaction as equal policy choices that can cause harm. But more fundamentally, the Court expressly stated that "it is obvious that there may be, and that here there is, a preponderant public interest in the preservation of one interest over the other." Thus even in cases where government action causes harm, as when opening a floodgate, the government may escape takings liability when not doing so could cause a greater harm to the public. The vitality of *Miler v. Schoene* in modern takings law, however, is questionable, as it relies on a deference to the police power that the Supreme Court has moved away from.[57]

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ground that the forest fire caused destruction of the plaintiffs' trees rather than the United States Forest Service's choice to not protect the plaintiffs' property).

55. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 394 (2014).

56. Miller v. Schoene, 276 U.S. 272 (1928).

57. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1022–23 (1992) ("The 'harmful or noxious uses' principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power."). Another obscure corner of takings law that will come into play when the government assumes control of nature are cases of actual necessity, such as when government blows up buildings to prevent the spread of fire. *See, e.g.*, Bowditch v. Boston, 101 U.S. 16 (1880). This exception to takings liability is narrow and has not been revisited in many years.

This essay has considered ways that climate change may push changes in property law. Sea-level rise, flooding, fire, and drought undermine the stability of improvements to land and, indeed, of land itself. Managing these increased risks will lead to greater government construction and management of protective infrastructure. Paradoxically, greater public physical protections will both expand the regulatory reach of government and expose government to increased liability for property damage from events historically considered "natural" but that will become seen as the results of government choice or negligence. This fundamental change in the relationship between government and private property owners will bring significant change to the property law in some ways suggested here and in other ways not yet anticipated.

THE MISSING RUNG: CHALLENGING REGULATORY BARRIERS TO PROPERTY ACQUISITION

CHRISTOPHER SERKIN*

A reliable property system, accessible to all people, is a critical precondition to a well-functioning economy and even to democracy itself. The absence of such a system can force people into informal legal relationships, largely invisible to the State and economically perilous for the participants. Hernando de Soto has explored in detail the regulatory and legal barriers in developing countries that prevent significant swaths of the population from participating in the formal property system.[1] In de Soto's telling, the problem is not the absence of law, but instead its over proliferation.[2] The result is that formal property is all but impossible to access, and those relegated to informal systems cannot climb the economic ladder. Formal property, in this view, is the missing rung in meaningful access to capital and to economic opportunity.

De Soto has devoted himself to political and regulatory reforms that create meaningful access to formal property systems.[3] Opponents of reform are those people rooted in the status quo, including lawyers who are often unwitting gatekeepers to formal property regimes.[4] It is possible, however, that the legal system itself may provide some meaningful pressure towards change if regulatory impediments to accessing formal property are viewed as infringing property rights. Conventionally, formal legal property rights are a

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1. *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2008) [hereinafter THE MYSTERY OF CAPITAL]; HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD (1989) [hereinafter THE OTHER PATH].

2. *See* THE MYSTERY OF CAPITAL, *supra* note 1, at 18–28 (discussing the regulatory obstacles that exist to opening legal businesses in various developing countries).

3. *See* Rashmi Dyal-Chand, *Exporting the Ownership Society: A Case Study on the Economic Impact of Property Rights*, 39 RUTGERS L.J. 59, 64–68 (2007) ("[De Soto's] theory is that property can only generate wealth efficiently if a person's rights to the property are formal, that is, . . . recognized by the state and everyone else. . . . The pragmatic aspect of de Soto's prescription is a step-by-step guide for eliminating bureaucracy and drafting laws to govern more simplified means of registration.").

4. *See* THE MYSTERY OF CAPITAL, *supra* note 1, at 198–202 (describing lawyers as prone "not to expand the rule of law but to defend it as they found it").

necessary precondition for claims that the government has infringed those rights.[5] In doctrinal terms, vested property rights are a prerequisite for legal standing to challenge a law or regulation burdening property.[6] The question addressed here is whether property is, in fact, necessary, and whether it is possible to imagine legal claims against the government—like regulatory takings claims under the Fifth Amendment of the United States Constitution—for imposing insuperable barriers to the acquisition of property in the first place. I argue that such claims are actually plausible, and I label them "impediment claims."

This is a radical suggestion, and it is offered here more as a thought experiment than as a full-throated proposal. Indeed, space constraints make it impossible to fully consider the consequences of vindicating such claims, or the ultimate plausibility of limiting principles. Nevertheless, even as a tentative proposal, it offers a new way of thinking about a legal system's obligations to provide meaningful opportunities to access formal property.

This proposal is not invented out of whole cloth. In a recent article, I argued that there are situations in which a government can violate the Fifth Amendment's Takings Clause through inaction.[7] I argued that the act/omission distinction makes little sense in certain regulatory contexts. Specifically, where the government has disabled self-help, or is so inextricably bound up with the substantive definition of property, the government should not be able to avoid liability by claiming that it has not acted.[8] The normative argument is straightforward. Takings protection creates perverse incentives if it applies only to government actions, because it allows the government to avoid liability altogether by simply ignoring a problem, even if this do-nothing response inflicts the most damage. By imposing liability for regulatory inaction as well, governments will have an incentive to choose the least costly regulatory response, instead of relying on unprincipled distinctions between regulatory acts and omissions.[9]

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5. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1245 n.113 (2009) (citing cases).

6. *Id.*

7. Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 346–47 (2014) [hereinafter *Passive Takings*].

8. *Id.* at 377–78.

9. *Id.* at 361–64.

I applied this argument to the problem of sea level rise. Local zoning regulations often impose strict height limits, and state and federal environmental regulations may proscribe certain forms of hard and soft armoring.[10] Assuming those regulations were constitutionally benign when adopted, they can nevertheless become unconstitutional over time in the face of ecological change. Strict height limits that made sense decades ago can now prohibit property owners from raising their houses on stilts, which may be critical as sea levels rise.[11] Similarly, regulations restricting (or permitting) various forms of armoring can suddenly impose significant new costs as storm surge and erosion become more intense.[12] In both of these examples, the underlying law has not changed since it was adopted. But legal stability coupled with changes in the world can, I argued, violate the Takings Clause.[13] In other words, the government can potentially be liable in the absence of a new regulatory action.

The argument here has a similar structure: the existence of property may not be necessary to bring claims alleging its infringement. Put differently, regulatory hurdles preventing the acquisition of property in the first place can violate property rights, if the hurdles are sufficiently high.

This argument—relying on de Soto—has important distributive consequences for my earlier article. One objection I anticipated to *Passive Takings* is that it would serve only to increase property protection for those who need it the least. It could be used by wealthy beachfront property owners to compel regulatory responses to the threat of sea level rise, or to receive compensation if government failed to act. It could, in short, redistribute scarce government resources from taxpayers to the wealthiest property owners. In contrast, impediment claims create progressive distributional pressures. They are available to the vast numbers of the poor who live and work informally, without vested property rights, in places particularly susceptible to sea level rise and other risks of global climate change.

Today, as sea level rise impacts our coastlines, property owners can access various forms of protection, from flood insurance, to *ex*

10. *Id.* at 391–94.
11. *Id.* at 393.
12. *Id.* at 394–95.
13. *Id.* at 360.

post grants to help rebuild, and even to legal claims against the government for failing to prevent certain kinds of damage to property.[14] But these protections are not available to the propertyless, leaving them particularly susceptible to the costs of global climate change. Impediment claims push back, and provide at least some measure of legal redress for those people who have been prevented from accessing formal property regimes in the first place.

Part I of this Essay describes the conventional account of protecting private property from overly burdensome regulations as requiring both a protectable property interest and government action. Part II offers a summary of my previous argument that government action is not actually necessary to violate the Takings Clause. Part III then expands on that insight to argue that a protectable property interest may also not be necessary if the government action at issue prevents the acquisition of property in the first place.

I. GOVERNMENT ACTIONS AND VESTED PROPERTY RIGHTS

The interaction between private property rights and regulatory power is frequently contested. Most if not all government actions impose some burdens on private property. The balance between public power and private rights is therefore a zero-sum game. Strong protection for private property substantially limits regulatory authority, and vice versa.[15]

This tension implicates a number of constitutional provisions that can protect private property from public encroachment—from Equal Protection,[16] to Due Process,[17] to the Free Exercise of religion.[18] Of course, the conflict between private property and regulatory power

14. *See* St. Bernard Parish Government v. U.S., 121 Fed. Cl. 687, 746 (2015) (finding the Army Corps of Engineers' "failure to maintain" a canal caused flooding that constituted a temporary taking).

15. *See, e.g.*, Robert Meltz, *Where the Wild Things Are: The Endangered Species Act and Private Property*, 24 ENVTL. L. 369, 369–71 (1994) (discussing the ebb-and-flow relationship between private property rights and regulatory authority in the context of the Endangered Species Act). *Compare* Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029, 2033–34 (2012) ("[T]he formalization of private property often enhances state power.").

16. U.S. CONST. amend. XIV.

17. *Id.*

18. U.S. CONST. amend. I.

plays out most clearly in the context of the Takings Clause, which explicitly prevents the government from taking private property without paying just compensation.[19]

This ubiquitous conflict is not only or even primarily constitutional. Statutory regimes at both the federal and at the state level extend property protection.[20] For example, the Uniform Relocation Assistance and Real Properties Acquisition Act[21] provides property owners with certain compensatory rights when the federal government exercises its power of eminent domain.[22] At the state level, the Bert Harris Private Property Protection Act provides heightened protection against regulations burdening property in Florida.[23] And many specific statutory regimes have detailed provisions that protect private property in myriad ways.[24]

But crucially—indeed, almost tautologically so—someone must have a property right before being entitled to any of these regimes' legal protections. In the constitutional context, the existence of a vested property right is frequently described as a prerequisite for standing to bring a claim under the Due Process or the Takings Clauses.[25] Conceptually, as well as doctrinally, property protection only applies to existing property rights, or so it would seem.

Similarly, these various protections only apply to government actions. The Takings Clause, in particular, is said to provide relief from legal transitions.[26] Legal change is therefore at the heart of

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19. U.S. CONST. amend. V.

20. Federal statutes protecting private rights include, for example, the federal relocation assistance act. *See* 42 U.S.C. §§ 4601–4655 (2012).

21. *Id.*

22. *See* Nicole Stella Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121–23 (2006) (detailing the Act).

23. FLA. STAT. § 70.001 (2016); *see also* OR. REV. STAT. § 195.305 (2015) (allowing landowners whose property value is reduced by certain land use regulations to claim compensation).

24. *See, e.g.*, DEL. CODE ANN. tit. 29, § 605 (2015) (requiring that all rules and regulations promulgated by state agencies be reviewed by the state attorney general to assess potential takings issues); Dennis L. Jones Beach and Shore Preservation Act, FLA. STAT. §§ 161.011–161.45 (2016) (providing for compensation in the event the law burdens private property); MISS. CODE ANN. §§ 49-33-7, 49-33-9 (2013) (allowing owners of agricultural and forest land to bring takings claims if state or local regulations diminish the value of their property by at least forty percent).

25. *See, e.g.*, Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment, 477 U.S. 41, 55 (1986) (rejecting a takings claim after finding an absence of "property" under the Takings Clause); *see also* Serkin, *supra* note 5, at 1245–46 (describing vested rights).

26. *See* Holly Doremus, *Takings and Transitions*, 19 J. LAND USE & ENVTL. L. 1, 11 (2003)

traditional takings claims.[27] The form of the transition can vary. Permit denials by zoning officials as well as new statutes or regulations can all effect changes in legal rights that become cognizable takings claims.[28] But some government action that interferes with a property owner's investment-backed expectations is conventionally necessary for takings liability to lie.

The ostensible reason for both requirements—a property interest and a government action—is rooted in the nature of the protection afforded by the Takings Clause. In the cryptic formulation originally adopted by the Supreme Court, the Takings Clause prohibits uncompensated regulations that "go[] too far."[29] The Supreme Court subsequently clarified this prohibition in the seminal case, *Penn Central v. New York*.[30] There, the Court articulated its admittedly ad hoc test, holding that a regulatory taking depends upon three factors: the character of the regulation, the extent to which the regulation interferes with distinct investment-backed expectations, and the resulting diminution in value.[31] Implicitly, application of these factors requires a property interest affected by some regulatory change that interferes with expectations. In fact, neither requirement is so straightforward.

II. PASSIVE TAKINGS

In an earlier article, *Passive Takings*, I argued that legal change is not actually necessary for a regulatory takings claim to lie.[32] Instead, in some circumstances, legal stability, coupled with ecological change, can give rise to a cognizable takings claim. This may

("Regulatory takings claims are all about change. They are obviously about distribution of the costs of regulatory transitions between landowners and society."); *see also* Abraham Bell, *Not Just Compensation*, 13 J. CONTEMP. LEGAL ISSUES 29, 33 (2003); Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569 (1984); Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 532 n.61 (1986).

27. *See Passive Takings*, *supra* note 7, at 349 n.11.

28. *See, e.g.*, McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1124 (Nev. 2006) (declaring a height restriction ordinance to be a per se regulatory taking); Eberle v. Dane Cty. Bd. of Adjustment, 595 N.W.2d 730, 739–40 (Wis. 1999) (finding the denial of a special exception permit to constitute a valid regulatory takings claim under Wisconsin's constitution).

29. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

30. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–38 (1978).

31. *Id.* at 124.

32. *See generally Passive Takings*, *supra* note 7.

sound like a small technical observation, but it has quite profound implications. Most broadly, it means that in some situations the government can violate the Takings Clause by failing to change the law. Or to state the same point differently: the Takings Clause can create an affirmative constitutional duty by the government to respond to ecological change. Where that is true, the government cannot avoid liability simply by failing to act.

It has been a long-standing goal of progressive constitutional law scholars to identify affirmative constitutional obligations. Starting in the 1960s, leading figures like Charles Reich and Frank Michelman argued that Due Process should compel the government to provide certain minimal levels of welfare rights to the poor.[33] Others argued that *Roe v. Wade* should be extended to compel the government to fund abortions for women who could not afford to pay for them.[34] How else, they asked, could the constitutional right to an abortion be meaningfully vindicated?

By and large, the Supreme Court has rejected these arguments, and has held repeatedly that the Constitution provides only negative rights.[35] It protects people from the government, and does not compel the government to act. In the most vivid articulation of this principle, *DeShaney v. Winnebago*,[36] the Court refused to find a Due Process violation when state social services failed to protect a child from his abusive father, despite repeated requests. The Court held that the government has an affirmative duty to act and protect only in extremely limited circumstances: for incarcerated prisoners, people involuntarily committed for psychological or medical purposes, or for people rendered especially vulnerable by the government.[37] In other

33. *See* Frank I. Michelman, *The Supreme Court, 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 785 (1964).

34. *See* Laurence H. Tribe, *Commentary, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331–33 (1985); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1392–93 (1984).

35. *See, e.g.*, Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 LAW & CONTEMP. PROBS. 257, 258–59 (2000) ("Establishing an unassailable right to welfare was once an important goal of legal academics and activists, but is no longer. . . . The diminishing interest in this project is partly a product of the courts' decisive rejection of the notion that the federal Constitution, as currently written, requires government to reduce inequality and relieve want.").

36. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 202–03 (1989).

