

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

* Senior Lecturer in Private Law, University of Glasgow. My thanks to Professor John A. Lovett and colleagues from the College of Law, Loyola University New Orleans, and to participants at the 2016 Brigham-Kanner Property Rights Conference for valuable comments on earlier drafts of this article. All mistakes are my own.

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 Rose³ and Alexander⁴ 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:

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:

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

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 Reich²² and Cass Sunstein²³ 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 Germany³⁰ 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

30. Grundgesetz [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 Union³⁹ 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

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; *accord, 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 taxation⁵³ or planning legislation,⁵⁴

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

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 State⁶⁷ 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 process⁶⁸—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 rules⁷⁶: 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 Costituzione [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

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 proprietary 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

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 tangible⁸⁵ or intangible⁸⁶ 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 hobby⁸⁹ 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); *Paefgen 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); *Melnichuk 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 environment⁹⁵ 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

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 possession⁹⁷ 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

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 proprietary 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

Öneriyildiz also provides interesting insight into the second way that the proprietary 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 proprietary 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 proprietary 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 1¹⁰⁷ 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 proprietary 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 proprietary 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

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 proprietary 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 proprietor 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 justice¹¹⁹: 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.

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.

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).