# ANCIENT LAND LAW: MESOPOTAMIA, EGYPT, ISRAEL

**ROBERT C. ELLICKSON* AND CHARLES DiA. THORLAND**

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ANCIENT LAND LAW: MESOPOTAMIA, EGYPT, ISRAEL

This Article provides an overview of the land regimes that the peoples of Mesopotamia, Egypt, and Israel created by law and custom between 3000 B.C. and 500 B.C. One purpose of the endeavor is narrowly pedagogic. In the United States, students who enroll in courses on property law traditionally have found the history of land law treated in highly stylized fashion. The leading casebooks begin their historical accounts with the Norman Conquest of 1066, sketch the English land regime under high feudalism, and then chronicle the developments over the ensuing centuries, particularly the weakening of the crown and the rise of a landowner's powers of alienation. Because English legal history is more directly relevant to an Anglo-American lawyer than any other remote history, some emphasis on these events is entirely appropriate. The shortcoming of this pedagogic tradition, however, is that the English struggles are presented as if they are without parallel. This is highly misleading. This Article demonstrates that the peoples of the ancient Near East grappled with comparable issues some 3,000 years before the English Normans did.

A look at land regimes in the earliest periods of human history can illuminate debate over the extent to which human institutions can be expected to vary from time to time and place to place. On this crucial question there are four general schools of opinion: rational-actor optimists, rational-actor pessimists, stage theorists, and cultural pluralists.

Some scholars who embrace a rational-actor model of human behavior are willing to leap from attributing universal characteristics to individuals to predicting significant regularities in social institutions. These rational-actor optimists forecast, with some caveats, that changes in economic conditions will prompt residents of a society to alter their property institutions so as to minimize the sum of:


2. Levmore, for example, has theorized: (1) that societies tend to develop efficient legal rules to prevent opportunistic behavior; and (2) when the efficient approach is plain, that these rules tend to converge. Saul Levmore, Variety and Uniformity in the Treatment of the Good-Faith Purchaser, 16 J. LEGAL STUD. 43 (1987) [hereinafter Levmore, Variety and Uniformity]; Saul Levmore, Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law, 61 TUL. L. REV. 235 (1986) [hereinafter Levmore, Rethinking Comparative Law]. For theoretical and empirical doubts about this convergence theory, see J. Mark Ramseyer, Water Law in Imperial Japan: Public Goods, Private Claims, and Legal Convergence, 18 J. LEGAL STUD. 51 (1989).
transaction costs; and (2) the costs of coordination failures. For example, one of the authors has hypothesized: that "a close-knit group virtually always entitles its members to own, as private property, lands used for dwellings, crops, and other intensive activities," that members of a close-knit group can be expected to opt for communal (group) ownership of lands only in circumstances where those arrangements exploit significant efficiencies of scale or spread significant risks that would otherwise be concentrated; and that a society invariably surrounds its private and communal parcels with a network of public open-access lands. Did the civilizations of the ancient Near East generate the marble cakes of land arrangements that this theory predicts?

Scholars who are rational-actor pessimists stress that defects in social-choice processes commonly prevent a society from developing adaptive institutions. A society is likely to go off track, various of these commentators might say, by starting down a path not easily reversed, or failing to prevent special interests from capturing undue political power. To illustrate, ancient Mesopotamia, Egypt, and Israel all had "palace" and "temple" organizations. Rational-actor pessimists might predict that these organizations, or others, would sometimes have succeeded in establishing inefficient land institutions that served the narrow interests of their constituencies.

Stage theorists aspire to identify sequences in institutional change. With earlier roots in the Scottish Enlightenment, stage theory was ascendent in the latter half of the nineteenth century, when Henry Maine, Lewis Henry Morgan, Karl Marx, Max Weber, and other leading intellectuals became engrossed with ancient civilizations. These

3. In the context of land institutions, this viewpoint is exemplified by Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967) (property rights evolve adaptively in response to changes in supply and demand conditions); Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315 (1993) [hereinafter Property in Land] (members of close-knit groups tend to generate rules that enhance the welfare of group members); and, for the ancient world specifically, Morris Silver, Economic Structures of the Ancient Near East (1985) [hereinafter Silver, Economic Structures].

4. Property in Land, supra note 3, at 1332.

5. Id. at 1331-32, 1341-44, 1381-87.

6. See, e.g., Avner Greif, Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies, 102 J. POL. ECON. 912 (1994). Also, see the folk theorem in game theory, which asserts that even an uncooperative equilibrium can be stable as long as each player could do even worse.


8. This perspective is evident in Douglass C. North, Structure and Change in Economic History (1981).
scholars sought to discern the transitions from, say, hunter-gatherer band, to rude agricultural village, to walled city. Marx in particular aspired to induce a theory of historical progression based on underlying property relations and "ruling classes." Much of the Marxian literature envisages a transition in late prehistory from a primitive tribal communism, in which class exploitation was absent, to emerging forms of private property that did entail exploitation. Marx's devotees, such as Engels and Lenin, tended to simplify his themes. Their most reductionist work envisioned a succession of stages: in the past—savagery, solidary clans, slavery, serfdom, and capitalism; in the future—socialism and ultimately pure communism. During the twentieth century, this linear script captured the imagination of many intellectuals and revolutionaries. Marxian ideas have particularly colored the work of the Soviet school of scholars of the ancient Near East. Does evidence from the ancient world support this or any other stage-theory of history?

Cultural pluralists, who now dominate work in history, anthropology, and sociology, stress differences among societies and epochs and the dangers of generalizing across them. This perspective is also well represented within the legal academy. For example, scholars associated with the Critical Legal Studies movement have tended to emphasize the mutability and contingency of human institutions. For them,


10. Writing before many of the significant archeological finds in Mesopotamia and Egypt, Marx saw history as a succession of stages based on modes of production, starting from a variety of "primary" bases: the Asiatic, the ancient, the Germanic, and the Slavonic. See E.J. Hobshawm, Introduction to Marx, Economic Formations, supra note 9, at 27-38.


ideology, language, class structure, and other interrelated cultural factors strongly influence institutions, including land regimes. A look back to earliest recorded human history can shed light on the plausibility of this perspective.

Our objective in this Article is not to reveal new findings about the ancient Near East—a task for which the senior author in particular is unqualified. Instead, our first aspiration is to publicize to a wide academic audience a trove of material about land institutions at the dawn of history. To scholars interested in institutional development, we offer the ultimate in time-series data. Aspiring to stimulate research, we pursue breadth, not depth. As a result, our discussion skitters across cultures and millennia.

Our second aim is to analyze this material from a law-and-economics perspective. This approach involves a set of methodological assumptions that should be made explicit. First, it assumes that 5,000 years is too brief a span for significant genetic evolution, and therefore that "human nature," such as it is, was no different in ancient times than it is in current times. Second, law-and-economics employs the previously mentioned rational-actor model of human behavior. This model anticipates that an individual will estimate the expected utility of alternative actions, and then choose the action that promises to maximize his personal expected utility, which may, of course, reflect a concern for others' welfare. Despite its many limitations, we regard this model as a fruitful prism in all social contexts, and think it has been too seldom used by scholars of ancient institutions.