37. *Id.* at 198–200.

words, "the state may have an affirmative duty to protect if it created a danger or left people more susceptible to a danger."[38]

In *Passive Takings*, I argued that property and the Takings Clause provide a better basis for establishing affirmative constitutional duties than liberty and due process rights. There are political, policy, and doctrinal reasons for this view. Politically, conservative justices have rejected the expansion of affirmative constitutional duties at least partly because of a skepticism about the underlying rights being claimed: welfare and access to abortion.[39] The politics of property are very different. Using property as the basis for state duties cuts across political lines and can generate support from the right and the left. As a policy matter, too, much of the Court's opposition to expanding constitutional duties comes from an uneasiness with invading traditional realms of prosecutorial discretion.[40] Courts by and large do not want to tell legislators what rules to enact, nor tell administrators how to balance their priorities. But the Takings Clause is importantly different. The remedy for a taking is not mandamus or an injunction, ordering the government to do something in the face of regulatory intransigence. Instead, the remedy is damages, measured by the resulting diminution in value, which falls squarely within courts' core competencies.[41] Courts are likely to feel more comfortable ordering the government to pay damages than ordering the government to undertake some particular regulatory reform. Of course, the government could choose to act in order to avoid or mitigate the payment of just compensation, but the executive and legislative branches would be back in control of that decision.

Doctrinally, too, property and the Takings Clause are surprisingly appropriate bases for affirmative constitutional obligations. In fact, the limited bases for affirmative duties the Court identified in *DeShaney* apply remarkably aptly to the property context.[42] Specifically, the act/omission distinction breaks down when the government exercises such comprehensive regulatory control that it effectively determines the distribution of burdens and benefits of property

38. *Passive Takings*, *supra* note 7, at 376.
39. *Id.* at 360.
40. *Id.* at 385–87.
41. *Id.* at 385.
42. *See* DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).

ownership, or when the government disables self-help.[43] Broadly interpreted, *DeShaney* stands for the proposition that affirmative constitutional duties will arise when the State has taken control over someone, or when it has rendered someone more susceptible to harm. Those conditions are actually quite common in property and land use law.

Passive Takings makes the argument in detail, but the intuition is easily captured. The act/omission distinction should not control when an earlier government act has rendered property especially susceptible to some subsequent harm. That earlier act is not itself the basis for the takings claim because it was constitutionally benign at the time. But it does create a kind of ongoing duty on the government to protect the property if conditions in the world change in a way that substantially alters the costs and benefits of the earlier regulation.

Comprehensive land use regulation—especially of coastal property—often specifies in tremendous detail all the rights and duties of property ownership. At its most basic, zoning can sometimes delimit a very small developable envelope, narrowly circumscribing a building's bulk by establishing strict height limits, setbacks from property boundaries, and so forth.[44] For much residential beachfront property, owners can expect to build only a one- or two-story, single-family house that covers no more than forty percent of the parcel. While reasonable minds can disagree about the appropriateness of such regulations in the abstract, it is by now well settled that such routine zoning requirements are permissible under the Takings Clause.[45] If a coastal city or town adopted such zoning decades ago, it would have been entirely permissible when enacted, and the ordinance may not have changed since.

What might have changed, however, is the threat of storm surge and sea level rise. Newly updated flooding projections from FEMA significantly alter development expectations on the coast. Indeed, the National Flood Insurance Program requires that property owners elevate buildings as much as two feet above base flood elevation.[46] But

43. *See Passive Takings*, *supra* note 7, at 379–80.

44. *See* ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS 61 (4th ed. 2013).

45. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 394–95 (1926) (upholding a routine zoning ordinance as within the police power).

46. *See Passive Takings*, *supra* note 7, at 392 n.214 (citing, *inter alia*, FEMA, NFIP

building heights are measured from the ground, not from the ground floor. Elevating property on stilts can shrink or even eliminate an already small developable envelope. Where height limits prevent property owners from elevating buildings to protect against anticipated flooding, owners should be able to challenge the height limits on takings grounds, even if the height limits have not changed.[47]

A similar analysis applies to armoring such as sea walls. Armoring is an extremely controversial response to the threat of erosion. While a sea wall may protect a specific area of the coast, it does so at the cost of increasing erosion elsewhere.[48] Installing or allowing a sea wall therefore amounts to a very explicit allocation of the benefits and burdens of erosion.[49] However, sea level rise again threatens to dramatically alter both sides of the equation. Thus, a sea wall allowed at one time as imposing a reasonable risk of erosion nearby might impose far greater risks with rising seas. Or, conversely, a prohibition on a sea wall might have exposed property to a small risk of storm surge before, but a much greater risk today. In either case, the law may remain the same—whether prohibiting or permitting armoring—but the government should not be able to immunize itself from takings liability simply because the law has not changed.[50]

The sea wall example is particularly revealing because it is a context in which the government exercises nearly complete control over costs. Allowing a sea wall predictably protects some property owners at others' expense, and vice versa. Here, then, the legal status quo should not determine whether a takings claim can lie. That is, whether the background rule in a particular context had been to permit or to prohibit a sea wall, the fact of ecological change creates the possibility of liability as the extent and allocation of costs change.

This is not to suggest that the government is necessarily liable to one party or the other. Takings liability is sufficiently difficult to establish that the government would still have great latitude to act.

FLOODPLAIN MANAGEMENT GUIDEBOOK 5–6, 23 (5th ed. 2009), http://www.fema.gov/media-library-data/20130726-1647-20490-1041/nfipguidebook_5edition_web.pdf).

47. *See id.* at 399–400.

48. *See, e.g.*, J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 87 (2012).

49. *See Passive Takings*, *supra* note 7, at 394.

50. *See id.* ("Constitutional liability should not then depend on whether the government's decision is characterized as an act or an omission.").

Prohibiting a sea wall will rarely rise to the level of a taking for the exposed property owner, just as permitting one will rarely result in a taking of neighboring property. Nevertheless, this is a context in which the mere fact of regulatory inaction (or legal stability) should not create automatic immunity.

Normatively, the category of passive takings fills an important gap. Leading accounts of the Takings Clause view its role as incentivizing efficient regulatory regimes.[51] By forcing the government to internalize the costs of its actions, the Takings Clause is said to help prevent governments from imposing regulatory burdens on property owners that are costlier than the resulting public benefits. There are many well-known reasons to be skeptical of this kind of straight economic account.[52] But it suffers from another less familiar flaw, even viewed wholly on its own terms. At most, this economic explanation ensures only that any regulatory *action* does not create more burdens than benefits. But that is not at all the same as inducing efficient regulatory incentives because often the costliest choice the government can make is to do nothing at all.[53] If the threat of liability only attaches when governments do something—take some regulatory initiative—then the Takings Clause functions as a kind of thumb on the scale against doing anything. The category of passive takings therefore serves as an important counterweight against such costly inaction.

Stepping back from the details of the argument, *Passive Takings* sought to address a particular political malfunction: government officials ignoring the threat of sea level rise in order to avoid the risk of takings liability. The new category of passive takings was designed to create countervailing pressure; by exposing government officials to potential takings liability for either their actions or inactions, they would have a greater incentive to do something, if that would be the lower-cost alternative. And to be transparent about my

51. *See, e.g.*, RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 84–85 (1993); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 73–74 (8th ed. 2011).

52. *See, e.g.*, Blume & Rubinfeld, *supra* note 26 (articulating a public choice critique); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (criticizing assumed asymmetry in governments internalizing costs and benefits); *see also* Bethany Berger, *The Illusion of Fiscal Illusion in Regulatory Takings*, 66 AM. U. L. REV. 1 (2016).

53. *See Passive Takings*, *supra* note 7, at 348.

goals, my hope was to encourage governments to begin to respond proactively to the threat of sea level rise, and to start to adopt sensible regulatory responses instead of acting like the problem does not exist. Recognizing passive takings is admittedly an imperfect solution, but it exerts pressure in the right direction. I stand by that argument. Increasing pressure on the government to act to address sea level rise will make society better off. Forcing the government to confront the costs of inaction as well as action will generate more appropriate regulatory responses.

There is, however, a troubling distributional consequence to this argument that must be addressed. The leverage from passive takings will almost certainly be applied by beachfront property owners seeking compensation when their property is threatened by sea level rise. But this invokes an unappealing image of affluent property owners—many of whom could or should have known of increased risks from erosion—suing the government to allow an ecologically damaging sea wall, for example. And if affluent beachfront property owners invoke passive takings, it will be to reinforce their already privileged position as owners of valuable land. Therefore, while the effect of passive takings will benefit government decision-making, the distributional consequences may be quite regressive. The poor, after all, are not the most likely to bring passive takings claims.

Indeed, there are many ways in which the poor and the propertyless are most likely to bear the brunt of climate change. Poor communities tend to be less resilient and more vulnerable to flooding and other consequences of climate change.[54] But they are less protected economically because they are more likely to be renters than owners, if they have a recognized property right at all. Especially internationally, the global poor tend to have informal possessory interests instead of formal property rights.[55] They are therefore unlikely to have insurance, and have few good ways of protecting

54. *See, e.g.*, Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT'L L. 309, 331–36 (2012) ("[P]oor persons already living at the margins of survival will likely suffer disproportionate impacts of climate change . . . ."). *See generally* STEPHANE HALLEGATTE ET AL., SHOCK WAVES: MANAGING THE IMPACTS OF CLIMATE CHANGE ON POVERTY (2015) (discussing at length the relationship between poverty and climate change effects).

55. *See* THE MYSTERY OF CAPITAL, *supra* note 1, at 5–7 (comparing the often informal property systems of the Third World with the formal property systems of Western capitalist nations).

the value of their possessory interests *ex ante,* or recovering their value *ex post*.

In general, these consequences are largely a function of poverty itself. People do not own property because they cannot afford it; they do not insure what they have because it is too expensive. And social responses must therefore be addressed to the problem of poverty. But at least sometimes, the absence of property may be a function of rules and regulations, and not simply the absence of money. Where that is true—where there is some regulatory barrier to property acquisition that then renders the poor especially vulnerable—then perhaps that barrier is itself illegal. The next Part explores precisely that possibility.

III. IMPEDIMENT CLAIMS

Where the government is responsible for the absence of a vested property interest, perhaps even the propertyless should be able to pursue property protection, whether through the Takings Clause or some other source. The doctrinal and normative bases for this suggestion are examined below, as are the conceptual problems with such claims. But first, there is an important antecedent inquiry: what would it mean for the government to be responsible for the absence of a vested property interest? Hernando de Soto's work provides the outlines of an answer.

In his book, *The Other Path*, de Soto identifies a remarkably complex, even byzantine warren of overlapping regulations that make formal property rights inaccessible to most Peruvians.[56] In his detailed account, a central impediment to economic progress in Peru and in developing nations around the world comes from the inaccessibility of formal property rights to the world's poor.[57] Regulatory barriers to entry, like insuperable hurdles to obtaining a business license, relegate the poor to a kind of informal property regime where most rights are merely possessory. Informal property does not receive legal protection, and it cannot easily be used as collateral for loans

56. *See, e.g.*, THE OTHER PATH, *supra* note 1, at 133–35 (detailing a study's findings that setting up a small garment factory in Peru entails 289 days' worth of procedural requirements).

57. For the generalization of his argument to the rest of the world, see THE MYSTERY OF CAPITAL, *supra* note 1, at 18–28.

or easily be transferred to others.[58] As a result, "owners" of such thin possessory rights must expend an enormous amount of effort in maintaining those rights through self-help.[59]

De Soto explores these dynamics in three different types of property: businesses, residential, and transportation. In each of these areas, regulatory barriers all but prohibit entire segments of the population from obtaining formal property interests. For example, when de Soto and his researchers sought to start a small business in order to learn what would be involved, his team had to stand in lines for more than eighteen hundred hours.[60] That is almost one year of standing in line, eight hours per day, five days per week. That is not merely a long time; it is an impossibly long time for any realistic opportunity to obtain formal rights to open a business. As a result, an enormous amount of economic activity in Peru takes place through informal businesses, like street vendors who operate without state recognition and who therefore rely on norms to create entitlements to particular locations.[61] Likewise, prohibitions on land subdivisions and development mean that people engage in a form of collective invasion of public property to establish a beachhead of possessory rights, thereafter relying on political pressure to remain.[62] But these, too, are not full-blown property interests. Possession of a plot of land, even with a dwelling, does not generate recordable title or a protectable property interest. There is not enough space here to describe in detail de Soto's fascinating and granular account of these informal regimes. But just these few examples at least gesture to a core insight: in some legal regimes, like Peru's, regulatory barriers to the acquisition of property can be so onerous that the State itself should bear some responsibility for the lack of vested property rights.

This idea has some intuitive appeal. But the doctrinal basis for liability is complicated. In the strongest form, the regulatory regime

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58. THE OTHER PATH, *supra* note 1, at 158–63 (discussing the "costs" of lacking formal property rights).

59. *See id.* at 160–61 ("[I]nformals incur substantial costs in defending their possessions . . . by establishing and operating thousands of different organizations.").

60. THE MYSTERY OF CAPITAL, *supra* note 1, at 190.

61. *See* THE OTHER PATH, *supra* note 1, at 66–69 (analyzing Peruvian street vendors' "special rights of ownership" of fixed locations on public roads).

62. *See id.* at 19–22, 38–42 (describing this process of informal property acquisition).

itself could be challenged as an impermissible burden on property under the Takings Clause. Admittedly, regulatory takings doctrine does not have a lot of analogues outside the United States.[63] However, bilateral investment treaties and international human rights laws may provide a source for such claims where foreign law does not.[64] Whatever the doctrinal hook, regulatory burdens that make it all but impossible to acquire any kind of new business license, as in Peru, would give rise to a cognizable impediment claim under this theory. Even a moment's reflection raises some difficult questions, however.

Most obviously, this kind of impediment claim appears to run counter to the plain text of the Takings Clause, which prohibits the government from taking property. The grammar strongly implies a kind of active expropriation of pre-existing property. The government cannot take from you something that you never had. However, this grammatical argument should not necessarily control. Purely textual interpretations of the Constitution are rarely dispositive, even where the text is plain.[65] And the meaning of the Takings Clause is particularly contested. One must then look to normative and consequentialist arguments instead.

According to James Ely, property is central to protecting independence; it carves out a sphere of "ordered liberty" that is immune from governmental intrusion, and is therefore—in his words—the "guardian of every other right."[66] But property cannot perform this essential function, nor can it act as a democratizing force, if it is not widely available.[67]

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63. GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY: LESSONS FOR AMERICAN TAKINGS JURISPRUDENCE xxxiii–xxxiv (2006) (discussing doctrinal differences between American regulatory takings law and that of other countries).

64. *See* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30, 32–34 (2003) (describing the proliferation of takings—like provisions in bilateral and multilateral investment agreements); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475, 496–501 (2008) (examining regulatory takings claims in the European Court of Human Rights).

65. Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 713–14 (2016) (noting that plain constitutional text is often not controlling).

66. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 26, 81, 172 (3rd ed. 2003).

67. *Cf.* Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period*, 33 LAW & HIST. REV. 277, 277–80 (2015) (discussing the Jeffersonian

Consequentially, too, conventional accounts of property and the Takings Clause view property protection as essential to induce efficient investments.[68] People will underinvest in property that is not sufficiently stable or protected. That is, in fact, precisely what de Soto observes in Peru and in other developing countries. People with mere possessory interests, and not full-blown property rights, tend to underdevelop their land, and overinvest in protecting what improvements they do make.[69] Arguments about investment incentives, then, apply equally to regulatory burdens of existing property rights and to regulatory burdens that prohibit people from acquiring formal property rights in the first place. In fact, most of the normative justifications for protecting property against regulatory interference apply as well to regulatory prohibitions on the acquisition of property because none of property's benefits can accrue in the absence of property.[70]

There are important distributive justifications for these kinds of claims as well. Traditional property protection is inherently conservative because it protects the existing allocation of property. While contemporary theorists have developed a sophisticated communitarian vision of property as including obligations to society, most conventional accounts implicitly view property protection as inherently anti-redistributive.[71] Protecting the right to acquire property,

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view that abolishment of the fee tail promoted egalitarianism by allowing "more property . . . to be acquired according to 'virtue and talent' . . . rather than by hereditary privilege").