Some historians regard the standard economic paradigm as an inappropriate heuristic for analysis of ancient economies. They believe, apparently, that people were too differently motivated then, or that markets could not, or did not, function in those environments.

16. Rather than commencing our analysis with a johnny-come-lately civilization such as ancient Rome, we have chosen to peer back twice as far.

17. A third, and presumably uncontroversial, assumption is that people in ancient societies faced scarcities of resources and possessed limited technical and scientific knowledge.


19. See, e.g., id. at 23-26, 35-55.

20. Levmore and Miller have been pioneers in the application of tools of law-and-economics to ancient law. See Levmore, Variety and Uniformity, supra note 2; Levmore, Rethinking Comparative Law, supra note 2; Geoffrey P. Miller, Contracts of Genesis, 22 J. LEGAL STUD. 15 (1993); Geoffrey P. Miller, Ritual and Regulation: A Legal-Economic Interpretation of Selected Biblical Texts, 22 J. LEGAL STUD. 477 (1993).

21. See, e.g., KARL POLANYI, THE LIVELIHOOD OF MAN 6-7 (Harry W. Pearson ed., 1977) [hereinafter POLANYI, LIVELIHOOD] (prices in noncommercial transactions do not fluctuate with
dissent from this view, and strive to demonstrate that law-and-economics can illuminate the institutions emerging at the outset of civilization.  

I. THE ANCIENT NEAR EAST

Taken together, Mesopotamia, Egypt, and Israel provide a rich lode of material on ancient land institutions. Despite their relative proximity, these three civilizations (two Goliaths and one David) differed sharply in numerous respects, including religion, language, and writing system. All three embraced a variety of practices that offend modern sensibilities—slavery, polygamy, and (with the qualified exception of Israel) polytheism. Nevertheless, Mesopotamia and Egypt rightly are regarded as cradles of civilization. By 3000 B.C., before any other society, the peoples of these lands had separately developed systems of writing, were capable of living in cities, and were beginning to engineer earthworks and other massive construction projects that for millennia would awe travelers from abroad. Ancient Israel, situated roughly equidistant between Mesopotamia and Egypt, took root in the highlands of Canaan during the late second millennium, nearly two thousand years afterward. The Israelites, however, ultimately had more direct influence on Western culture.

A. Mesopotamia

Mesopotamia, literally "the land between the rivers," lies between the Tigris and Euphrates, largely in present-day Iraq. Babylonia, the southern portion of the area, offers the richest concen-
tration of sources for our inquiry. Deceptively inauspicious, it is a semi-arid and exceptionally flat alluvial plain, with virtually no rain during the eight-month dry season and a mean daily high temperature reaching 122 degrees Fahrenheit in August.

Babylonia's climate and topography destined it to become a quintessential "hydraulic society," to invoke Karl Wittfogel's influential phrase. By no later than 4000 B.C., the natives of the region had recognized that, by controlling the Euphrates to provide irrigation, they could transform this inhospitable desert floodplain into fertile cropland. In its natural state, the Euphrates crossed the alluvium in shifting and meandering braids, dropping sediment that built up natural levees higher than the land surface. Especially at flood stage in spring, the water level in the river was higher than the riparian land. The natives' challenge was to devise a system of gravity-flow irrigation for the late fall and winter, critical periods in the annual crop cycle. Over many centuries, the inhabitants of southern Mesopotamia perfected the necessary earthworks. These included: outlets cut in the sides of the natural river levees to feed canals; excavated canals (perhaps opportunistically congruent with abandoned meander channels); regulators (weirs) employed to keep canal waters above...
adjoining land surfaces; and localized canal outlets to allow for controlled inundation of fields.\textsuperscript{34}

To build these earthworks, the Mesopotamians of the alluvium had to develop not only technologies but also social institutions that would enable them to mobilize large teams of men and animals. \textit{In this setting, investments in the social capital of civilization promised unusually high returns.} In addition, because southern Mesopotamia was relatively invulnerable to invasion during its early burst of agricultural development, the Mesopotamians could expect good success in preventing aliens from seizing what they produced. To the west, the Syrian desert (home of pesky Amorite nomads) initially provided something of a buffer; the rugged Zagros Mountains (home of clan-nish but fragmented tribes) lay to the east; to the south was the marshy delta at the top of the Persian Gulf; and, finally, to the north of the irrigable plain was a protective stretch of territory too inhospitable to sustain much settlement.\textsuperscript{35} Responding to their conducive natural conditions, during the fourth millennium the residents of Sumer (the southern portion of Babylonia) led human civilization into the Bronze Age.\textsuperscript{36} Their extraordinary innovations included axled vehicles, bronze tools, mathematics, the world’s first practical system of writing, and (by inference) methods of managing large organizations.\textsuperscript{37}

As the third millennium progressed, several dozen rivalrous walled city-states, surrounded by hinterlands of villages and farms, evolved in both Sumer and Akkad (northern Babylonia).\textsuperscript{38} Powerful states arose during the Old Akkadian (c.2350-2200 B.C.) and Ur III

\textsuperscript{34} See Postgate, \textit{Mesopotamia}, supra note 26, at 173-80.

\textsuperscript{35} Id. at 14.

\textsuperscript{36} See William H. McNeill, \textit{The Rise of the West: A History of the Human Community} 29-33 (1963) (conditions in lower Mesopotamia were conducive to emergence of larger social units after c.4000 B.C.); see also Johannes M. Renger, \textit{Institutional, Communal, and Individual Ownership or Possession of Arable Land in Ancient Mesopotamia from the End of the Fourth to the End of the First Millennium B.C.}, 71 CHI.-KEN L. REV. 269, 272 (1995) [hereinafter Renger, \textit{Arable Land}] (regional political entities arose in late fourth millennium concurrently with provision of regional irrigation facilities); Wittfogel, supra note 11, at 22-51 (how hydraulic agriculture fosters cultural and organizational advances).

\textsuperscript{37} The first evidence of cultivated crops and domesticated animals dates from c.8000 B.C. and comes from sites in the Fertile Crescent (including northern Mesopotamia) that are much less hydraulic than southern Mesopotamia. See Daniel Zohary & Maria Hoff, \textit{Domestication of Plants in the Old World} 13, 207 (1988). Cities also were evolving in northern Mesopotamia during the sixth millennium, before the settlement of the alluvium. Knapp, supra note 24, at 23-26. Our theory of the rise of civilization cannot account for the innovations at those times and places. It does offer, however, a hypothesis for why the seeds of civilization that had been sprinkled about the Fertile Crescent blossomed first in Sumer.

\textsuperscript{38} Silver, \textit{Economic Structures}, supra note 3, at 163, conjectures that the urban population of the ancient Near East was about 10%-20% of total population.
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(c.2100-2000 B.C.) periods under charismatic rulers, only to collapse again under the weight of foreign invasion, internal revolt, and the region's relentless centrifugal forces. A highpoint of the subsequent Old Babylonian period (c.2000-1600 B.C.) was the kingship of Hammurabi of Babylon (beginning c.1792 B.C.). In the sixteenth century B.C., however, all of Mesopotamia entered into something of a dark age after successive foreign invasions. The region's influence later revived, especially c.950-500 B.C., the era of the great Assyrian and Neo-Babylonian empires. In all, Mesopotamia enjoyed more than a 3000-year run as the site of one of the world's leading civilizations.

Mesopotamian societies developed sophisticated legal institutions, and more is gradually being learned about how they functioned.\(^\text{39}\) A village's council (elders and "mayor") may have served as a court of first resort. Many cities eventually housed temple- or palace-affiliated courts, whose judges were capable of dealing with complex disputes.\(^\text{40}\) The law codes, a primary source of legal information, mainly date from the period 2100-1700 B.C. Fragments of these codes have been found written in cuneiform on stone pillars (stelae). Four of the oldest and most complete of the known codes, all issued under the name of a ruler of an ascendant city-state, are the Laws of Ur-Namma\(^\text{41}\) (c.2100 B.C.); the Laws of Lipit-Ishtar\(^\text{42}\) (c.1930 B.C.); the Laws of Eshnunna\(^\text{43}\) (c.1770 B.C.); and the renowned Code of Hammurabi\(^\text{44}\) (c.1750 B.C.).\(^\text{45}\)

Although published by rulers of distinct regimes in different centuries, these codes share numerous themes and provisions. These similarities suggest enduring commonalities in the customary law of

\(^{39}\) Indeed, these legal institutions left a considerable "clay trail." Modern scholars have published editions of hundreds of tablets recording legal transactions, such as sales, estate divisions, even court decisions, and thousands more remain unpublished.

\(^{40}\) Postgate, Mesopotamia, supra note 26, at 275-77.

\(^{41}\) See Martha T. Roth, Laws of Ur-Namma, in Law Collections from Mesopotamia and Asia Minor 13, 15-22 (Piotr Michalowski ed., 1995) [hereinafter Laws of Ur-Namma]. Roth's translations of the cuneiform law codes are the most recent and reliable. We rely on them in virtually all instances.

\(^{42}\) See Martha T. Roth, Laws of Lipit-Ishtar, in Roth, supra note 41, at 23, 24-35 [hereinafter Laws of Lipit-Ishtar].

\(^{43}\) See Martha T. Roth, Laws of Eshnunna, in Roth, supra note 41, at 57, 59-70 [hereinafter Laws of Eshnunna].

\(^{44}\) See Martha T. Roth, Laws of Hammurabi, in Roth, supra note 41, at 71, 76-142 [hereinafter Code of Hammurabi].

\(^{45}\) Also relevant are a Sumerian legal exercise tablet, c.1800 B.C., and a compendium of contractual clauses in Sumerian, c.1700 B.C. For recent translations of these texts, see, respectively, Martha T. Roth, A Sumerian Laws Exercise Tablet, in Roth, supra note 41, at 42, 43-45 [hereinafter Sumerian Laws Exercise Tablet]; Martha T. Roth, Sumerian Laws Handbook of Forms, in Roth, supra note 41, at 46, 47-54 [hereinafter Sumerian Laws Handbook of Forms].
Babylonia\(^{46}\) (and also, perhaps, a compiler’s tendency to start from an existing text).\(^{47}\) Whether Old Babylonian judges actually heeded these code provisions is a matter of vigorous debate.\(^{48}\) No one disputes, however, that the code provisions are a valuable source on the customs and institutions of the era.

\section*{B. Egypt}

Ancient Egypt also was a hydraulic society centered on a desert floodplain.\(^{49}\) Apart from regions such as the Fayyūm just south of the Nile delta, however, its arable lands were in a fixed valley basin, not a flat alluvial expanse. The Nile inundated its valley each summer and then receded, leaving moist fertile soils prime for planting with barley (the staple grain of the ancients), flax, or emmer (a hard-to-thresh wheat). The Nile’s floods are more reliable and predictable than that of any other major river. Its relative regularity enabled the Egyptians to operate a largely decentralized irrigation system less complex than the Babylonians’.\(^{50}\)

In ancient Egypt, as in southern Mesopotamia, the expected returns from investing in the social capital of civilization were unusually high. To prevent a Hobbesian land-rush in late summer on fields in the moist flood basins, the ancient Egyptians had to devise systems for surveying and recording land titles. This circumstance undoubtedly helped spur the development of mathematics and writing. In addition,

\(^{46}\) Commonalities in the cuneiform codes and documents justify the use of phrases such as “Old Babylonian law,” or even, “Mesopotamian legal tradition.” See Martha Roth, Scholastic Tradition and Mesopotamian Law: A Study of FLP 1287, A Prism in the Collection of the Free Library of Philadelphia 1 (1979) (unpublished Ph.D. dissertation, University of Pennsylvania); A. Leo Oppenheim, Letters From Mesopotamia 16 (1967). This cuneiform jurisprudence influenced legal developments elsewhere in the ancient Near East, e.g., the “Hittite Laws” that governed what is now Anatolia. This collection of laws, the earliest copies of which date to 1650-1500 B.C., are translated in Martha T. Roth, Hittite Laws, in Roth, supra note 41, at 213, 217-40 [hereinafter Hittite Laws].


\(^{48}\) Compare Postgate, Mesopotamia, supra note 26, at 291 (codes probably influenced judges), with Raymond Westbrook, Cuneiform Law Codes and the Origins of Legislation, 79 Zeitschrift für Assyriologie und Vorderasiatische Archäologie 201-02 (1989) [hereinafter Westbrook, Cuneiform Law Codes] (powerful argument that, while monarch’s edicts were (strictly retrospective) legislation, the law codes were only compilations of precedent and custom, and did not in themselves bind the courts).

\(^{49}\) For a detailed description of the cultural ecology of Egypt in the Predynastic (c.5200-3050 B.C.) and Dynastic periods, see Karl W. Butzer, Early Hydraulic Civilization in Egypt: A Study in Cultural Ecology (1976). It is conventionally thought that Egyptian civilization burst forth somewhat after Sumerian civilization did. See McNeill, supra note 36, at 64-69.