68. *See* George Y. Gonzalez, *An Analysis of the Legal Implications of the Intellectual Property Provisions of the North American Free Trade Agreement*, 34 HARV. INT'L L.J. 305, 315–16 (1993) ("Increased foreign investment is a primary goal of the domestic industrial property protection laws."); *see generally* Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007) (proposing a more localized conception of private property protection as a means of attracting investment).

69. *See* THE OTHER PATH, *supra* note 1, at 158–61 ("[I]nformals do not use or preserve the resources available to them as efficiently as they might if they were sure of their rights.").

70. The one obvious exception concerns normative accounts that focus on the endowment effect, or the psychological attachment that people have for things they own. Property as personhood, for example, depends upon pre-existing property and may not justify rules protecting the acquisition of property.

71. *Compare* Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN L. 127, 138–45 (2009) (outlining a property theory based on "[d]ependence and [o]bligation" to communities), *and* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 760–62 (2009) (developing further this "Aristotelian" communitarian view of property), *with* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 911–12 (2000) ("The 'hallmark' of constitutional

instead of just the existing allocation, changes the valence of property protection.

Accordingly, allowing the propertyless to pursue property protection can be progressive and redistributive. Depending on how such claims arise, they may be available only to the very poor—people without meaningful access to property at all. At the very least, such claims would allow people without property some measure of protection from government interference—protection that they do not now receive.

There are, however, additional conceptual problems that impediment claims must overcome. For one, must a plaintiff show that she could not obtain access to formal property herself, or rather must she show that no one could? Even (or especially) in Peru, the regulatory regime described by de Soto is simultaneously exclusionary and protectionist. Some people do have business licenses, recordable title in their homes, and so forth. The problem is the inaccessibility of such recognition to many people; it is meaningfully available only to the affluent and politically connected.[72] But should someone be able to object to a regime that deprives her of access to property, even if it poses little or no hurdle to others? How many people must be excluded for the regulatory regime to be subject to this kind of challenge?

To illustrate the problem—with an example that does not implicate wealth or class—imagine a property regime that requires recordation or some form of registration, but the paperwork must be filed in person at a single location in Washington, D.C. For people in Virginia or Delaware, that may not be so burdensome. But as the distance grows, so too does the height of the regulatory hurdle. Contrast this, then, with the same rule but where paperwork can be filed in every county in every state. That is considerably less burdensome to most people, but for some much smaller subset it might still be too much—people who cannot drive, expats living overseas, and the like. The regulation is more problematic the more people it excludes from meaningful access to property. But that does not provide much guidance about how broad the exclusion must be before it creates the kinds of problems de Soto identifies.

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property is the right to exclude others."), *and* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319–21 (1987) ("[W]e primarily understand property in its constitutional sense as an antiredistributive principle . . . .").

72. *See* THE OTHER PATH, *supra* note 1, at 189–99 ("[In Peru,] wealth is not so much the result of labor as of political wheeling and dealing.").

Similarly, must the regulatory burdens effectively eliminate all access to formal property, or only access to some distinct and desirable property? People denied a business license, for example, might well have access to other formal property rights. Indeed, many regulations prevent many people from getting exactly what they want, but that cannot be grounds for objecting. As an extreme example, regulatory requirements mean that only the most sophisticated companies can obtain a license to operate a nuclear power plant.[73] Clearly, I should not be able to complain because I cannot obtain such a license. The regulatory barriers are insuperable to me, and that is entirely appropriate. I have plenty of access to other forms of property, and so should have no grounds to complain. Even the very poor in de Soto's Peru have access to some property—the clothes on their backs, if nothing else—and so even that regulatory environment does not effect a total prohibition on property acquisition. Here, too, there is a spectrum. The most problematic regulatory regimes deny formal property recognition for the most important assets; the least problematic put only some specific and less central assets out of reach.

And finally, some assets are deliberately not treated as property at all. Most famously, corpses and organs defy characterization as property. This rule has both common law and statutory bases. In *Moore v. Regents of the University of California*,[74] the plaintiff sued for conversion after doctors had harvested cells from his spleen to develop a cure for a particular kind of cancer. The California Supreme Court looked at strict statutory provisions limiting the disposal of body parts to conclude that the plaintiff did not have a property interest in his organs.[75] Could that give rise to an impediment claim? Could the plaintiff have challenged those underlying regulations on grounds that they denied him property in his own organs? That seems wrongheaded, but is at least superficially difficult to distinguish from the examples above. At the very least, some assets—bodies, people, navigable waters, submerged lands, and so forth—can be removed entirely from a property regime for normative reasons. But the broader the category of assets excluded from property, the more problematic the regime.

73. *See generally* 10 C.F.R. pt. 52 (2016) (establishing nuclear licensing requirements).
74. 793 P.2d 479, 480–83 (1990).
75. *Id.* at 491–97.

These various problems may prove insoluble. Impediment claims become untenable in the absence of principled limits. Otherwise, they would become a generalized challenge to any grievance that property is inaccessible. Nevertheless, such claims are at least plausible in the most extreme cases, where regulatory barriers to property acquisition exclude whole swaths of the population from formal ownership of core assets. It is therefore worth considering what form such protection might take and how these claims might work in practice.

Consider exclusionary zoning, a conceptually obvious source of impediment claims. Some municipalities today exercise their land use authority for exclusionary purposes. Familiar forms of exclusionary zoning include imposing large minimum lot sizes, prohibiting multifamily housing, placing large amounts of land in undevelopable "holding zones," and other techniques that radically reduce supply.[76] Depending on local housing markets, such approaches can dramatically increase property values, placing the municipality effectively out of reach for all but the affluent.

Most commentators agree that exclusionary zoning practices are objectionable, especially in their strongest forms. But there are significant legal barriers to challenging such provisions. The real harms of exclusionary zoning are visited upon the diffuse class of potential residents who are excluded from the municipality. But they do not even self-identify as a class of people, let alone have standing to sue.[77] Instead, challenges are generally brought by developers objecting to regulations that prohibit or limit their building plans. While developers sometimes suffer a real economic harm from overly restrictive zoning, and happen to represent the end consumers of their intended developments by proxy,[78] this is an imperfect enforcement strategy. Many times, developers simply use

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76. *See* Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1667, 1689 (2013) (describing traditional methods of exclusionary zoning).

77. For a narrow exception, see *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 263–64 (1977) (granting standing based upon showing that plaintiff would have been eligible for, and would likely have moved in to, excluded subsidized housing).

78. *See, e.g.*, *id.* at 261–63 (finding developer standing to challenge an exclusionary zoning measure).

the mantle of exclusionary zoning to force municipalities to the bargaining table to allow new high-end building.[79]

An impediment takings claim would offer a more direct approach for challenging exclusionary zoning. Strong exclusionary zoning amounts to a significant regulatory burden on many people's ability to acquire property in the municipality. A takings claim would seek compensation for that burden. A very similar analysis would apply to regulations that make credit inaccessible to swaths of potential homeowners—like FHA practices prior to the 1970s that made credit largely unavailable for minority neighborhoods.[80]

While exclusionary zoning is perhaps the most intuitive context for imagining impediment takings claims, it may not be the most likely because it still presents a number of the problems identified above. For one, who can sue? Anyone without a lot of money, anywhere in the country, could claim to have been denied the right to acquire property in the municipality. Millions of people could object to the zoning practices in Mt. Laurel, New Jersey, for example, even though the most permissive zoning regime imaginable would have resulted in only modest growth. It would be necessary to find some way of limiting recovery; otherwise the entire universe of potentially aggrieved propertyless plaintiffs could all sue Mt. Laurel and every other municipality engaged in exclusionary zoning.

Furthermore, measuring compensation under impediment takings claims for the impact of exclusionary zoning on any individual is conceptually problematic. Imagine that exclusionary zoning practices increase the median price per square foot of residential housing by, on average, fifty percent. Any individual's "harm" will depend upon the house that she would have bought but for the exclusionary zoning. Needless to say, attempting such a hypothetical calculation seems extremely speculative.

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79. *See* Toll Bros., Inc. v. Twp. of West Windsor, 803 A.2d 53, 93 (N.J. 2002) (Stein, J., concurring in part and dissenting in part) (noting the small percentage of low income housing built after New Jersey's *Mount Laurel II* decision); Andrew Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 28, 47 (1996) (describing developers' use of challenges to exclusionary zoning to construct more profitable housing); Diane Mastrull & Evan Halper, *Land-Use Battles Frustrate Pa. Towns*, PHILA. INQUIRER, Mar. 12, 2000, at A1 (reporting on developers' manipulative use of Pennsylvania's affordable housing law to build upscale housing).

80. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 52–57 (1993) (chronicling the FHA's redlining policies).

Maybe the Takings Clause is the wrong doctrinal hook, and compensation the wrong remedy. A substantive due process claim challenging the rationality of regulatory barriers to property acquisition might better fill the gap identified in this Essay. It has the twin virtues of being more deferential to the government and providing injunctive relief instead of damages. The former helps to constrain impediment claims and prevent them from swallowing up all regulations. The latter resolves the complex compensation question, and effectively allows any individual to challenge the very existence of the burdensome regulations.

Ultimately, however, the appeal of any of these claims—whether under the Takings or Due Process Clauses—turns on the ability to identify limiting principles. If impediment claims are limited to the most egregious examples of exclusion—to total prohibitions on new building or to Peru-style limits on business licenses—then they will be very rare. They will also be important to remedy when they do arise. But if they expand to include more innocuous hurdles to the acquisition of discrete assets and specific forms of property, then these kinds of claims become a broad opportunity for anyone to challenge any regulatory regime. Even rational zoning, after all, creates a barrier for some property owners to have precisely the use they want in the location they want. Safety regulations make some property unaffordable to some people.[81] The federal Resource Conservation and Recovery Act makes it impossible to have certain kinds of hazardous waste.[82] Without identifying principled limits, impediment claims are non-starters out of the gate.[83]

A more plausible impediment claim, then, might take a narrower and more technical form. Instead of direct challenges to the regulatory barriers to property acquisition, perhaps those barriers simply satisfy the standing requirement to challenge other regulations that are

81. *See, e.g.*, Werner Z. Hirsh et al., *Regression Analysis of the Effects of Habitability Laws upon Rent: An Empirical Observation on the Ackerman-Komesar Debate*, 63 CALIF. L. REV. 1098, 113–32 (1975) (finding a positive relationship between the implied warranty of habitability and higher rental rates).

82. *See* 42 U.S.C. §§ 6921–6926 (2012) (specifying requirements for hazardous waste generation, transportation, and storage).

83. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

independently burdensome. In other words, the substantive challenge would not be to the impediments to property acquisition themselves; instead, those impediments, if sufficiently onerous, would substitute for the normal requirement of a vested property right to challenge some government action burdening property on other grounds.

In general, as described above, vested property rights are a prerequisite for any kind of takings claim or other form of property protection.[84] And of course that makes sense. No matter the form, a government action that disrupts a mere possessory interest—whether a squatter, or an illegal business—will not give rise to a takings claim. But what if the government itself is responsible for the lack of a vested property interest? In that case, perhaps, there is a kind of derivative taking: the regulatory barriers to acquiring property rights in the first place could create standing to challenge a government action, even in the absence of vested property rights.[85]

This is not such a radical suggestion, because it is not fundamentally different from allowing public interest–impact litigation to challenge exclusionary zoning. In fact, the leading exclusionary zoning case is *NAACP v. Mt. Laurel*.[86] The state supreme court largely avoided the issue of the NAACP's standing by finding that the plaintiffs included "present residents . . . residing in dilapidated or substandard housing."[87] It therefore held that it did not have to rule on others' standing, which had gone unchallenged.[88] But in other cases, standing could prove a substantial hurdle. The availability of an alternative basis for standing—based on the regulatory barriers to property acquisition—could eliminate some of the judicial contortions in existing doctrine.

However, even this may be too great an expansion of standing rules. Potentially, anyone priced out of a jurisdiction by exclusionary zoning practices could sue. It also potentially conflates the standing inquiry with the merits of the underlying claim. After all,

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84. *See supra* note 25 and accompanying text.

85. Note that this kind of claim is entirely consistent with the text of the Takings Clause. Such claims only arise when the government is taking property without just compensation. The property happens to not belong to the plaintiff, but nothing in the text of the Takings Clause limits who can seek to vindicate such claims.

86. So. Burlington Cty. NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975).

87. *Id.* at 717 n.3.

88. *Id.*

exclusionary zoning practices are, by definition, impediments to property acquisition. The standing requirement effectively disappears if the allegation of exclusionary zoning is enough, by itself, to establish standing. Anyone seeking to challenge zoning practices as exclusionary could find any person priced out of the local jurisdiction to serve as a plaintiff. It is one thing to open the courthouse doors to such challenges; it is another to remove the doors entirely.

Nevertheless, the work of the impediment claim here is simply to establish standing, and so a plaintiff would have to allege some independent violation of law. While equal protection and due process claims are possible, they are by no means easy to win. Quite the contrary. Establishing standing has essentially no relationship to the likelihood of success. Using an impediment claim simply to establish standing is actually quite narrow and therefore surprisingly plausible. In fact, if anything, it is so narrow that it may not be worth the candle.

These problems may ultimately render impediment claims untenable, either because they are too broad to be constrained, or too narrow to be useful. But they have the potential to provide the propertyless with a mechanism for objecting to burdensome government actions. And so they hold some promise for marshalling the protection of property rights in the service of those without property.

CONCLUSION

Allowing people without property to bring what amounts to property claims—whether under the Takings Clause, or some other legal mechanism—might seem fantastical. After all, the existence of a property right is a kind of definitional prerequisite to property protection. Focusing, however, on regulatory burdens inhibiting the right to acquire property in the first place offers a new avenue for invoking the power of property for redistributive instead of just conservative ends. Such a refocusing may thus provide a means of addressing the missing rung of formal property so critically diagnosed by Hernando de Soto. While the kinds of impediment claims identified in this Essay may ultimately fail doctrinally and conceptually, they nevertheless invite more work exploring how property can serve the interests of the propertyless.

PROTECTION OF PROPERTY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

FRANKIE MCCARTHY*

INTRODUCTION

A scholar with an interest in the constitutional property rights of any legal system will eventually find herself exploring the literature from the United States. Over the years, the Takings Clause has generated such a treasure trove of judicial thought and legal writing that to ignore it is to impoverish the property rights scholarship of other jurisdictions. It was a genuine delight, therefore, to read that the 2016 Brigham-Kanner Property Rights Conference was to be held in Europe, and that continental property scholars would be invited to participate in an exchange of knowledge with the expert U.S. delegates who have made the conference what it is over the years. During my three days in The Hague last October, I not only learned a great deal, I also enjoyed one of the warmest and most collegiate conference experiences of my career to date. It was a pleasure, if not a surprise, to find that the hospitality of U.S. property rights lawyers is every bit as rich as their writing.

This paper continues in the spirit of that happy exchange of legal cultures, making use of scholarship from both the United States and Europe to develop a novel argument that will, I hope, be of relevance on both sides of the Atlantic. The focus of the paper is the constitutional property protection provided to European citizens by Article 1 of the First Protocol to the European Convention on Human Rights ("Convention"). This protection has been available in Europe since 1954, and has given rise to a huge volume of cases both in the domestic courts of European states and before the European Court of Human Rights ("ECHR").[1] However, it has yet to receive

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1. For an overview of the jurisprudence, see DAVID HARRIS, ED BATES, MICHAEL O'BOYLE & CARLA BUCKLEY, HARRIS, O'BOYLE & WARBRICK: LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ch. 18 (3d ed. 2014).

the kind of detailed, theoretical analysis that U.S. scholars have delivered in respect to the Takings Clause. My paper fills that gap by developing a theoretical analysis that builds upon the work carried out in the United States.