\(^{50}\) Butzer, supra note 49, at 41-51.
Egyptian farmers were strongly motivated to coordinate with one another to develop irrigation systems to enable them to grow a second crop of vegetables and fodder.\(^{51}\)

The Egyptians' investments in civilization were even less risky than the Mesopotamians'. Protected by deserts to the east and west, cataracts of the Nile to the south, and the Mediterranean Sea to the north, the Egyptians could anticipate the success they would have in keeping foreigners from capturing riches they produced.\(^{52}\) Ancient Egypt had a far more unified and stable political structure than did Mesopotamia, perhaps because there were fewer potential invaders nearby and because the Nile was more suited than the Euphrates for large ships. In any event, Menes, the first pharaoh, succeeded in uniting the Upper and Lower Kingdoms of the Nile valley in around 3200 B.C. He was succeeded by thirty dynasties of pharaohs, whose reigns lasted until 341 B.C. Although periodically riven with internal chaos, with one exception Egypt was free of foreign invaders until the late second millennium.\(^{53}\) The civilization along the Nile prospered particularly during the Old (2695-2160 B.C.), Middle (1991-1785 B.C.), and New (1540-1070 B.C.) Kingdoms.\(^{54}\)

The ancient Egyptians' showy accomplishments overtly symbolized their organizational prowess. By the end of the Old Kingdom, they had sailing vessels 170 feet long\(^{55}\) and pyramids far taller than any ziggurat temple the Babylonians would ever erect. Although the Egyptians' painting, sculpture, and architecture were long unmatched, their hieroglyphic method of writing was less compact than Mesopotamian cuneiform (wedge-shaped markings on clay or stone). In addition, because papyri are far less durable than cuneiform's primary media, comparatively few ancient Egyptian documents have survived. As a result, while troves of Mesopotamian documents await translation, the structure of Egyptian land institutions must be inferred from a small number of texts written centuries apart. The most important of these are the farmer Hekanakht's letters (2002 B.C.), records of the lawsuit of Mose (c.1250 B.C.), and the cadastral survey contained in

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51. Id. at 50. Summer fodder crops also served to restore soil fertility.
52. KNAPP, supra note 24, at 31-32.
53. The exception was the roughly hundred-year domination of the Nile Delta by Palestinian kings (known as the Hyksos) during the seventeenth century B.C. See BARRY J. KEMP, ANCIENT EGYPT: ANATOMY OF A CIVILIZATION 25-26 (1989) [hereinafter KEMP, ANCIENT EGYPT]. Beginning in the twelfth century B.C., many invaders, especially ones from the sea, made Egypt their target. See KNAPP, supra note 24, at 182, 212-15, 239.
54. The dates of various Egyptian periods are drawn from KEMP, ANCIENT EGYPT, supra note 53, at 14.
55. SILVER, ECONOMIC STRUCTURES, supra note 3, at 66
the Wilbour Papyrus (1142 B.C.). Historians can derive some solace, however, from the exceptionally conservative and static character of Egyptian civilization; what is discovered about Egypt's early legal system almost invariably accords with the better documented portrait of its institutions in later eras.

C. Israel

The civilization of ancient Israel arose relatively inconspicuously, in the early Iron Age. The Israelites appear to have settled in the hill country of Canaan during the thirteenth century B.C., following their exodus out of enslavement in Egypt. Giving up their previously pastoral ways, they turned to cultivating wheat, barley, grapes, and olives, and raising sheep, goats, and other livestock. Agriculture was less centralized than in the hydraulic societies of Mesopotamia and Egypt. Israel has a Mediterranean climate, and essentially no rain from mid-May until September. In Canaan the basic tools of water management were the household cistern and the hillside terrace. Urbanization accelerated in Israel after David established his monarchy in 1000 B.C. The population of Jerusalem, King David's capital, grew from about 2,000 in c.1000 B.C., to about 25,000 in c.701 B.C. Alien emperors, such as Sargon II of Assyria and Nebuchadrezzar of

56. Legal texts, such as official records of lawsuits or contractual agreements, from the Old and Middle Kingdoms are especially rare, and there are almost no traces of law codes or other legal promulgations prior to the third century B.C. P.W. Pestman, The Law of Succession in Ancient Egypt, in Essays on Oriental Laws of Succession 58, 58-59, 65 (J. Brugman et al. eds., 1969). Nevertheless, documents of legal practice, often handed down in redacted form as funerary inscriptions, remain the best sources on Egyptian land law. See Aristide Théoridoridès, The Concept of Law in Ancient Egypt, in The Legacy of Egypt 291, 292 (J.R. Harris ed., 2d ed. 1971).


58. A wide-ranging source is Morris Silver, Prophets and Markets: The Political Economy of Ancient Israel (1983) [hereinafter Silver, Prophets]. Silver, the most prominent economic historian of the ancient Near East, focuses especially on the period 800-600 B.C.


60. See generally Oded Borowski, Agriculture in Iron Age Israel 87-139 (1987).


62. See id. at 151-52, 173-87 (on water systems in use c.1250-1050 B.C.); Silver, Prophets, supra note 58, at 22-23 (describing minor Israelite irrigation works in eighth and seventh centuries B.C.).

Babylonia, bullied Israel, particularly during 721-587 B.C.64 The Israelites' perennial concerns about security influenced their institutional arrangements.

The Hebrew Bible (or Old Testament) is the primary textual source on ancient Israelite society. Its first five books, the Torah (or Pentateuch), include several law codes, seemingly highly redundant, that contain numerous provisions on land.65 The Torah is thought to have been written in patches and fragments over many centuries. Its first portions date from no earlier than 1200-1100 B.C., and are recordings of oral accounts of events of the prior several centuries.66 Deuteronomy, the last of the five books, probably dates from the seventh or sixth century B.C.67 In 587 B.C., Babylonian invaders removed many Israelite priests to Babylon after sacking Jerusalem, and kept them there for the next fifty years. In anticipation of their eventual return to Canaan, the exiled priests interstitially inserted fresh material into the Torah and added glosses to older texts. This priestly material (the "P source") reflects the influence of egalitarian prophets—Amos, Hosea, Micah, Isaiah, Jeremiah, and others—who angled during 800-587 B.C. to reform the wickedness of their prospering and urbanizing society.68 The land law of the Hebrew Bible thus reflects over 500 years of development and reveals a variety of normative perspectives. Some of the Biblical land rules—particularly those created during the Babylonian captivity—appear not to have had any practical significance.69 Many provisions, however, unquestionably reveal customary practices that priests involved in the administration of the Israelite judicial system would have honored.70

64. KNAPP, supra note 24, at 251-52.
65. These are the Covenant Code (Exod. 20:22-23:33); the Holiness Code (Lev. 17-26); and the Deuteronomic Code (Deut.).
66. Westbrook tentatively dates the Covenant Code, the earliest of the three, to the tenth century B.C. Westbrook, Cuneiform Law Codes, supra note 48, at 219. Because the Hebrew script evolved only after 1000 B.C., any earlier versions had to have been written in other languages.
67. See id. at 219 (seventh century B.C.); Eryl W. Davies, Land: Its Rights and Privileges, in The World of Ancient Israel 349, 356 (R.E. Clements ed., 1989) (Deuteronomy was "essentially composed" after 587 B.C., during the Babylonian exile.).
68. See KNAPP, supra note 24, at 253; SILVER, PROPHETS, supra note 58, at 123-263.
69. See infra text accompanying notes 142, 459-69.
70. Deut. 17:8-13 implies priestly involvement in judicial matters. It is widely accepted that the Covenant Code, at least, prescribed juridically recognized norms. Cf. RAYMOND WESTBROOK, STUDIES IN BIBLICAL AND CUNEIFORM LAW 134-35 (1988) ("[U]nlike the cuneiform texts, [biblical law apart from the Covenant Code] contains the voice of dissent as much, if not more, than that of the establishment."). Westbrook regards Israelite law as part of a larger legal tradition of the ancient Near East. Id. at 1-8.
Another window on ancient Israel is the archival material unearthed in the port of Ugarit, a site in what is presently northern Syria. Ugarit's rich store of administrative and political documents, some in Akkadian and some in Ugaritic, has been dated to the fourteenth and thirteenth centuries B.C. Some texts provide information about land transactions, and the institutions depicted commonly parallel those described in the Hebrew Bible.

II. PRIVATE PROPERTY IN LAND

To an unblinking reader of formalist ancient texts, the pharaoh owned all land in ancient Egypt, and Yahweh, all in Israel. Contrarily, for more than a century, some commentators have asserted that ancient man knew only communal property. Evidence of actual social practices in ancient settings belies both of these reductionist perspectives. This Part demonstrates that in all historical periods some lands in ancient Mesopotamia, Egypt, and Israel were held as private property.

Private property connotes both a type of owner and a core set of entitlements. The discussion in this Part assumes that a private owner is either an individual, a nuclear household, or a household extended to include sons' wives and children. A private landowner's basic entitlements are the right to exclude trespassers, the privilege of deciding how the land is to be used, and the power at death to pass ownership interests in the land to successors. The civilizations of the


72. As a matter of theological formality, throughout ancient times the pharaoh was the titular landowner by virtue of his divinity. See Herman Kees, Ancient Egypt: A Cultural Topography 61-74 (F.D. Morrow trans., 1961).

73. Lev. 25:23 ("the land is mine; with me you are but aliens and tenants").


75. Chattels appear to have been "privately/individually owned" as far back as the Mesopotamian record reveals. Ignace J. Gelb et al., Earliest Land Tenure Systems in the Near East: Ancient Kudurrus 17 (1991) [hereinafter Gelb et al., Ancient Kudurrus].

76. The next Part considers land ownership by larger social units (such as clans and tribes) and also bureaucratic organizations (such as temples and palaces).

77. For the heritability of land in the ancient Near East, see infra Part IV.A. Some observers are unwilling to call a bundle of entitlements private property unless the entitled party has power to transfer by sale. See, e.g., William A. Ward, Some Aspects of Private Land Ownership and Inheritance in Ancient Egypt, ca. 2500-1000 B.C., in Land Tenure and
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ancient Near East conferred entitlements along these lines, but—like other societies that honor private property—also hedged the entitlements in certain respects.

A. Evidence of Private Land Ownership

Law-and-economics theory suggests that a society is almost certain to devolve to private households responsibility for dwelling maintenance and hard-to-monitor agricultural operations. In the three ancient civilizations, small family units indeed tended to dominate these land activities.

1. Houses and Gardens

All commentators agree that, from the earliest periods of ancient Near Eastern history, free family households—even the poorest of them—typically owned their own houses and garden plots.

SociaL TranSformation in the Middle East 63, 64 (Tarif Khalidi ed., 1984); cf. Renger, Arable Land, supra note 36, at 286-89, 295-96 (construing absence of field sales as evidence of absence of private property in fields). In ordinary language, however, the core denotation of private property is the owner's right to exclude. Restrictions on the power to alienate land by sale or gift not only were common in ancient times (see infra Part VI.D.) but also are today (e.g., cooperative apartments, commercial leases, beneficial interests in trusts). As these modern examples illustrate, one can appropriately characterize the ownership of an asset as private even though the owner lacks an unfettered power to sell.

See Property in Land, supra note 3, at 1322-32. Commercial and industrial buildings seem to have been rare in the ancient Near East. While archeologists have found some evidence of shops, most trade seems to have taken place along embankments, just inside city gates, and in other open areas. See Postgate, Mesopotamia, supra note 26, at 78-79; Silver, Economic Structures, supra note 3, at 118-21. On warehouses, see Silver, Prophets, supra note 58, at 35-38.

78. Some commentators might prefer possessed (or held) to owned, on the basis that owned falsely implies that an ancient household's entitlements were entirely secure. See infra text accompanying notes 127-34 & 311-19 (on expropriations and landowner duties). But possessed is surely too weak a term. In the ordinary language, one does not hesitate to assert that someone owns a house even though, for example, the state could take the house by eminent domain, the municipality could compel the owner to pay property taxes, and a bank could sell the house if the owner were to fall in arrears on mortgage payments. If the members of an ancient household could reasonably expect that authoritative decisionmakers would help them remain indefinitely on a land parcel as long as they performed the duties required of ordinary members of their society, they are appropriately labeled as owners of that parcel.

80. Even Saggs, a staunch advocate of the temple-ownership model, admits this was the case in Mesopotamia. H.W.F. Saggs, The Greatness That Was Babylon 163-64 (1962) [hereinafter Saggs, Babylon]; see also Adam Falkenstein, The Sumerian Temple City 14 (Maria del. Ellis trans., 1974) (1954); Postgate, Mesopotamia, supra note 26, at 94-96 (on ownership by extended and nuclear families). For Egypt, see Joseph Gilbert Dominic Manning, 1 The Conveyance of Real Property in Upper Egypt During the Ptolemaic Period: A Study of the Hauswaldt Papyri and Other Related Demotic Instruments of Transfer 25 (1992) (unpublished Ph.D. dissertation, University of Chicago) ("Garden and house plots . . . were arguably always in private control."). The earliest direct evidence from Egypt relates to a legal dispute during the early 4th Dynasty (c.2600 B.C.) following the consensual sale of a small house in Khufu. See Théoridoridès, supra note 56, at 292-93. For Israel, see Borowski, supra note 60, at
Although some stone and wood was in use, the basic domestic building material was mud brick, at times reinforced with straw.\textsuperscript{81} On farmsteads and in rural villages, where most of the population resided, an extended household might dwell in a cluster of one-story buildings. A wealthy family, rural or urban, might have a two-story house with an unroofed central court.\textsuperscript{82} Even within the crowded areas of walled cities, private homeownership appears to have been the norm.\textsuperscript{83}

A text from Ugarit suggests the intensity of interest in security in one's housing:

\begin{quote}
Ammistamru, ... king of Ugarit ... gave the house of Anndr ... to bdmlk ... and to his sons for ever. Nobody shall take it away from them. This house is in the hands of bdmlk ... and in the hands of his sons for ever, and there is no corvee from it.\textsuperscript{84}
\end{quote}

The prevalence of home ownership in Israel seems reflected in the opening words of the Tenth Commandment: “You shall not covet your neighbor’s house.”\textsuperscript{85}

2. Croplands, Orchards, and Vineyards

Of the three civilizations, Israel seems to have had the most privatized system of agriculture.\textsuperscript{86} The Hebrew Bible is rife with incidents and rules involving farmers’ fields, vineyards, and orchards.\textsuperscript{87}

25-26 (the Samaria Ostraca, an extra-biblical source, confirms private ownership of land in Israel). \textit{Cf.} Marx, \textit{Economic Formations, supra} note 9, at 90 (“[D]wellings ... appear to be always in the possession of individuals.”).