The research question I address concerns the normative values underlying European property protection. Carol Rose, Emerita Professor of Law at Yale University and recipient of the 2010 Brigham-Kanner Property Rights Prize, and Gregory Alexander, A. Robert Noll Professor of Law at Cornell University and a member of Cornell's influential progressive property group, have argued in their works that a tension can be identified in U.S. takings jurisprudence between two competing accounts of property and property rights. The first and perhaps prevailing account in the United States is that of property as a commodity, a tool to maximise the satisfaction of individual preferences through the maximisation of wealth. The second account is that of property as propriety, a tool to maintain the appropriate social order.[2] In this paper, I consider whether a similar tension, with the risk of incoherence in the jurisprudence that it creates, can be identified in the case law of the European Court of Human Rights.

The paper is made up of three sections. In the first, I explain the theoretical lens through which I will examine the European property rights protection, summarising the competing accounts of property as developed in the works of Rose and Alexander. In the second, I outline the constitutional property protection offered by Article 1 of the First Protocol, explaining its place in the European legal order and the approach taken by the European Court of Human Rights when adjudicating an application in respect of property rights. In the final part, I explore the extent to which the competing accounts of property identified by U.S. scholars can be identified in relation to the European constitutional property protection. My analysis is focused on what can be learned from the wording of Article 1 itself, from the approach taken by the court to define which possessions merit the protection of the Convention, and from the requirement developed by the court that compensation must be paid in every case where an applicant is deprived of ownership. In concluding, I

2. See *infra* Part I for further explanation of property as "commodity" and property as "propriety."

suggest that the normative inconsistency found in U.S. jurisprudence is also identifiable in European case law and suggest that, as in the United States, understanding that normative conflict can help to explain certain incoherencies. In this way, I offer some insight into how we "do" constitutional property in Europe, and also demonstrate how valuable a cross jurisdictional understanding of constitutional property scholarship can be in developing a novel analysis of mono-jurisdictional issues.

I. UNDERSTANDING CONSTITUTIONAL PROPERTY: TWO STORIES

Within the U.S. scholarship on constitutional property, a line of argument that has been developed particularly by Rose[3] and Alexander[4] posits that competing understandings of the purpose of property as a legal institution can be discerned in Supreme Court jurisprudence, even though these notions may not have been explicitly described or acknowledged in the judgments themselves. Rose suggests that the famously "muddled"[5] nature of takings jurisprudence results, in fact, from this unacknowledged conflict over the core purpose of property law.

Both authors describe these competing visions in broadly similar terms, although the terminology varies. In her works, Rose discusses the concept of property as "preference-satisfaction" in opposition to the idea of property as "propriety."[6] Alexander focuses on property as "commodity" in contrast to (borrowing explicitly from Rose) property as "propriety."[7] In short, the commodity approach

3. *See generally* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) [hereinafter Rose, Mahon *Reconstructed*]; Carol M. Rose, *Property as Wealth, Property as Propriety*, 33 NOMOS 223 (Robert W. Gordon & Margaret Jane Radin eds., 1991), *as reprinted in* CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 49 (1994) [hereinafter Rose, *Property as Wealth*] (this article references pagination in the reprint).

4. *See generally* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970 (1997) [hereinafter ALEXANDER, COMMODITY AND PROPRIETY].

5. *See* Rose, Mahon *Reconstructed*, *supra* note 3, at 561.

6. *See* Rose, *Property as Wealth*, *supra* note 3, at 52–58 (property as preference satisfaction), 58–65 (property as propriety).

7. *See* ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 4, at 1 (setting out the concept of property as commodity), 2 (setting out the concept of property as propriety).

sees property as an institution designed to allow for the realisation of individual autonomy through the maximisation of preference satisfaction. The propriety approach sees property as the material foundation for creating and maintaining the social order—the private basis for the public good.[8] Although neither of these approaches precludes the possibility of legitimate government takings of property, the conditions in which such takings will be justified and the consequences for expropriated owners will vary significantly depending on which account dominates. Alexander's work makes plain that these conflicting notions of property have existed, in one form or another, throughout the history of American legal thought, challenging the claim that a single historical conception of property can be identified, let alone relied upon, by modern-day jurists who must determine or justify constitutional property decisions. In Rose's view, it is the Supreme Court's unarticulated vacillation between the two approaches that has resulted in a jurisprudence lacking overall coherence.

The following section will provide a fuller account of the commodity and propriety approaches to property, before considering their repercussions for constitutional property protection.

A. Property as Commodity

Based in part on the work of Stephen Munzer,[9] Rose's account of property as "preference-satisfaction" posits that the key purpose of any property law regime is maximisation of the satisfaction of individual preferences through maximisation of wealth. Property law facilitates this process of wealth maximisation by enabling legal persons to obtain secure rights in things. A person has an incentive to work on enhancing the value of her things, since her secure rights give her confidence that she will reap the rewards of that effort in due course. In so doing, she increases the wealth of society as a whole.[10] Rose describes this as:

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8. *Id.* at 1.

9. *See generally* Stephen R. Munzer, *Compensation and Government Takings of Private Property*, 33 NOMOS 195 (1991).

10. *See* Rose, *Property as Wealth*, *supra* note 3, at 52–55.

> [T]he standard but very powerful story about property as a preference-satisfying institution. According to that story, a property regime satisfies preferences not by divvying up a finite bag of resources, but rather by encouraging behaviour that enhances resources' value, making the total bag a whole lot bigger and more diverse.[11]

Alexander's commodity account situates the same basic concept within an explanation that emphasises the concept's role in separating public from private, noting that this view suggests property has one core purpose:

> [T]o define in material terms the legal and political sphere within which individuals are free to pursue their own private agendas and satisfy their own preferences, free from governmental coercion or other forms of external interference. Property, according to this understanding, is the foundation for the categorical separation of the realms of the private and public, individual and collectivity, the market and the polity.[12]

In this account of property, governmental takings can be justified only in limited circumstances, since every instance of a taking undermines the security of property rights. Certain projects—the construction of large-scale infrastructure might be an example—are capable of greater wealth maximisation when publicly managed. In these situations, a taking is justified, provided that the expropriated owner is compensated for her loss. The compensation is necessary not just in recognition of the effort already made by the owner to enhance the value of her thing but to reassure others that it remains worthwhile to work on enhancing the value of *their* things.[13] The government is also justified in preventing a use of property without payment of compensation if that use does not maximise the overall wealth of society. Prevention of nuisance and prohibition or regulation of monopolies both fall into this category.[14]

The idea of property as commodity can be seen to fall within a liberal tradition focused on the attainment of individual autonomy:

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11. *Id.* at 54–55.
12. ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 4, at 1.
13. Rose, *Property as Wealth*, *supra* note 3, at 57.
14. *Id.* at 57–58.

freedom *from* (in this case, state interference) rather than freedom *to* carry out any particular activity.[15]

B. Property as Propriety

The alternative conception of property is termed by both authors as property as "propriety." In this account, the key purpose of property as an institution is to ensure that each person or entity has "that which is needed to keep good order in the . . . body politic"[16]: no more and no less. In Alexander's terms, propriety recognizes property law as "the material foundation for creating and maintaining the proper social order, the private basis for the public good."[17]

Alexander identifies the propriety approach as in keeping with the Aristotelian understanding of human beings as fundamentally interdependent creatures, who therefore owe one another obligations as an incident of their very humanity.[18] The notion of property as propriety can be traced back to the political traditions of Western Europe in the Middle Ages. At that time, the social order was strictly hierarchical, with the monarch at the head of the state, the husband and father at the head of the family, and various permutations in between. (The value of having such a rigid hierarchy was seldom questioned in political philosophy: the universe was accepted as being formed in hierarchy with God at the top.) A person at the head of a given hierarchy was granted property rights in combination with responsibilities to those further down the pyramid. Property was, in a sense, simply one aspect of the broader role the person was required to fulfil. Property law was therefore viewed as a mechanism for maintaining the social order for the good of the country as a whole.[19]

This understanding of the purpose of property evolved into the Jeffersonian conception of civic republicanism in the America of the late eighteenth century. Although keen to distance itself from outmoded feudal systems of tenure where land was concentrated in the

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15. ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 4, at 3; *see* C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986).

16. Rose, *Property as Wealth*, *supra* note 3, at 58.

17. ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 4, at 1.

18. *Id.* at 1–2.

19. *Id.* at 1–2; *see also* Rose, *Property as Wealth*, *supra* note 3, at 58–61.

hands of an unchanging, undeserving aristocracy, civic republicanism retained the notion of property as essential to the social order. Ownership of an appropriate amount of land allowed individuals to be independent rather than relying on the favour of the aristocracy, meaning they were free to participate in the creation and maintenance of the public good, described by Thomas Jefferson as the pursuit of "republican virtue."[20] Responsibility towards the less fortunate was viewed as an inherent aspect of this virtue.[21] Although civic republicans eschewed the European form of aristocracy, a hierarchy was still evident within the social structures of the new republic—only white men of certain social standing were empowered to own land. In more recent times, theorists such as Charles Reich[22] and Cass Sunstein[23] have sought to move away from the hierarchical aspects of the civic republican conception of property whilst retaining the aspects of social obligation inherent within them.[24]

Government takings of property make sense in this conception since property rights are justified only to the extent necessary for the good of society. If an owner of property is not fulfilling the obligations which come alongside that ownership, the State is justified in compelling that action for the benefit of the community.[25] If a person has *more* property than she needs to meet her social responsibilities, there can be little justification for retaining the excess where the community has need of it. Compensation may be appropriate, but it need not be "market value"—only sufficient to reflect the needs of her social role. It is also legitimate to treat different types of property differently in a takings regime where this conception holds sway, since some property is essential to the discharge of the owner's social responsibility, whereas the remainder is not.

Property as propriety can also be associated within a certain type of liberty, in this case the freedom *to* achieve certain ends.[26] Alexander notes an important distinction between the two accounts of property in that regard. Property as commodity is concerned with

20. Rose, *Property as Wealth*, *supra* note 3, at 61–62.
21. *Id.*
22. *See generally* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
23. *See generally* Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).
24. *See* Rose, *Property as Wealth*, *supra* note 3, at 63–64.
25. ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 4, at 2.
26. *See supra* note 15 and accompanying text.

the structure of society only in a purely instrumental sense. It demands that individuals be free to operate securely within the market, meaning that the society which results will be based on market transactions; but what that society actually looks like is of no concern in the commodity model. Property as propriety, by contrast, uses property law as a tool with which to achieve a normative vision of an appropriate form of society. It is concerned with substantive outcomes. The nature of those outcomes will vary in different times, places, and societal philosophies, but there will always be substantive values at the centre of a proprietarian outlook, and the property rules put in place under that view will be in service to those values.[27]

C. The Operation of Constitutional Property Protection

Constitutional protection of property will operate quite differently in a context where the property-as-commodity narrative prevails than in a context where the property-as-propriety narrative is dominant. At one end of the spectrum, best symbolized by Robert Nozick's "night watchman state," constitutional property rights should operate to prevent virtually any state action impacting on individual ownership.[28] Property as commodity is embedded, if not articulated, within the Nozickian view of rights. The alleged adoption of this view of property by U.S. lawmakers is what underscores Jennifer Nedelsky's concerns over the constitutionalization of property, which she fears will lead to entrenched economic inequality resulting from powerful property rights becoming insulated in a regulation-free private enclave.[29]

In the property-as-propriety narrative, however, the protection offered by a constitutional clause is limited by the social obligations inherent in property ownership. Explicit recognition of such obligations can in fact be found within the constitutional property clauses of various countries, most notably in Article 14 of the Basic Law for

27. ALEXANDER, COMMODITY AND PROPRIETY, *supra* note 4, at 3.

28. *See* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

29. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY ch. 6, at 203–76 (1990) (discussing the flawed vision underlying American constitutionalism and the role of its original focus on property).

the Federal Republic of Germany[30] and in Section 25 of the South African Bill of Rights.[31] Alexander demonstrates that some form of the obligation may also be detected in constitutional jurisprudence even where it is not explicit within the text of a country's constitution itself, using both Canadian and U.S. takings jurisprudence as examples.[32]

The distinction is neatly summarised by Andre van der Walt, who describes a contrast between a constitutional property clause used as guarantee as opposed to one used as a limitation.[33] Free market, minimalist-state libertarianism and the barrier it erects between public and private spheres argues for a property clause acting as a guarantee that private property will be insulated from state regulation in all but the most extraordinary circumstances.[34] However, if property is understood to come with responsibilities, a constitutional property protection would operate to secure a minimum level of rights for owners, sufficient to ensure human dignity, without removing the discretion of the State to limit or redefine the non-essential aspects of property where necessary to achieve social goods.[35]

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30. Grundesetz [GG] [Basic Law], art. 14, *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0085 (Ger.). The text translates as follows:

> (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
>
> (2) Property entails obligations. Its use shall also serve the public good.
>
> (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

31. S. AFR. CONST., Seventeenth Amendment Act of 2017, http://www.justice.gov.za/legislation/constitution (full text omitted for space).

32. *See* GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY, chs. 1, 5 (2006) [hereinafter ALEXANDER, GLOBAL]; *see also* Gregory S. Alexander, *Civic Property*, 6 SOC. & LEGAL STUD. 217 (1997); Gregory S. Alexander, *Property as a Fundamental Right? The German Example*, 88 CORNELL L. REV. 733 (2003); Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

33. *See* Andre van der Walt, *The Constitutional Property Clause: Striking a Balance Between Guarantee and Limitation*, *in* PROPERTY AND THE CONSTITUTION 109, 109–46 (Janet McLean ed., 1999).

34. *Id.* at 123–25.

35. *Id.* at 126–28.

II. EUROPEAN CONSTITUTIONAL PROPERTY: ARTICLE 1 OF THE FIRST PROTOCOL

A. The European Convention on Human Rights

In addition to property clauses included within the individual constitutions of many European states, citizens of Europe also benefit from the protection given to ownership as a human right under Article 1 of the First Protocol ("A1P1") to the European Convention on Human Rights.[36] The Convention was drafted between 1949 and 1951 by the Council of Europe ("Council"), an intergovernmental grouping of European nations founded in the aftermath of the Second World War with the aim of furthering European political co-operation by protecting human rights, democracy, and the rule of law.[37] Originally formed by ten countries, membership of the Council has expanded over the decades and now stands at forty-seven countries, including several states which were formerly part of the Communist bloc.[38] Every State that is a member of the Council is also a signatory to the Convention. The European Union[39] has also acceded to the Convention in its own right, meaning that actions taken by the EU must be Convention compliant.[40] Every signatory

36. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. I, *opened for signature* Mar. 20, 1952, ETS No.009 (entered into force May 18, 1954).

37. Convention for the Protection of Human Rights and Fundamental Freedoms, art. I, *opened for signature* Nov. 4, 1950, ETS No.005 (entered into force Sept. 3, 1953).

38. A detailed treatment of the history of the Council of Europe can be found in DENIS HUBER, A DECADE WHICH MADE HISTORY: THE COUNCIL OF EUROPE 1989–1999 (1999).

39. Although the terminology can be confusing, it is important to distinguish between the Council of Europe, an international organisation whose forty-seven government members are focused principally on the protection of human rights and the rule of law, and the European Union, a group of twenty-eight member states joined in a political and economic union requiring (subject to certain exceptions) use of a shared currency and free movement of goods, services, and people within its area. The Council of Europe has no directly elected members in its institutional bodies and no power to legislate: it operates in a manner somewhat similar to the United Nations. The European Union, with its directly elected Parliament and legislative, executive, and judicial branches, is more like a form of federal government for the States who have been permitted to join it (unless and until such a State chooses to leave it, of course). For more information, the standard textbook in this area is LORNA WOODS & PHILIPPA WATSON, STEINER & WOOD'S EU LAW (12th ed. 2014).

40. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union art. 6(2), Oct. 26, 2012, 2012 O.J. (C326). For an examination of how human rights protection operates in combination between the two European systems,

State must implement the Convention into its domestic legislation, with enforcement actions pursued first through the courts of the member States before a final right of appeal to the European Court of Human Rights in Strasbourg, France.[41]

The protection of property rights is set out in Article 1 of the First Protocol to the Convention. The text of the Convention is authentic in both English and French, with the English version of the relevant Article providing that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No 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 principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.[42]

B. Applying Article 1 of the First Protocol

When hearing an application in respect of Article 1 of the First Protocol, the European Court of Human Rights follows a three-step

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see Bruno de Witte, *The Interaction between the European Court of Justice and the European Court of Human Rights*, *in* HUMAN RIGHTS PROTECTION IN THE EUROPEAN LEGAL ORDER (Patricia Popelier, Catherine Van de Heyning & Piet Van Nuffel eds., 2011).

41. Again, it is important to distinguish between the Strasbourg court, which has jurisdiction in respect to Convention claims only, and the European Court of Justice in Brussels, Belgium, which is effectively the judicial branch of the EU.

42. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. I, *opened for signature* Mar. 20, 1952, ETS No.009 (entered into force May 18, 1954). Curiously, the terms used in the French text do not correspond directly with the use of "property" and "possessions" in the English text (*see* George L. Gretton, *The Protection of Property Rights*, *in* HUMAN RIGHTS IN SCOTS LAW (Alan Boyle, Chris Himsworth, Andrea Loux & Hector MacQueen eds., 2002)). The French text reads:

> *Toute personne physique ou morale a droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.*
>
> *Les dispositions précédentes ne portent pas atteinte au droit que possèdent les États de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformément à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.*

process to ascertain whether the state action in question has led to a violation of the applicant's rights.

1. Engaging the Right: Possessions

First, the court will ascertain whether the applicant holds a "possession" in the meaning used by the Convention. The significant body of case law on this question provides useful data as to whether property is viewed as commodity or propriety by the court. I will examine this jurisprudence in detail in Part III below.

2. The Nature of the Interference: The Three Rules

Second, the court will ask whether the state action complained of by the applicant has resulted in an interference with the protection offered by Article 1. The decision in *Sporrong and Lönnroth v. Sweden*,[43] arguably the most significant decision on Article 1 to date, explains the court's approach to this question. The case concerned two buildings located in an area of central Stockholm which had been marked out for redevelopment by the city authorities. The buildings were subject to expropriation permits, which made clear that they would be subject to the exercise of eminent domain powers as part of the redevelopment programme. These permits did not restrict or remove any rights held by the owners as a matter of law, but had a significant impact on the marketability of the buildings in practice. The properties were, in addition, subject to a prohibition on construction work. As a result of delays and amendments to the redevelopment programme, the permits were extended on multiple occasions, with the eventual result that the first applicant's property had been subject to the permit for twenty-three years, and the second, for eight years. Ultimately, the redevelopment programme, insofar as it affected the applicants' properties, was cancelled. No eminent domain powers were ever exercised.

In determining whether the series of actions taken by the city authorities had resulted in a violation of the applicants' rights, the court found the protection offered by A1P1 to be comprised of three rules.

43. Sporrong v. Sweden, 52 Eur. Ct. H.R. (ser. A) (1982), 5 Eur. H.R. Rep. 35 (1983), http://hudoc.echr.coe.int/eng?i=001-57580.

> The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained within the second paragraph.[44]

The court went on to examine the limits of the second rule, noting that it covered both formal and de facto expropriation,[45] and considered whether the extent of the state interference with the applicants' rights, though clearly falling short of de jure loss of title, would nevertheless amount to deprivation of possessions under the first rule of A1P1. The applicants contended that the limitations on their properties throughout the time period in question were so excessive that their property rights had effectively been deprived of any substance. By a very slim margin,[46] the court disagreed. The focus of the judgement was on the powers that remained to the applicants whilst the properties were subject to the permits. The applicants' rights were certainly precarious whilst the threat of expropriation loomed, and their ability to sell their properties on the open market was therefore considerably reduced. In addition, their rights to develop the properties were circumscribed in many respects.[47] However, the possibility of sale existed nevertheless: the Swedish government provided evidence of properties subject to similar restrictions which had, as matter of fact, been sold during the relevant time period.[48] The court concluded: "Although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions."[49] The application was instead dealt with as an interference

44. *Id.* ¶ 61, at 17, 5 Eur. H.R. Rep. 35 (1983) ¶ 61, at 50.

45. Bramelid v. Sweden, App. No. 8588/79, 29 Eur. Comm'n H.R. Dec. & Rep. 64, 81 (1982), http://hudoc.echr.coe.int/eng?i=001-74253.

46. The count was ten votes to nine. *See Sporrong*, 52 Eur. Ct. H.R. (ser. A) ¶ 89, at 25, 2 Eur. H.R. Rep. ¶ 89, at 59.

47. *Id.* ¶ 62, 63, at 18, 2 Eur. H.R. Rep. ¶ 62, 63, at 51; a*ccord*, *id.* ¶ 58, at 16, 2 Eur. H.R. Rep. ¶ 58, at 49.

48. *Id.* ¶ 30, at 7, 2 Eur. H.R. Rep. ¶ 30, at 40.

49. *Id.* ¶ 63, at 18, 2 Eur. H.R. Rep. ¶ 63, at 51.

with the peaceful enjoyment of possessions (rule one) in relation to the expropriation permits, and a control of use (rule three) in relation to the prohibition of construction. A violation of the rights of both applicants was ultimately found by ten votes to nine, and the question of an appropriate remedy was reserved to allow the parties time to seek a settlement.[50]

In addition to setting out the three rules contained within Article 1, *Sporrong* is instructive as to the criteria by which the court will determine whether an applicant has been deprived of her possessions, or subjected to some lesser interference. In particular, the case demonstrates that the right to dispose of the property is central to the question of deprivation, but not determinative. In fact, very few de facto deprivations have been recognised by the court in the years subsequent to the *Sporrong* decision,[51] even when the owner is subject to severe restrictions on his use of the property with the result that his ability to dispose of the property is rendered useless in fact, if not in law.[52] The majority of rule two cases result from de jure losses of title.

The court has not scrutinised the meaning of "control of use" in the same level of detail. Effectively, a state action will amount to control of use when it falls short of the standard required for de facto deprivation or in circumstances where common sense indicates that the use of the property in question is being regulated. Common examples of a state action which may be categorised as such control include the imposition of rules of taxation[53] or planning legislation,[54]

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50. *See* Sporrong v. Sweden, 85 Eur. Ct. H.R. (ser. A) (1984), 7 Eur. H.R. Rep. CD256 (1985). The first applicant was ultimately awarded eight hundred thousand Swedish Krona ("SEK") (approximately ninety-six thousand U.S. dollars), and the second application was awarded two hundred thousand SEK (approximately twenty-four thousand U.S. dollars).

51. A rare example can be found in Papamichalopoulos v. Greece, 260-B Eur. Ct. H.R. (ser. A) (1993), 16 Eur. H.R. Rep. 440 (1993), http://hudoc.echr.coe.int/eng?i=001-57836. *See also* Papamichalopoulos v. Greece, App. No. 14556/89, 69 Eur. Comm'n H.R. Dec. & Rep. 261, 266–69 (1991), http://hudoc.echr.coe.int/eng?i=001-84089 (providing additional background information).

52. For an example, see generally Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989) 12 Eur. H.R. Rep. 391 (1990), http://hudoc.echr.coe.int/eng?i=001-57616.

53. *See generally* Spacek v. Czech Republic 1999-V Eur. Ct. H.R. 65, 30 Eur. H.R. Rep. 1010 (2000), http://hudoc.echr.coe.int/eng?i=001-58358 (imposition of additional income tax liability, a control of use); Nat'l and Provincial Bldg. Soc'y v. United Kingdom 1997-VII Eur. Ct. H.R. 2325, http://hudoc.echr.coe.int/eng?i=001-58109 (removal of right to reclaim overpaid tax, a control of use).

54. *See generally* Agrotexim v. Greece, 330-A Eur. Ct. H.R. (ser. A) (1995), 21 Eur. H.R.

restrictions on rent,[55] licensing laws,[56] and the operation of rules of succession.[57]

The relationship between the three rules is open to debate. In a much cited dictum from *James v. United Kingdom*,[58] the court indicated that deprivation and control are particular instances of the broader category of interference with peaceful enjoyment of possessions, and it seems clear that the court is bound to reject both the second and third rules before it can find the first rule applicable.[59] The court has also suggested that the categories operate as a set of concentric circles, with deprivation as a subset of control, which is in turn a subset of general interference with possessions.[60]

3. Justifying the Interference: Lawfulness, Legitimate Aim, and Proportionality

The final step in the court's adjudication process is to determine whether the interference with the applicant's property rights can be justified. If so, the state action will not amount to a violation of those rights.

For a justification to be established, the state action must pass three tests. First, the court must be satisfied that the interference was lawful, meaning that it had a clear basis in domestic law and that the legal basis in question adhered to the basic rule-of-law principles of clarity, accessibility, and nonretrospectivity.[61] It is unusual for state action to fail this test, although not unheard of—with

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Rep. 250 (1996), http://hudoc.echr.coe.int/eng?i=001-57951 (planning restrictions preventing development of land, a control of use).

55. *See generally* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989), 12 Eur. H.R. Rep. 391 (1990), http://hudoc.echr.coe.int/eng?i=001-57616 (cap on rent levels, a control of use).

56. *See generally* Tre Traktörer Aktiebolag v. Sweden, 159 Eur. Ct. H.R. (ser. A) (1989), 13 Eur. H.R. Rep. 309 (1991), http://hudoc.echr.coe.int/eng?i=001-57586 (licensing regime for sale of alcohol, a control of use).

57. *See generally* Inze v. Austria, 126 Eur. Ct. H.R. (ser. A) (1987), 10 Eur. H.R. Rep. 394 (1987), http://hudoc.echr.coe.int/eng?i=001-57505 (legal regulation of inheritance, a control of use).

58. *See* James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) (1986), 8 Eur. H.R. Rep. 123 (1986), http://hudoc.echr.coe.int/eng?i=001-57507.

59. *Id.* ¶ 37, at 17, 8 Eur. H.R. Rep. ¶ 37, at 139–40.

60. *See generally* AGOSI v. United Kingdom, 108 Eur. Ct. H.R. (ser. A) (1986), 9 Eur. H.R. Rep. 1 (1987), http://hudoc.echr.coe.int/eng?i=001-57418.

61. *See James*, 98 Eur. Ct. H.R. (ser. A) ¶ 37, at 17, 8 Eur. H.R. Rep. ¶ 37, at 139–40.

problems most likely to arise when discretion afforded to the State to take certain steps is not sufficiently bounded.[62]

Secondly, the state action must pursue a legitimate aim in the public or general interest.[63] Given the complexity of the policy areas in which state action is likely to affect property rights—the economy, housing, the environment—the court has been clear that States have a wide margin of appreciation in determining what falls within the public interest.[64] As an unelected judiciary within a centralised system, the court will not substitute its judgement on this question for that of a democratically elected legislature within the jurisdiction in question. Short of a situation in which a State fails to offer any public interest argument for their action at all,[65] state interference will almost invariably pass this test.

Finally, the court must determine whether the interference was proportionate, meaning that it struck a fair balance between the public interest and the human rights of the applicant.[66] It is hard to discern any systematic approach to the court's assessments of proportionality in property cases. One can point to various factors that may be taken into account—the strength of the public interest served by the State[67] or the extent of the applicant's opportunity to

62. *See, e.g.*, Vasilescu v. Romania, 1998-III Eur. Ct. H.R. 1064, 28 Eur. H.R. Rep. 241 (1999), http://hudoc.echr.coe.int/eng?i=001-58169 (confiscation of gold coins had no basis in domestic law); Iatridis v. Greece (Art. 41), 2000-XI Eur. Ct. H.R. 81, 30 Eur. H.R. Rep. 97 (2000), http://hudoc.echr.coe.int/eng?i=001-59087 (the eviction order on which the State had based their eviction of the applicant from the land had been quashed, so the State had no lawful basis to prevent the applicant returning); Hentrich v. France, 296-A Eur. Ct. H.R. (ser. A) (1994), 18 Eur. H.R. Rep. 440 (1994), http://hudoc.echr.coe.int/eng?i=001-57903 (provision in the tax code allowing the State to pre-empt sale of land where the price was "too low" was insufficiently precise to meet the test of foreseeability); Smirnov v. Russia, 51 Eur. H.R. Rep. 19 (2010), 51 Eur. H.R. Rep. 19 (2010), http://hudoc.echr.coe.int/eng?i=001-96399 (regulations which allowed the State to retain property for an unlimited time where the property was "instrumental" to a criminal investigation were insufficiently precise to meet test of foreseeability).

63. These terms are used interchangeably in the jurisprudence.

64. James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) ¶ 46, at 19 (1986), 8 Eur. H.R. Rep. ¶ 46, at 142 (1986) (because of their direct knowledge of their society and its needs, elected national authorities are better placed than an unelected international judge to determine what is in the interest of their public, and must be afforded some discretion by the court).

65. *See generally* Zwierzyński v. Poland, 2001-VI Eur. Ct. H.R. 203, 38 Eur. H.R. Rep. 6 (2004), http://hudoc.echr.coe.int/eng?i=001-59522 (the unsuccessful state defence to a claim of expropriation was that no expropriation had taken place, with no argument made in justification of its actions).

66. Sporrong v. Sweden, 52 Eur. Ct. H.R. (ser. A) ¶ 69, at 19 (1982), 2 Eur. H.R. Rep. 350 ¶ 69, at 19 (1979).

67. *See generally* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989), 12 Eur. H.R. Rep.

be represented in the decision-making process[68]—but the only rule that can be stated with any certainty is that a rule-two interference (a deprivation of possessions) will not be proportionate unless the applicant has received valuable compensation for his loss.[69] My discussion of the development of this rule, and what it can tell us about the court's view of property as commodity or propriety, follows in Part III.

III. EUROPEAN CONSTITUTIONAL PROPERTY: COMMODITY OR PROPRIETY?

In the first two parts of this paper, I have outlined the competing accounts of property as commodity and property as propriety developed in U.S. constitutional property scholarship and explained the nature of the property rights protection offered by Article 1 of the First Protocol to the European Convention on Human Rights. Next, I address the central research question I posed in the introduction. In this third part of the paper, I argue that the clash of normative values articulated through the commodity/propriety analysis of the U.S. takings jurisprudence can also be identified in relation to Article 1 of the First Protocol. In demonstrating this hypothesis, I examine the text of Article 1, the approach of the European Court of Human Rights to defining which "possessions" are protected by the Article, and the requirement developed by the court that compensation *must* be paid for every deprivation of possessions before it can meet the test of proportionality.

A. The Wording of the Protection

Alexander's comparative work reveals that robust constitutional protection of property can exist without any written document or bill

391 (1990), http://hudoc.echr.coe.int/eng?i=001-57616 (rent controls aimed to prevent housing crisis); Spadea v. Italy, 315-B Eur. Ct. H.R. (ser. A) (1995), 21 Eur. H.R. Rep. 482 (1996), http://hudoc.echr.coe.int/eng?i=001-57937 (regulation of rental property during accommodation shortage).

68. *See generally* AGOSI v. United Kingdom, 108 Eur. Ct. H.R. (ser. A) (1986), 9 Eur. H.R. Rep. 1 (1987), http://hudoc.echr.coe.int/eng?i=001-57418 (discussing extensive domestic appeal process available for confiscation of allegedly smuggled goods).