81. On house materials and designs, see Postgate, \textit{Mesopotamia, supra} note 26, at 88-91 (Mesopotamia); Hopkins, \textit{supra} note 61, at 143-48 (Israel); Silver, \textit{Prophets, supra} note 58, at 83-86 (Israel).
82. See Lloyd, \textit{supra} note 27, at 162-63; Silver, \textit{Prophets, supra} note 58, at 4, 84-86 (archaeological evidence of multiroom and multifloor houses in Israel by c.1050 B.C.). For evidence of mass production of houses, see \textit{id.} at 19.
83. See Postgate, \textit{Mesopotamia, supra} note 26, at 96-97 (on heritability of urban residential property). In New Kingdom Egypt, at the impacted “model” workmen’s village of Deir el-Medina, there is also evidence that houses tended to pass from father to son. James, \textit{supra} note 57, at 230-31; see also \textit{id}. at 174-75, 216 (letter to agent ordering purchase of urban land as house-plot and giving instructions for building of house).
84. Heltzer, \textit{Royal Economy, supra} note 71, at 479 (punctuation simplified). An interpreter of this passage should want to know more about what had happened to Anndr.
85. \textit{Exod.} 20:17. This interpretation is not utterly plain, however, because in some Biblical contexts house refers not to a dwelling but to a family line or patrimonial inheritance. \textit{See Raymond Westbrook, Property and the Family in Biblical Law} 12-14 (1991) [hereinafter \textit{Westbrook, Biblical Law}].
86. On the dominance of households in Israelite agriculture, see Borowski, \textit{supra} note 60, at 22-26; Hopkins, \textit{supra} note 61, at 252-54. When settling a new territory, Israelite households divided the land into portions of equal value, and then chose plots by lot. Moshe Weinfeld, \textit{The Promise of the Land} 35-36 (1993). In light of the Hebrew tradition of household farming, the kibbutz movement of modern Israel had to be founded on a secular socialist ideology, not ancient religious tenets. \textit{See Property in Land, supra} note 3, at 1347-48.
87. \textit{Deut.} 5:21 adds field to the Tenth Commandment’s list of a neighbor’s things that one should not covet.
Israelite practice was hardly exceptional for its region. Legal texts from Ugarit, the seaport in northern Syria, attest to the existence of privately owned estates in 1400-1200 B.C.\textsuperscript{88}

In the hydraulic civilizations of Mesopotamia and Egypt, ownership of agricultural lands was more varied.\textsuperscript{89} Most scholars currently agree that during all historic periods some croplands in both regions were in the hands of private owners who owed no special services to the crown.

There has been much debate over the extent of private land tenure in southern Mesopotamia during the third millennium, the earliest historic period. An outdated view holds that Sumerian culture then recognized only institutional or communal ownership of arable land, and that Semitic immigrants imported the alien institution of private landownership, bringing it first to Akkad toward the end of the millennium.\textsuperscript{90} The most recent scholarship on Mesopotamia, however, indicates that private property in fields co-existed with palace and temple property throughout the third millennium.\textsuperscript{91} While Diakonoff and other members of the Soviet school have argued that almost all land was held communally prior to the rise of the temple in the mid- and late third millennium,\textsuperscript{92} some of the earliest recorded land sales are by individuals, not groups.\textsuperscript{93} Even during the Ur III period in Sumer, when palace power was at a peak, investigators have found records of sales of private houses and orchards, field leases, and royal grants of fields to individuals.\textsuperscript{94}


89. See infra text accompanying notes 173-257.

90. Knapp, supra note 24, at 82-84, 86-87, 96; Saggs, Babylon, supra note 80, at 46, 164.


92. See infra note 175 and accompanying text.

93. Ignace J. Gelb, On the Alleged Temple and State Economies in Ancient Mesopotamia, 6 Studi in Onore di Edoardo Voltterra 137-54 (1969); Foster, New Look, supra note 91, at 239-40 (review of mid-third millennium administrative records from an archive at Telloh reveals 652 instances of individually held land parcels, mostly 4-12 acres in area, with a large majority of the landholders identified as skilled craftsmen, professionals, and other untitled people not associated with the temple).

In any case, there is universal agreement that outright private ownership of agricultural lands was widespread in northern Babylonia by the start of the second millennium (the Old Babylonian period).\(^5\) By that time and place, at least, there appear to have been brisk markets for agricultural workers and other farm inputs.\(^6\) A provision of the Code of Hammurabi deals explicitly with breach of a promise to faithfully supervise crop-growing operations:

> If a man hires another man to care for his field, that is, he entrusts to him the stored grain, hands over to him care of the cattle, and contracts with him for the cultivation of the field—if that man steals the seed or fodder and it is then discovered in his possession, they shall cut off his hand.\(^7\)

Evidence on land tenure is thinnest for Egypt. Perhaps because the coordination of post-inundation land recoveries may have been particularly crucial along the Nile, land ownership appears to have been more centralized there than in southern Mesopotamia and Israel.\(^8\) A number of parties, private and institutional, sometimes retained concurrent claims on the same land.\(^9\) Even so, the emerging scholarly consensus holds that private owners controlled some agricul-

\(^{323}\), but market inalienability does not negate the existence of private land ownership. See supra note 77.

\(^{95}\) See Johannes Renger, Interaction of Temple, Palace, and "Private Enterprise" in the Old Babylonian Economy, in 1 State and Temple Economy in the Ancient Near East 249, 250-51 (Edward Lipinski ed., 1979). Renger doubts that private field ownership was common in the South, where the palace and temple retained many sustenance and rental fields. Id.

\(^{96}\) Paragraphs 257-58, 261, \& 268-273 of the Code of Hammurabi, supra note 44, specified the wages private farmers were to pay to cultivators, shepherds, and wagoners, and the rentals farmers were to pay to hire draft animals. A prior Mesopotamian Code had analogous provisions. See Laws of Eshnunna, supra note 43, ¶¶ 3, 7-8, 10. Prices in ancient codes tended to be below market. See Postgate, Mesopotamia, supra note 26, at 194-95. This pattern suggests that the authors of these provisions were seeking to gain the favor of purchasers involved in these transactions. Whether these sorts of price controls—common in the ancient Near East—that any practical effect is uncertain. See Yaron, Eshnunna, supra note 47, at 224-25; see also infra text accompanying notes 482-87; infra note 440 (on usury laws).