69. *See generally* James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A) (1986), 8 Eur. H.R. Rep. 123 (1986).

of rights.[70] Where express clauses do exist, however, dramatic differences in wording are found from jurisdiction to jurisdiction. The U.S. Takings Clause is notoriously brief, providing simply: "nor shall private property be taken for public use, without just compensation."[71] Section 51(xxxi) of the Constitution of Australia makes a similarly succinct provision for "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws."[72]

Within Europe, constitutional property clauses tend to be more detailed, particularly as regards justification for state intervention with property rights. Article 14 of the German Basic Law has been given as an example above.[73] The Italian Constitution of 1948 also makes explicit reference to the social function of property, recognising the possibility of expropriation with compensation in the public interest in addition to other regulatory restraints on ownership and property.[74]

In drafting terms, A1P1 occupies a position somewhere in the middle of these two approaches. Its first sentence contains a positive statement of the right to property, which might be assumed to provide a more robust protection than in jurisdictions like the United States where such a right is merely implied.[75] The second and third sentences appear, on their face, to contain what law and economics scholars would categorise as liability rules[76]: that no one shall be deprived of possessions except in the public interest and subject to relevant legal conditions; and that the State may control the use of property in the general interest, or to secure payment of taxes, other contributions, or penalties.[77]

Reading the text offers little guidance, however, as to which conception of property underpins the protection envisaged by the clause. In fact, the wording can lend itself to potential constructions in

70. ALEXANDER, GLOBAL, *supra* note 32, ch. 1.

71. U.S. CONST. amend. X.

72. *Australian Constitution* s 51.

73. *See supra* note 30 and accompanying text.

74. Art. 42 Constituzione [Cost.] (It.).

75. Alexander challenges the assumption that property rights are most strongly protected where a positive statement of this kind appears in a constitutional document. *See* ALEXANDER, GLOBAL, *supra* note 32, ch. 1.

76. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

77. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. I, *opened for signature* Mar. 20, 1952, ETS No.009 (entered into force May 18, 1954).

support of both the commodity and propriety approaches. The positive statement of a right to property, in combination with the somewhat vaguely expressed liability rules, could support a commodity account. This interpretation would require the case law to employ a restrictive definition of "public interest" and "general interest," limited to the types of situation where state intervention would result in greater collective wealth maximisation, and to offer no real scope for public interest to encapsulate redistributive objectives. A commodity argument constructed purely from the text would be weakened, however, by the absence of an express right to compensation for deprivation. The lack of any written compensation requirement forms the foundation of a proprietarian understanding of Article 1. This understanding would be bolstered by case law employing a wide interpretation of the public-interest/general-interest requirements.

The *travaux préparatoires* make clear that the ambiguous wording of Article 1 results not from a failure to capture the normative understanding of property intended by the drafters but rather from the political divisions and ideological uncertainty on that point which affected the drafting process. Although some rumination on the core purposes of property law as an institution can be detected within the drafting debates,[78] no attempt was made to define any version of those purposes. The lack of agreement amongst European nations as to the role of property as an institution was acknowledged,[79] but not considered fatal to the inclusion of the protection within the Convention. Some delegates suggested clarity in the meaning of the Article would best be achieved not through debate at the drafting stage but through the development of the jurisprudence of the court.[80]

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78. *See, e.g.*, Statement of De Valera, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS at 62, 104 (Martinus Nijhoff 1975); Statement of Nally, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra*, at 80.

79. *See* Statement of Edberg, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 86; Statement of Teitgen, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 126.

80. *See* Statement of Mitchison, *in* 6 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 97–98; Statement of Pernot, *in* 6 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 106; Report by Committee of Experts, *in* 4 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 18–21.

To be clear, a reader will not find within the *travaux préparatoires* any reference to commodity or propriety, or any real normative discussion at all. What can be seen is clear agreement that some level of protection of property against the State is a civil and political necessity in a world where totalitarian regimes would use arbitrary dispossession as a mechanism for silencing dissent.[81] However, this is qualified by a lack of agreement about where that level should be set. In other words, the clash between the competing normative perspectives identified by Rose and Alexander seems to have been built into Article 1 from the beginning. The text was designed to allow for either interpretation to be possible.

B. The Meaning of "Possessions"

The term "possessions" has an autonomous meaning for the purposes of the Convention.[82] This allows the court to interpret the term in a manner consistent with the delivery of the real and effective protection of rights that the Convention is intended to provide.[83] Without an autonomous definition, a State could simply deny that a property rights violation had occurred by using a domestic law definition to argue that no "possessions" were affected. For the purposes of my argument, the interest lies in how this autonomous definition has been developed by the court over time. As has been made clear in the first part of this paper, a definition animated by a commodity view of property is likely to look somewhat different to one animated by a proprietarian approach. What can the definition the court has developed in its jurisprudence reveal about the underlying normative values it ascribes to property protection in Article 1?

In a commodity account, possessions would be broadly construed to equate with wealth. Anything with a financial value should fall

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81. *See* Statement of Sundt, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 10; Statement of de la Vallée-Poussin, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 62; Statement of de la Vallée-Poussin, *in* 2 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 78, at 62.

82. *See generally* Beyeler v. Italy, 2000-I Eur. Ct. H.R. 57, 33 Eur. H.R. Rep. 52 (2001), http://hudoc.echr.coe.int/eng?i=001-58832.

83. Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979) ¶ 24, at 9, 2 Eur. H.R. Rep. 205 (1979) ¶ 24, at 9, http://hudoc.echr.coe.int/eng?i=001-57420 ("The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.").

within the definition, regardless of its intrinsic nature—whether tangible or intangible, in rem or in personam—since autonomy through individual and societal wealth maximisation is the ultimate goal of property-law rules. Where a person has a legitimate expectation of acquiring something with a financial value, the expectation of that interest should also be protected, since security of property rights is considered a key element of a successful system.

To date, the Strasbourg jurisprudence has been broadly consistent with this approach. Economic value is at the core of determining what a possession is,[84] whether with respect to tangible[85] or intangible[86] assets. The value must be capable of transfer or some other form of realization.[87] Where an applicant had a legitimately held expectation of acquiring such an interest, that will be sufficient in itself to attract the protection of Article 1.[88] An interest with no economic value, such as the right to pursue a hobby[89] or the right to

84. In the admissibility decision in *Bramelid and Malmström v. Sweden*, the European Commission of Human Rights noted that the company shares concerned in the dispute certainly had an economic value and must therefore be possessions. Bramelid v. Sweden, App. No. 8588/79, 29 Eur. Comm'n H.R. Dec. & Rep. 76, 81 (1982), http://hudoc.echr.coe.int/eng?i=001-74445.

85. *See, e.g.*, Akdivar v. Turkey, 1996-IV Eur. Ct. H.R. 23, 23 Eur. H.R. Rep. 143 (1996), http://hudoc.echr.coe.int/eng?i=001-58062 (ownership of land); Wittek v. Germany, 2002-X Eur. Ct. H.R. 43, 41 Eur. H.R. Rep. 46 (2005), http://hudoc.echr.coe.int/eng?i=001-60815 (usufruct over land).

86. *See, e.g.*, Intersplav v. Ukraine, App. No. 803/02 (Eur. Ct. H.R. May 23, 2007), 50 Eur. H.R. Rep. 4 (2010), http://hudoc.echr.coe.int/eng?i=001-78872 (right to a tax refund); Paeffgen GMBH v. Germany, App. No. 25379/04 (Eur. Ct. H.R. Sept. 18, 2007), http://hudoc.echr.coe.int/eng?i=001-82671 (registration of domain names); Kline v. Netherlands, App. No. 12633/87 (Eur. Ct. H.R. Oct. 4, 1990), http://hudoc.echr.coe.int/eng?i=001-738 (patent); Melnychuk v. Ukraine, 2005-IX Eur. Ct. H.R. 397, http://hudoc.echr.coe.int/eng?i=001-70089 (copyright).

87. *See* Durini v. Italy, App. No. 19217/91, 76-B Eur. Comm'n H.R. Dec. & Rep. 76 (1994), http://hudoc.echr.coe.int/eng?i=001-82831 (nonalienable usufruct held by the firstborn son in respect to the ancestral home was held not to be a possession, in contrast to the transferable usufruct found to be a possession in *Wittek*, 2002-X Eur. Ct. H.R. 43, 41 Eur. H.R. Rep. 46).

88. The rules here are usefully elaborated in a series of cases concerning licences, with the broad principle that where a licence has been granted on certain conditions and where the licence-holder has dutifully fulfilled those conditions, they have a legitimate expectation that the licence will be retained. *See, e.g.*, Batelaan v. Netherlands, App. No. 10438/83, 41 Eur. Comm'n H.R. Dec. & Rep. 170 (1984), http://hudoc.echr.coe.int/eng?i=001-74878; van Marle v. Netherlands, 101 Eur. Ct. H.R. (ser. A) (1986), 8 Eur. H.R. Rep 483 (1986), http://hudoc.echr.coe.int/eng?i=001-57590; Pudas v. Sweden 125-A Eur. Ct. H.R. (ser. A) (1987), 10 Eur. H.R. Rep 380 (1988), http://hudoc.echr.coe.int/eng?i=001-57562; Tre Traktörer Aktiebolag v. Sweden, 159 Eur. Ct. H.R. (ser. A) (1989), 13 Eur. H.R. Rep. 309 (1991). The possession in question here has been identified as the income and goodwill generated by holding the licence.

89. *See generally* R.C. v. United Kingdom, App. No. 37664/97, 94-B Eur. Comm'n H.R. Dec. & Rep. 119 (1998), 26 Eur. H.R. Rep. CD 10 (1998), http://hudoc.echr.coe.int/eng?i=001-88213.

hold a driving licence (when not being used for employment-related purposes),[90] will not constitute a possession. In brief, the focus is on property as wealth.

The proprietarian account would argue for a different understanding of possessions in two key respects. In the first place, for a proprietarian, ownership of a certain amount of property is an essential requirement of participation in a democratic society. The "real and effective protection" the property right seeks to provide could not, therefore, be entirely decoupled from substantive redistributive outcomes: constitutional property protection must guarantee each citizen the freedom *to* pursue social goods, not simply limit (or provide freedom *from*) state interference with the property that person happens to own.[91] What property would fall within this proprietarian minimum? At one time, the answer might have been something like the U.S. homestead—a building in which to live along with sufficient space to produce food to support a family. This concept was updated for more modern times by Charles Reich,[92] who argued that in a world dominated by large corporations and the large State, it was no longer possible for an individual to secure his independence through private ownership of productive assets. To achieve the same independence in the modern world, private property must be reconceptualised to include state "largess"[93]—benefits, services, licences—as being held in the hands of individuals.[94] This "new property" covers the basic requirements for subsistence. Connections can be drawn between this and subsequent works arguing that a meaningful property protection would encapsulate additional aspects essential to human flourishing, such the right to a clean environment[95] and the right to public ownership of public property.[96]

The new property concept is not entirely unsupported in Strasbourg case law. The most obvious example of consonance with the concept

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90. *See generally* X. v. Germany, App. No. 9177/80, 26 Eur. Comm'n H.R. Dec. & Rep. 255 (1981), http://hudoc.echr.coe.int/eng?i=001-74038.

91. *See supra* note 15 and accompanying text.

92. *See* Reich, *supra* note 22.

93. *Id.* at 734–37.

94. *Id.* at 785–86.

95. *See generally* Gudmundur Alfredsson & Alexander Ovsiouk, *Human Rights and the Environment*, 60 NORDIC J. INT'L L. 19 (1991).

96. *See generally* Carol Rose, *The Comedy of the Commons: Custom, Commerce and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); John Page, *Towards an Understanding of Public Property, in* 7 MODERN STUDIES IN PROPERTY LAW 195 (Nicholas Hopkins ed., 2013).

is the court's approach to welfare benefits. In this respect, the court's position shifted gradually from an initial view that a state benefit could not constitute a possession[97] to a recognition that where contributions had been made—for example, into a social security scheme—a possession in the form of a pecuniary right to claim from that fund might emerge,[98] including situations where the contributions were made by way of general taxation.[99] This view soon expanded to incorporate both contributory and non-contributory benefit schemes,[100] until finally the court stated that where

> a Contracting State has in force legislation providing for the payment as of right of a welfare benefit—whether conditional or not on the prior payment of contributions—that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.[101]

In other words, it now seems settled that where legislation provides for a public law benefit, a private property right may emerge, much in line with Reich's thinking. A possession of that kind may still be removed by the State, but as with any other private property right, such action would have to be lawful, in the public interest, and proportionate.

A different instance of the court arguably recognising a form of substantive entitlement within Article 1 of the First Protocol is *Öneryildiz v. Turkey*.[102] In that case the applicant successfully argued

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97. *See generally* X. v. Germany, App. No. 2116/64 (Eur. Comm'n H.R. Dec. 17, 1966), http://hudoc.echr.coe.int/eng?i=001-2975.

98. *See generally* X. v. Netherlands, App. No. 4130/69, 38 Eur. Comm'n H.R. Dec. & Rep. 9 (1971), http://hudoc.echr.coe.int/eng?i=001-3101; G v. Austria, App. No. 10094/82, 38 Eur. Comm'n H.R. Dec. & Rep. 84 (1984), http://hudoc.echr.coe.int/eng?i=001-73786; Müller v. Austria, App. No. 5849/72, 1 Eur. Comm'n H.R. Dec. & Rep. 50 (1974), http://hudoc.echr.coe.int/eng?i=001-75078; Gaygusuz v. Austria, 1996-IV Eur. Ct. H.R. 1141, http://hudoc.echr.coe.int/eng?i=001-58060.

99. *See generally* Stec v. United Kingdom, 2006-VI Eur. Ct. H.R. 131, 43 Eur. H.R. Rep. 47 (2006), http://hudoc.echr.coe.int/eng?i=001-73198.

100. *See generally* Andrejeva v. Latvia, 2009-II Eur. Ct. H.R. 71, http://hudoc.echr.coe.int/eng?i=001-91388.

101. Moskal v. Poland, App. No. 10373/05, ¶ 38, at 9 (Eur. Ct. H.R. Sept. 15, 2009), http://hudoc.echr.coe.int/eng?i=001-94009 (citation omitted).

102. *See* Öneryildiz v. Turkey, 2004-XII Eur. Ct. H.R. 79, 41 Eur. H.R. Rep. 20 (2005), http://hudoc.echr.coe.int/eng?i=001-67614.

that a makeshift dwelling constructed in contravention of domestic planning rules, on a refuse tip which he did not own, was a possession. The court relied on ambiguous state policy surrounding slum settlements in general, together with state inaction with respect to this particular dwelling over a period of five years, to find that the applicant *did* have a proprietary interest in the dwelling which the State had de facto acknowledged. This reliance on the state's (in)action means that the case cannot be read as accepting the proprietarian view that all persons require a stake in property to participate in society—it does not create a right *to* a dwelling. However, the court's focus on the idea that the State *should have* recognised the applicant's right as proprietary within domestic law, together with further comment on the positive duties incumbent on States under A1P1, goes beyond a reductive "night watchman state" view of property rights.[103]

Öneryildiz also provides interesting insight into the second way that the proprietarian account argues for an understanding of possessions different than the one supported by the commodity account. This argument builds on the work of Morris Cohen, who considered property as providing not only *dominium* (power over things) but also *imperium* (power over people).[104] All private property connotes imperium of some sort, in the sense that the owner can exclude another person from using the thing in question. However, in some situations—for example, in relation to ownership of large-scale assets such as companies—the extent of that power over the lives of others can be profound. Modern proprietarian understandings seek to develop property-law rules that prevent the establishment of this type of entrenched economic and social hierarchy. Michael Robertson argues that it is necessary to separate out private property that gives power over others from private property that does not, in order to protect individuals who are subject to this exercise of power, and also to prevent those exercising the power from sheltering behind

103. The State's positive obligation to protect dwellings even where the exact nature of the dweller's property rights was contested is also discussed in Kolyadenko v. Russia, App. No. 17423/05 (Eur. Ct. H.R. Feb. 28, 2012), 56 Eur. H.R. Rep. 2 (2013), http://hudoc.echr.coe.int/eng?i=001-109283, in which the homes of several families were washed away when the local reservoir burst its banks, and the loss was attributed to the failure of the State to take appropriate steps to mitigate the known flooding risk.