\(^{97}\) Code of Hammurabi, supra note 44, ¶ 253.

\(^{98}\) Manning, supra note 80, at 24 (citing summary by Kees, supra note 72). From the start of the historical era in the third millennium, however, Egypt's social and administrative system rested on the interactions of families and individuals with civil institutions, temples, and the state. Tribal and gentilic organizations, if present at all, played no discernible role. See Théodoridès, supra note 56, at 292.

\(^{99}\) Private individuals, officials, and temple foundations, for instance, could each hold simultaneous interests in a parcel of land recorded on an official survey such as the Wilbour Papyrus. The king maintained a superordinate interest in all lands: theologically, through his divine status, and practically, by virtue of his continuing levies of land taxes. See David O'Connor, New Kingdom and Third Intermediate Period, 1552-644 B.C., in Ancient Egypt: A Social History 183, 226-28 (B.G. Trigger et al. eds., 1983) [hereinafter Ancient Egypt]; see also Kees, supra note 72.
tural lands throughout ancient Egyptian history. In the Early Dynastic period of Egypt (3050-2695 B.C.), some royal officials controlled landed estates that had been transferred to them (perhaps by pharaonic grant, perhaps through inheritance), and villagers honored traditional private land holdings. There is some evidence of private land ownership in the Old and Middle Kingdoms, and much for the New Kingdom. Perhaps to diversify risks of variations in the Nile's inundation, many private landholders held not a single discrete farm, but a collection of scattered plots, some owned outright, and others rented from a temple or other landholder. The Wilbour Papyrus, the richest source on ancient Egyptian land tenure, identifies smallholders by 54 different professions, some of the most frequent of which were: priest, stablemaster, soldier, herdsman, and scribe. Perhaps surprisingly, 11% of the identified smallholders were women.

B. A Landowner's Right to Exclude Trespassers

The foundational norm of private property in land is an owner's broad (but not unlimited) right to control entry. On this legal issue there is much textual evidence from Mesopotamia and Israel, the two civilizations for which law codes have been found.

100. Manning, supra note 80, at 21-22. One scholar confidently states that it is "well known that private individuals could own farm land at all periods of ancient Egyptian history." Klaus Baer, The Low Price of Land in Ancient Egypt, 1 J. AM. RES. CENTER IN EGYPT 25 (1962) [hereinafter Baer, Low Price]; see also Ward, supra note 77, at 64, 67-68, 72 (while the royal family, temple, and highest aristocrats owned most of Egypt's agricultural land during 2500-1000 B.C., persons from all social classes could and did own it as private property).

101. B.G. Trigger, The Rise of Egyptian Civilization, in ANCIENT EGYPT, supra note 99, at 1, 57-58. Moreover, the Palermo Stone demonstrates that, at least from the 2nd Dynasty onwards (c.2900 B.C.), the state conducted a biennial census "of gold and fields," a procedure that implies transactions in a private economic sector. Thêoridoridês, supra note 56, at 292.

102. Barry J. Kemp, Old Kingdom, Middle Kingdom, and Second Intermediate Period c. 2686-1552 BC, in ANCIENT EGYPT, supra note 99, at 71, 81-82 [hereinafter Kemp, Old Kingdom]. But cf. George R. Hughes, Saite Demotic Land Leases 1-2 (1952) (doubting if there were many small-holders prior to the New Kingdom).

103. See Sally L.D. Katary, Land Tenure in the Ramesside Period 23, 211-12 (1989); Manning, supra note 80, at 21.


105. Katary, supra note 103, at 299-301. There has been debate over how to characterize the financial obligations listed in the Wilbour Papyrus. Compare Baer, Low Price, supra note 100, at 32, 41 (P. Wilbour probably is a central agency's accounting of the rents due temples) with Katary, supra note 103, at 11, 211-12 (because P. Wilbour smallholders had inheritable rights and owed only small quantities of grain, they should be regarded as freeholders regardless of whether sums listed in the P. Wilbour are "rents" or "taxes").


107. Property in Land, supra note 3, at 1362-63 (discussing the "Blackstonian" bundle of land entitlements).
Sumerian and Akkadian boundary inscriptions commonly included general “curses” against boundary crossers. The Akkadian verb meaning “to cross,” like the English “trespass,” sometimes connotes immorality. All four major Mesopotamian codes include provisions that condemn trespassing. To violate certain of these provisions, a trespasser had to have not only entered the land without permission, but also either to have committed an additional wrongful act or harbored an improper motive. For example, several codes impose stiff monetary penalties for felling a tree on another’s land or entering an orchard with an intent to steal. A provision in the Laws of Eshnunna, however, makes a trespasser strictly liable for being in cropland, even in the absence of aggravating circumstances:

A man who is seized in the field of a commoner among the sheaves at midday shall weigh and deliver 10 shekels silver; he who is seized at night among the sheaves shall die, he will not live.

This provision, by distinguishing cropland from, say, pasture, signals the importance of protecting investments in cultivation.

The chief livestock in ancient Mesopotamia were sheep and goats, with cattle and pigs next in importance. Animals commonly were placed in the care of shepherds, who specialized in locating fodder and pasture within the semiarid environment. The Code of Hammurabi includes two provisions on a fieldowner’s remedies for trespass by sheep; these triple the sheep-herder’s liability once the crop has progressed beyond the stage of green shoots. The Israelites’ Covenant Code requires a party to make restitution for having

109. Laws of Lipit-Ishtar, supra note 42, ¶ 10; Code of Hammurabi, supra note 44, ¶ 59; see also Hittite Laws, supra note 46, ¶ 104.
110. Laws of Lipit-Ishtar, supra note 42, ¶ 9 (“If a man enters the orchard of another man and is seized there for thievery, he shall weigh and deliver 10 shekels of silver.”); see also Hittite Laws, supra note 46, ¶¶ 101, 103 (prescribing sanctions against those who steal crops).
111. On the meaning of this word in the original, see YARON, ESHNUMNA, supra note 47, at 51, 132-46 (eventually deciding to translate it as “subject”).
112. Laws of Eshnunna, supra note 43, ¶ 12. Like many provisions in the cuneiform codes, this one does not explicitly identify to whom the monetary sum is to be “delivered.” The code provisions that do specify a recipient, however, invariably name the victim of the offense, not crown or village authorities. See, e.g., Laws of Eshnunna, supra note 43, ¶¶ 23, 36, 53; Code of Hammurabi, supra note 44, ¶¶ 24, 42, 53.
113. Code of Hammurabi, supra note 44, ¶¶ 57-58. For commentary, see 1 The Babylonian Laws 154-57 (G.R. Driver & John C. Miles eds., 1952) [hereinafter Driver & Miles]; see also Hittite Laws, supra note 46, ¶ 107 (setting formulas for damages to be paid by stockman who let sheep ruin another’s vineyard).
intentionally (and perhaps even negligently) caused livestock to trespass.\textsuperscript{114}

The ancient codes are especially unforgiving of an unconsented entry into a dwelling. Applying distinctions reflected in the English common law three millennia later, the Laws of Eshnunna call for the death of a trespasser who is discovered in a commoner’s house at night.\textsuperscript{115} The Code of Hammurabi prescribes capital punishment for a trespasser who has \textit{broken into} a house.\textsuperscript{116} \textit{Exodus} 22:2-3, only slightly more forgiving, privileges a house owner to kill a burglar caught breaking in at night, but not “after sunrise,” when the owner’s successful use of lethal force would be deemed excessive enough to justify the burglar’s kinfolk avenging the burglar’s death.