104. *See* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

the justifications given for nonpowerful property.[105] Nonpowerful property could be said to cover only what is "appropriate" in the proprietarian sense. Powerful property is the excess, and therefore subject to a greater social obligation.

The decision in *Öneryildiz* arguably contains a grain of this approach to categorization of property, in the sense that the court's willingness to deem the existence of a possession in the case was influenced by the fundamental nature of the asset in question. The applicant was looking for recognition of a very basic shelter. Had he been seeking recognition of something less vital to his day-to-day survival—an asset critical to his financial rather than his physical safety—it is questionable whether the court would have taken the same approach. In a pure commodity approach to possessions, on the contrary, no right would have been recognised at all.

C. The Requirement of Compensation

The development of the definition of possessions shows the court largely making use of a commodity-type approach to property, with occasional diversions into propriety territory. The evolution of the rules on compensation for deprivation of possessions, however, shows a clear example of the commodity view being adopted wholesale. Although the text of Article 1 includes no express right to compensation, and the drafters of the Convention were unable to reach agreement on whether such a provision should be made, over time the jurisprudence has established a requirement that "valuable" (usually meaning market value) compensation be paid for almost any deprivation of possessions. Where this level of compensation is not made available, the state action will almost invariably be found to be disproportionate.

The roots of the court's approach to compensation are found in *Lithgow v. United Kingdom*,[106] an application arising from the nationalisation of the aircraft and shipbuilding industries in the United Kingdom in the 1970s. The court recognised that the reference to the "general principles of international law" in the text of

105. *See* Michael Robertson, *Property and Ideology*, 8 CAN. J.L. & JURISPRUDENCE 275, 280-281 (1995).

106. *See* Lithgow v. United Kingdom, 102 Eur. Ct. H.R. (ser. A) (1986), 8 Eur. H.R. Rep. 329 (1986), http://hudoc.echr.coe.int/eng?i=001-57526.

Article 1[107] did not have the effect of requiring that compensation be paid for every interference with the right. However:

> The Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 . . . is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.[108]

As Tom Allen notes, whether protection would be illusory or ineffective depends on the purpose of the property right in the first place.[109] In terms of the value of compensation to be awarded, the court went on to note:

> The taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 . . . . Article 1 . . . does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest," such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[110]

In itself, *Lithgow* does not exclude the possibility of a proprietarian approach: in fact, the court's express recognition that public-interest demands, including social-justice measures, might justify something less than market-value compensation would seem to leave space for a proprietarian jurisprudence to develop. In subsequent case law, however, arguments of this kind have not proved successful.

A stark example is *Holy Monasteries v. Greece*,[111] in which eight monastic estates acquired by the applicants some decades previously

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107. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. I, *opened for signature* Mar. 20, 1952, ETS No.009 (entered into force May 18, 1954).

108. *Lithgow*, 102 Eur. Ct. H.R. (ser. A) ¶ 120, at 43, 8 Eur. H.R. Rep. 329 ¶ 121, at 372.

109. Tom Allen, *Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights*, 59 INT'L & COMP. L.Q. 1055, 1067 (2010).

110. *Lithgow*, 102 Eur. Ct. H.R. (ser. A) ¶ 121, at 44, 8 Eur. H.R. Rep. 329 ¶ 121, at 372 (citation omitted).

111. *See* Holy Monasteries v. Greece, 301-A Eur. Ct. H.R. (ser. A) (1994), 20 Eur. H.R. Rep. 1 (1995), http://hudoc.echr.coe.int/eng?i=001-57906.

had been restored to the State without payment of compensation. At the level of the European Commission of Human Rights, it had been accepted that the circumstances justified the absence of compensation: the estates had initially been given to the applicants to facilitate the administration of tasks such as social care and education, which had subsequently been taken over by the State. Even when the applicants had been providing the social services in question, they had been financially reliant on the Greek Orthodox Church, in itself funded by the State. From a proprietarian perspective, the applicants had been given the property to perform a social function which they were no longer required to perform, making it only appropriate for the property to be transferred to the entity now performing that function. The commission appeared to agree with this approach. The court, however, disregarded these arguments in reviewing the case as a more straightforward deprivation of private ownership. It considered the burden borne by the applicants in the case to be disproportionate in the absence of compensation, and so it found a violation of Article 1.

The jurisprudence surrounding legislation on security of tenancy also seems to indicate a gradual shift towards a commodity approach to compensation regardless of the dicta in *Lithgow*. On several occasions, the court has been asked to review legislation designed to enhance security of tenure for residential tenants in circumstances where housing is in crisis and homelessness is a real risk. Although the details of the regimes vary, in general they entail controlled-rent levels and/or restrictions on the landlord's right to evict the tenant. A proprietarian might argue that, provided the landlord had sufficient alternative property to enable her to fulfil her social role,[112] a profitable investment property is not deserving of constitutional rights protection. Sublimating the landlord's rights in the property to those of the tenant—who does, after all, need a place to live—should not therefore require compensation. The court's initial view of such legislation seemed broadly in accordance with this proposition. In *Mellacher v. Austria*,[113] for example, the court was content to find that matters fell within the State's margin of appreciation, despite legislative controls reducing rental income by more than

112. *See supra* Part I.B.

113. *See* Mellacher v. Austria, 169 Eur. Ct. H.R. (ser. A) (1989), 12 Eur. H.R. Rep. 391 (1990), http://hudoc.echr.coe.int/eng?i=001-57616.

eighty percent, in some cases, without allowing landlords the right to compensation.[114] More recently, however, the court's position has shifted.[115] For example, in *Hutten-Czapska v. Poland*, a violation was found on the basis that the landlord's "entitlement to derive profit from their property" had been disproportionately impacted by the regime in question,[116] a decision significantly more in keeping with a commodity account of property rules.

In the search for counterexamples, it is possible to point to a line of cases in which less than market-value compensation has been justified, namely in those cases related to the reallocation of property in former Communist countries.[117] Here, the court seems willing to accept that owners who acquired property during a Communist regime, and are expropriated of that property post-communism, may not be entitled to receive (full) compensation when the original acquisition is considered illegitimate.[118] The owner could or should have had no expectation that her ownership would continue, and so no compensation is merited. An argument can be made that these cases indicate some acceptance of a social obligation attaching to property ownership in the eyes of the court, but that argument has a flaw. As Allen points out, these cases are really about transitional rather than social justice[119]: the underlying inference in the court's language is that once the transition period ends—with the establishment of a liberal market economy—the "normal" rules will once again apply and market-value compensation will be required.

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114. *See generally* Spadea v. Italy, 315-B Eur. Ct. H.R. (ser. A) (1995), 21 Eur. H.R. Rep. 482 (1996), http://hudoc.echr.coe.int/eng?i=001-57937; Immobiliare Saffi v. Italy, 1999-V Eur. Ct. H.R. 73, 30 Eur. H.R. Rep. 756 (2000), http://hudoc.echr.coe.int/eng?i=001-58292; Scollo v. Italy, 315-C Eur. Ct. H.R. (ser. A) (1995), 22 Eur. H.R. Rep. 514 (1996), http://hudoc.echr.coe.int/eng?i=001-57936.

115. *See generally* Schirmer v. Poland, App. No. 68880/01 (Eur. Ct. H.R. Dec. 21, 2004), 40 Eur. H.R. Rep. 47 (2005), http://hudoc.echr.coe.int/eng?i=001-66642; Radovici v. Romania, 2006-XIII Eur. Ct. H.R. 21, 51 Eur. H.R. Rep. 32 (2010), http://hudoc.echr.coe.int/eng?i=001-77789.

116. *See* Hutten-Czapska v. Poland, 2006-VIII Eur. Ct. H.R. 57 ¶ 239, at 83, 45 Eur. H.R. Rep. 4 ¶ 239, at 134 (2007), http://hudoc.echr.coe.int/eng?i=001-75882.

117. *See generally* Jahn v. Germany, 2005-VI Eur. Ct. H.R. 55, 42 Eur. H.R. Rep. 49 (2006), http://hudoc.echr.coe.int/eng?i=001-69560; Zvolský v. Czech Republic, 2002-IX Eur. Ct. H.R. 163, http://hudoc.echr.coe.int/eng?i=001-60749; Pincová v. Czech Republic, 2002-VIII Eur. Ct. H.R. 311, http://hudoc.echr.coe.int/eng?i=001-60726.

118. The court would generally take this view when the applicant had acquired the property during the Communist era as a result of its expropriation without compensation from the prior owner.

119. Allen, *supra* note 109, at 1073.

CONCLUSION

In the introduction, I asked whether a tension between the commodity and propriety accounts of property could be identified in relation to the protection offered by Article 1 of the First Protocol to the ECHR. My exploration of the jurisprudence in Part III suggests that this tension does exist. As in U.S. takings jurisprudence, the commodity account is dominant within European case law, but excursions into the proprietarian narrative can also be identified.

The follow-on question that inevitably suggests itself is: why should we care? In short, my argument is that law benefits from clarity. When a person seeks to rely on the rights offered under Article 1, it should be possible to ascertain exactly what those rights are and to predict with some certainty whether the court would find an action taken by the State in violation of those rights. This basic tenet of the rule of law is of particular significance in the context of the fundamental rights under discussion here. A statement of rights does not exist purely to provide a remedy in instances when a State oversteps its bounds. It should also perform a normative function in directing States towards appropriate behaviour. If the right in question is poorly understood, its ability to perform this function is reduced. Even a scrupulous State may fail to respect the property rights of its citizens if the extent of those rights is confused. The lack of normative coherence in relation to Article 1 reduces its clarity and undermines the protection it should provide. In addition, it prevents meaningful analysis of whether the protection provided by the right is set at the correct level.

Furthermore, as with U.S. case law, identifying the normative values at play in the jurisprudence can help to explain areas where those decisions do not seem to make sense. One striking example of this in European jurisprudence concerns cases in which state action has resulted in the de jure loss of an applicant's title, but the court has determined the loss to be a rule three control of use rather than a rule two deprivation of possessions.[120] This occurs, it seems, in

120. *See generally* Gasus Dosier v. Netherlands, 306-B Eur. Ct. H.R. (ser. A) (1995), 20 Eur. H.R. Rep. 403 (1995), http://hudoc.echr.coe.int/eng?i=001-57918 (applicant's property being held by a third party was seized as partial repayment of that party's debt to the state); Butler v. United Kingdom, 2002-VI Eur. Ct. H.R. 349, http://hudoc.echr.coe.int/eng?i=001-22577 (two hundred forty thousand pounds in cash seized on the suspicion of use in criminal activity was

cases where the court does not consider the losses in question to merit payments of compensation.[121] Since the court has developed a rule that compensation *must* be paid for a deprivation, in such circumstances it is left with no other option than to say a loss of title is merely a control of use.

This absurd result comes about precisely because the normative basis for the compensation requirement has never been acknowledged. If I have correctly argued that the compensation requirement has developed through the court's adoption of a commodity account of property, it follows that the compensation requirement has limits. Had the court acknowledged this normative underpinning to its case law, it could have gone on to develop a line of normatively justified exceptions to the compensation rule. Without that acknowledgment, the case law has become, to use a familiar term, a "muddle."

There is no doubt that European scholars have some distance yet to travel to match the breadth and depth of constitutional property analysis developed by our U.S. counterparts to date. The ambition of this article is to begin bridging that gap, informed by the valuable dialogue between participants from both sides of the Atlantic during the conference in The Hague last year. I look forward to continuing these discussions as the European scholarship develops.

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forfeited despite no criminal conviction of applicant); J. A. Pye (Oxford) Land Ltd. V. United Kingdom, 2007-III Eur. Ct. H.R. 365, 46 Eur. H.R. Rep. 45 (2008), http://hudoc.echr.coe.int/eng?i=001-82172 (applicant's title was lost through the operation of domestic doctrine of adverse possession); Booker Aquaculture v. Sec'y of State [2003] 3 CMLR 6 (Scot.) (state-ordered slaughter of fish stock to lower the risk of the spread of piscine disease).

121. *See* David Anderson, *Compensation for Interference with Property*, 6 EUR. HUM. RTS. L. REV. 543, 553 (1999); George. L. Gretton, *The Protection of Property Rights*, *in* HUMAN RIGHTS AND SCOTS LAW 279 (Alan Boyle, Chris Himsworth, Andrea Loux & Hector MacQueen eds., 2002).

PROPERTY RIGHTS AS DEFINED AND PROTECTED BY INTERNATIONAL COURTS

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SYNOPSIS

International agreements have broad implications for property ownership and trade. Under international agreements, property is not limited to real property and intangible commodities but includes intellectual rights and any other right which have value. International conventions establishing rules expressly recognized by the contesting state must be applied by an international court when deciding disputes that are submitted to it. From this one may conclude that treaties are one of the principal sources of international law.

The role of the International Court of Justice ("ICJ") in legal disputes is discussed. The right to property is recognized in the Universal Declaration of Human Rights. A review of the case law indicates that to bring oneself within the protocols of the Universal Declaration of Human Rights, one must establish the existence of a property right. In general, a state does not have a right to property under international law. The paper also discusses the United Kingdom's decision to withdraw from the European Union. Once Brexit occurs, the ICJ and Britain will no longer have a formal legal relation. The paper concludes that property rights are protected by international treaties as a fundamental human right. Those rights belong to individuals not states.

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I. PROPERTY RIGHTS AS DEFINED AND PROTECTED BY INTERNATIONAL COURTS

The right of an individual to own property may be traced to the French Revolution and the United States Bill of Rights. As American lawyers, we assume not only the right to own property but the right to compensation if that property is taken by the government. That process is known as eminent domain.

Eminent domain is the right of the sovereign to take your property. It is an inherent power of government that is necessary for the fulfillment of sovereign functions. The idea that the government has the power of eminent domain goes back in English history to Magna Carta in 1215. This was the first time that the idea was written into law. Magna Carta was the first official document in English history that required the monarch to obey the written laws of the government. Article 39 of Magna Carta says: "No freemen shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land."[1] Indeed, one will find nothing in our American federal and state constitutions creating the power, only limitation on its exercise. That limitation is found within the Fifth Amendment to the United States Constitution: "[N]or shall private property be taken for public use, without just compensation."[2] These limitations are made applicable to the states by the Fourteenth Amendment. The Fifth Amendment to the United States Constitution was adopted on December 15, 1791. The New York State Constitution similarly provides, "private property shall not be taken for public use without just compensation."[3] There are similar protective provisions in place in the other forty-nine state constitutions.

A. Property Defined

The U.S. Supreme Court has declared that:

> The term "Property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It

1. MAGNA CARTA (1215) cl. 39.
2. U.S. CONST. amend. V.
3. N.Y. CONST. art. I, § 7(a).

> is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." . . . The constitutional provision is addressed to every sort of interest the citizen may possess.

Rights in property are basic civil rights that are constitutionally protected.[4]

As one author stated,

> What does "property" mean? Definitions vary, of course, but Black's Law Dictionary offers a fairly standard version: "That which is peculiar or proper to any person; that which belongs exclusively to one." It includes "everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate." John Lewis, in his classic treatise on eminent domain, put it this way: "Property may be defined as certain rights in things which pertain to persons and which are created and sanctioned by law. These rights are the right of user, the right of exclusion and the right of disposition." Unless "property" comes with a limiting adjective, then, it covers anything of value subject to an owner's exclusive rights of use transfer.[5]

B. International Agreements and Their Effect upon U.S. Law

The U.S. Constitution allocates primary responsibility for international agreements to the executive branch. In order for a treaty to become binding upon the United States, the Senate must provide its advice and consent to treaty ratification by a two-thirds majority.[6] In order to have domestic, judicially enforceable legal effect, the provisions of many treaties and executive agreements may require implementing legislation that provides the authority to enforce and comply with the international agreement's provisions.[7]

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4. Lynch v. Household Finance Co., 405 U.S. 538, 552 (1972) (citation omitted).

5. Tom W. Bell, *"Property" in the Constitution: The View From The Third Amendment*, 20 WM. & MARY BILL RTS. J. 1243, 1250 (2012).

6. U.S. CONST. art. II, § 2.

7. MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW (2015), https://fas.org/sgp/crs/misc/RL32528.pdf.

C. International Agreements

Certainly, international agreements have broad implications for property ownership and trade. Indeed, the definition of property as expressed in international agreements takes on a more expansive definition. Property is not limited to real property and tangible commodities but includes intellectual rights and any other right which has value.

Considering the fundamental role of treaties in international relations and recognizing the importance of treaties as a source of international law, the Vienna Convention on the Law of Treaties was adopted in 1969. The Vienna Convention on the Law of Treaties regulates the conclusion and entry into force of treaties, the application and interpretation of treaties, as well as the amendment, invalidity and termination of treaties. According to Article 2 of this multilateral agreement, a "treaty" means "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." A treaty concluded between one or more States and one or more international organizations, or between international organizations, can also be referred to as a treaty. According to Article 38 of the Statute of the International Court of Justice, "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states" must be applied by the ICJ, when deciding disputes that are submitted to it. From this, one can conclude that treaties are one of the principal sources of public international law.[8]

D. The International Court of Justice

According to its website, the International Court of Justice serves two functions.

> First, it settles, in accordance with international law, legal disputes submitted to it by States. Such disputes may concern, in particular, land frontiers, maritime boundaries, territorial sovereignty,

8. *Research Guides*, PEACE PALACE LIBRARY, http://www.peacepalacelibrary.nl/research-guides (last visited Jan. 6, 2017).

> the non-use of force, violation of international humanitarian law, non-interference in the internal affairs of States, diplomatic relations, hostage taking, the right of asylum, nationality, guardianship, rights of passage, and economic rights.
>
> Second, the ICJ gives advisory opinions on legal questions referred to it by duly authorized United Nations organizations and agencies. These opinions can clarify the ways in which such organizations may lawfully function, or strengthen their authority in relation to their member States.
>
> The ICJ consists of 15 judges, all from different countries, who are elected for a period of nine years and can be re-elected. One third of the composition of the Court is renewed every three years. The President of the Court is elected by his peers every three years; the current President is Judge Ronny Abraham from France. The hearings of the ICJ are always public. French and English are the official languages of the Court.[9]

E. Recognizing the Right to Property

A right to property is recognized in Article 17 of the Universal Declaration of Human Rights ("UDHR") which provides as follows:

> 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property.[10]

The right to peaceful enjoyment is found in Article 1 of Protocol 1 of European Convention of Human Rights.

The European Court of Human Rights ("ECHR") has held that Article 1 of Protocol 1 contains three rules:

> • The first one establishes the protection of property. It is contained in the first sentence of Article 1 of Protocol 1. ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions.")

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9. *International Court of Justice*, PEACE PALACE, https://www.vredespaleis.nl/jurisdiction/international-court-of-justice (last visited Jan. 6, 2017).

10. *Universal Declaration of Human Rights*, G.A. Res. 217 (A), art. 17 (Dec. 10, 1948).

- The second rule concerns the deprivation of property. It sets out requirements and general principles for expropriations and is laid down in the second sentence of Article 1 of Protocol 1. ("No 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 principles of international law.")

- The third rule deals with the control of use of property. It clarifies that obligations, such as tax duties, may be tied to property in the interest of the public. This rule is contained in the second paragraph of Article 1 of Protocol 1. ("The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.")[11]

While the ECHR has held that Article 1 of Protocol 1 contains the above three rules, it has also determined that the rules should not be viewed as isolated but rather as forming one concept of property protection.

II. *BEYELER V. ITALY*

Beyeler v. Italy was a case involving a Van Gogh painting, *Portrait of a Young Peasant*, purchased by Ernst Beyeler, a well-known Swiss art collector. The sale took place in Italy, which has laws protecting historical and artistic interest. The sale was reported to the Italian Ministry of Cultural Heritage. The Ministry showed interest in acquiring the painting. However, it had a limited budget for this purpose. The Ministry exercised its right of preemption, which was challenged by Mr. Beyeler. All challenges in Italian Courts resulted in dismissal. Mr. Beyeler then applied to the European Court of Human Rights arguing that there had been a violation of Article 1 of Protocol 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which guarantee the peaceful enjoyment of ownership rights. The ECHR held there was a

11. *The Right to Property—Introduction*, ECHR-ONLINE, http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/ (last visited Aug. 24, 2017).

violation and ordered the Italian State to pay Mr. Beyeler an amount of €1,355,000.

The litigation took over thirteen years. The case raised the interesting question of whether Italy had a legitimate public interest in acquiring a painting created by a Dutch artist in France.[12]

One commentator noted that before one can even begin to bring oneself within Article 1 of Protocol 1, one must establish the existence of a property right. It is well established that this can include "existing possessions" or assets, including claims that have at least a "legitimate expectation" of obtaining effective enjoyment of a property right.[13]

A. The State's Right to Property Under International Law

In general, a State does not have a general right to property under international law. There is no question that individuals have a general right to property under international law. The issue in the case of *Timor-Leste v. Australia* arose when agents of the Australian secret intelligence service seized privileged documents belonging to Timor-Leste on the premises of Timor-Leste's legal advisors in Australia. Timor-Leste sued Australia in the International Court of Justice.[14] There was no question that Australia had taken the documents. The International Court of Justice ruled that when a State interferes with any other type of property belonging to another State, no cause of action arises.[15]

Ursula Kriebaum and Christoph Schreuer, in their article, *The Concept of Property in Human Rights Law and International Investment Law*,[16] noted that property ownership may be compared to a bundle of sticks, each representing a distinct and separate right.

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12. Beyeler v. Italy, Eur. Ct. H.R. 2000-I 57.

13. Jessica Simor, *Key Developments in Human Rights in Judicial Review*, MATRIX LAW UK (June 18, 2012), http://www.matrixlaw.co.uk/wp-content/uploads/2016/03/01_12_2014_01_03_41_Judicial-review-and-regulatory-proceedings-conference.pdf.

14. Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Verbatim Record, 2014 I.C.J. 156 (Jan. 20).

15. Peter Tzeng, *The State's Right to Property Under International Law*, 125 YALE L.J. 1805 (2016).

16. Ursula Kriebaum & Christoph Schreuer, *The Concept of Property in Human Rights Law and International Investment Law*, *in* HUMAN RIGHTS DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 743, 757 (Stephan Breitenmoser et al. eds., 2007).

The issue was whether someone who owns only one or several, but not all sticks, enjoys property protection. The question was answered in the affirmative.

The authors presented three cases to support the conclusion.

In *Iatridis v. Greece*,[17] the ECHR accepted the good will of cinema as a "possession" within the meaning of Article 1, 1st Protocol. The case concerned the eviction of the operator of a cinema who owned the cinema equipment but had only leased the cinema site. The ECHR said in this respect: "[B]efore the applicant was evicted, he had operated the cinema for eleven years under a formally valid lease without any interference by the authorities, as a result of which he had built up a clientele that constituted an asset."[18]

The second case pertained to someone who owns real estate or an enterprise, i.e., the whole bundle of sticks, and is deprived only of one or several of them but not all of them. Is the deprivation of one of the sticks to be considered an expropriation of this single right or only a limitation of the whole bundle? In the first case, the second sentence of paragraph one of Article 1, 1st Protocol (deprivation of possession) would be applicable, whereas in the second case, paragraph two of Article 1, 1st Protocol (control of the use of property) would govern the situation. As will be illustrated, the ECHR did not look at single rights in isolation.

Tre Traktörer v. Sweden[19] concerned the revocation of a license to serve alcoholic beverages. The ECHR accepted the economic interest in the running of the restaurant as a "possession" within the meaning of Article 1, 1st Protocol. It said:

> [T]he Court takes the view that the economic interests connected with the running of Le Cardinal were "possessions" for the purpose of Article 1 of the Protocol. Indeed, the Court has already found that the maintenance of the license was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant.[20]

17. Iatridis v. Greece, 1999-II Eur. Ct. H.R. 75 (1999).
18. *Id.* at ¶ 54. Reference omitted.
19. Tre Traktörer Aktiebolag v. Sweden, 159 Eur. Ct. H.R. (ser. A) 7 (1989).
20. *Id.* at ¶ 53. Reference omitted.

Nevertheless the ECHR did not regard the interference in *Tre Traktörer v. Sweden* as expropriation as the measure did not take away all the rights of the bundle, but it instead considered the case under the second paragraph of Article 1 of the Protocol (control of the use of property). The ECHR said in this respect:

> Severe though it may have been, the interference at issue did not fall within the ambit of the second sentence of the first paragraph. The applicant company, although it could no longer operate Le Cardinal as a restaurant business, kept some economic interests represented by the leasing of the premises and the property assets contained therein, which it finally sold in June 1984. There was accordingly no deprivation of property in terms of Article 1 of the Protocol.[21]

The case of *Fredin v. Sweden*[22] concerned the revocation of the applicant's permit to extract gravel. When assessing whether the measure amounted to a *de facto* expropriation, the ECHR took into account the effects of the revocation on the surrounding properties also owned by the applicant. It said: "Nothing indicates, however, that the revocation directly affected these other properties. Viewing the question from this perspective, the Court does not find it established that the revocation took away all meaningful use of the properties in question."[23]

B. Brexit

Brexit from the European Union was approved by referendum on June 23, 2016. The U.K. government has two years to negotiate a withdrawal from the EU. Until then it remains an EU member State. On June 28, 2016, the leaders of the European Union's twenty-seven other nations made it clear to Prime Minister David Cameron that his country would not enjoy the benefits of membership like access to Europe's single market while sloughing off its burdens.[24]

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21. *Id.* at ¶ 55. Reference omitted.
22. Fredin v. Sweden, 192 Eur. Ct. H.R. (ser. A) (1991).
23. *Id.* at ¶ 45. Reference omitted.
24. Andrew Higgins & James Kanter, *A Blunt Message after Brexit: Bolting Will Carry a Heavy Price*, N.Y. TIMES, June 29, 2016, at A11.

The Vienna Convention on the Law of Treaties establishes that a party may withdraw "in conformity with the provisions of the treaty,"[25] which in this case is Article 50 of the Treaty on European Union.[26] Once this has been invoked, the EU and the United Kingdom will negotiate an agreement setting out the arrangements for withdrawal. The agreement will set out the arrangements for its withdrawal, taking into account the framework for its future relationship with the Union. According to an article in *The New York Times*, trade talks on quitting the bloc could last a decade, and even then might fail.[27] Great Britain's civil servants were instructed to draw up plans, which is apparently proving chaotic because no one knows what kind of deal the government is aiming at.

As was written by Heather McRobie in *Novara Wire*, "Brexit: What it Does and Doesn't Mean for Human Rights," discussing which human rights instruments would be affected by Brexit:

> This is the subject of some debate and much media noise, particularly over the 1998 Human Rights Act, which the Conservatives pledged to scrap in the last general election. As an Act of Parliament, the Human Rights Act stitched the European Convention on Human Rights (ECHR) into British law: like any other piece of legislation it can be removed at any time by a new Act of Parliament. The European Convention on Human Rights—like the European Court of Human Rights, to which it is attached—emerged out of the Council of Europe system, which is separate from the European Union. The removal of the Human Rights Act, whilst likely to come in tandem with Brexit, is neither dependent on Brexit nor Brexit upon it.
>
> The European Court of Justice (ECJ) is, on the other hand, an EU body that draws upon the case law of the European Court of Human Rights, and its Convention, so Brexit would entail Britain formally cutting the link between the ECJ and the UK (the legal relationship between the ECJ and the ECHR, (http://jurist.org/dateline/2013/09/elena-butti-lisbon-treaty.php) and how this

25. Vienna Convention on the Law of Treaties art. 54, May 23, 1969, 1155 U.N.T.S. 311.

26. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 50, Dec. 13, 2007, 2007 O.J. (C 306) 1.

27. Stephen Castle, *'Brexit' Talks Could Stretch 10 Years, British Officials Warn*, N.Y. TIMES (Dec. 15, 2016), http://www.nytimes.com/2016/12/15/world/europe/brexit-talks-could-stretch-10-years-british-official-warns.html.

> affects the UK as a non-standard member of the EU, has been complicated further by the Treaty of Lisbon).[28]

One thing is certain, Brexit will make London a far less attractive place to do business. According to an article published in *Bloomberg* on October 24, 2016, Brexit would cost banks and related companies in the United Kingdom almost forty-nine billion dollars in lost revenue and put seventy thousand jobs at risk.[29]

The apparent immediate concern is the impact for intellectual property rights. In an article published in *The National Law Review* on June 22, 2016, Laura Ganoza wrote:

> A UK exit from the EU will likely have a major effect on EUTMs. Currently, IP owners engaged in business in the UK have access to national protections through the UK Intellectual Property Office as well as EU-wide rights via the European Union Intellectual Property Office. Following Brexit, however, EUTMs would not be valid in the UK. Consequently, current trademark-holders would have to register for national trademark protections in order to maintain their rights in the UK. Furthermore, existing registrations that had been used only in the UK could become the subject of revocation for non-use post-Brexit, because their owners would not be able to prove use in the EU.[30]

According to Ms. Ganoza, Brexit will have a large impact on intellectual property enforcement and litigation. There will be a significant downside in the loss of U.K. courts' ability to grant EU wide injunctive relief for infringement of IP rights. Enforcement proceedings against European defendants would have to be brought in both the European Union and the United Kingdom. Once the United Kingdom has officially left the EU, property owners requiring protection of their rights will have to file separate applications in the United Kingdom and EU for trademarks and designs.

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28. Heather McRobie, *Brexit: What it Does and Doesn't Mean for Human Rights*, NOVARA MEDIA (Mar. 11, 2016), http://novaramedia.com/2016/03/11/brexit-what-it-does-and-doesnt-mean-for-human-rights/.

29. Gavin Finch, *What Brexit Means for Banks*, BLOOMBERG (Oct. 20, 2016, 12:07 AM), https://www.bloomberg.com/news/articles/2016-10-20/what-brexit-means-for-banks.

30. Laura Ganoza, *Impact of UK's Brexit for Intellectual Property Rights*, NAT'L L. REV. (June 22, 2016), http://www.natlawreview.com/article/impact-uk-s-brexit-intellectual-property-rights.

Perhaps this enormous change brought about by Brexit has justified the statement, "City law firms are preparing for a bonanza as clients seek guidance on the complex legal implications of Brexit."[31]

CONCLUSION

Property rights are protected by international treaty as a fundamental human right. The right belongs to individuals, not States. Property rights are broadly defined and may consist of partial enjoyment of a benefit. It is also clear that Brexit will cause the United Kingdom to suffer an extended period of uncertainty and contract disputes.

31. Jane Croft, *Lawyers Prepare for Brexit Bonanza*, FIN. TIMES (June 24, 2016), https://www.ft.com/content/7c08a07a-3a02-11e6-9a05-82a9b15a8ee7.