Private property in land presupposes sanctions against encroachments and interferences with valid boundary monuments. The earliest of the known codes, the Laws of Ur-Namma, provides that a farmer who violates the “rights” of another by growing a crop on his field forfeits all expenses.\textsuperscript{117} A number of cuneiform codes from northern Mesopotamia deal explicitly with encroachments.\textsuperscript{118} Under the Middle Assyrian Laws, a bad-faith encroacher has to forfeit his improvements to the land’s owner, but one who improves another’s land while its owner looks on without objection is entitled to keep the improved land if he compensates the owner with equivalent land.\textsuperscript{119} In Egypt, a similar concern with physical boundaries is manifested in the charter

\textsuperscript{114} \textit{Exod.} 22:5: “When someone causes a field to be grazed over, or lets livestock loose to graze in someone else’s field, restitution shall be made from the best in the other’s field or vineyard.”

\textsuperscript{115} \textit{Laws of Eshnunna, supra} note 43, \S\ 13 (trespasser in house at night shall die (perhaps privileging self-help homicide by house-owner); trespasser in broad daylight shall pay 10 shekels of silver). For discussion, see \textsc{Yaron, Eshnunna, supra} note 47, at 259-60 & n.11.

\textsuperscript{116} \textit{Code of Hammurabi, supra} note 44, \S\ 21 (“If a man breaks into a house, they shall kill him and hang (?) him in front of that very breach.”); cf. \textit{Hittite Laws, supra} note 46, \S\ 93 (pecuniary sanctions to be imposed on trespasser caught attempting to enter house).

\textsuperscript{117} \textit{Laws of Ur-Namma, supra} note 41, \S\ 27. Tablet B, \S\ 13 of an Assyrian code originating in the fourteenth century B.C. calls for a bad-faith squatter on a field to forfeit his crops and other improvements to the land’s owner. For a recent translation of this code, see Martha T. Roth, \textit{Middle Assyrian Laws, in Roth, supra} note 41, at 153, 155-94 [hereinafter \textit{Middle Assyrian Laws}].

\textsuperscript{118} \textit{See Hittite Laws, supra} note 46, \S\ 168 (“He who violated the boundary, shall give one sheep, 10 loaves, and one jug of ... beer and reconsecrate the field.”); \textit{Middle Assyrian Laws, supra} note 117, Tablet B, \S\S\ 8-9 (large-scale encroachments by one neighbor upon another’s lands subjects guilty party to forfeiture of three times the land in question, corporal punishment, and penal servitude; small-scale encroachments subject guilty party to lesser corporal punishment and money fine).

\textsuperscript{119} \textit{Compare Middle Assyrian Laws, supra} note 117, Tablet B, \S\ 12 with \textit{id}. Tablet B, \S\S\ 13-15.
of a temple foundation at Abydos (c.1300 B.C.).\textsuperscript{120} The Hebrew Bible includes numerous condemnations of those who tamper with boundary markers, for example, \textit{Proverbs} 23:10: "Do not remove an ancient landmark or encroach on the fields of orphans."\textsuperscript{121}

In exceptional circumstances, Anglo-American common law privileges a passerby to enter the private land of another without consent. For instance, a parent can invoke private necessity to enter to retrieve a wandering toddler. In a similar vein, and without any known Mesopotamian precedent, the Torah of the Israelites authorizes impoverished persons to enter upon private agricultural lands to obtain small quantities of food.\textsuperscript{122} \textit{Leviticus} 19:9-10 provides an example:

When you reap the harvest of your land, you shall not reap to the very edges of your field, or gather the gleanings of your harvest. You shall not strip your vineyard bare, or gather fallen grapes of your vineyard; you shall leave them for the poor and the alien.\textsuperscript{123}

The exact terms of this archaic social-insurance program vary from passage to passage in the Hebrew Bible. While the Leviticus Holiness Code confers entry rights upon "the poor and the alien," portions of the Deuteronomic Code define the beneficiaries as "the alien, the orphan, and the widow," somewhat more definite categories of persons.\textsuperscript{124} All Torah provisions limit the amount that can be taken, but vary in how the ceiling is set. An entrant seeking grain is variously restricted to: the leavings after the harvest; the crop growing at the edge of the field; or what the entrant could gather without use of a sickle.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{120} This is monumentally preserved on the so-called Nauri Decree of Sethos I. The Decree includes a by-law that ordains that any high official, overseer of the estate's fields, herdsman of plowing cattle, or factor who tampers with the boundaries of the land belonging to the temple shall have his ears cut off and be reduced to a field laborer of the temple. \textit{See} JAMES, \textit{supra} note 57, at 80-82.
\item \textsuperscript{121} \textit{See also} Deut. 19:14, 27:17; Hosea 5:10; Prov. 22:28 (all condemning those who "move" or "remove" boundary markers). SILVER, PROPHETS, \textit{supra} note 58, at 74, interprets these provisions as injunctions against land consolidations, a construction plausible only if the verb were to be translated as "remove." One might expect a passage intended to prevent land assembly to read, "You must not acquire your neighbor's field," not, as in Deut. 19:14, "You must not move your neighbor's boundary marker . . . ."
\item \textsuperscript{122} These Torah provisions had enduring influence. \textit{See} 3 WILLIAM BLACKSTONE, CON\textsc{}MENTARIES *212-13 (citing Israelite codes as a basis for the rights of the English poor to glean).
\item \textsuperscript{123} \textit{See also} Lev. 23:22 (similar, but lacks references to vineyards).
\item \textsuperscript{124} Deut. 24:19-21. These categorical limitations must be reconciled with the broader language in Deut. 23:24-25, which in isolation could be construed as creating universal privileges to enter private farmland to obtain a meal.
\item \textsuperscript{125} Compare Lev. 19:9-10, reproduced earlier in this paragraph, with Deut. 23:25 (ban on use of sickle). An entrant into a vineyard might be limited to: the leavings after harvest; fallen grapes; or (Deut. 23:24): "If you go into your neighbor's vineyard, you may eat your fill of grapes, as many as you wish, but you shall not put any in a container."
\end{itemize}
The extent to which this system of social insurance was honored in ancient Israel is impossible to know. Perhaps instructive on this front is the story of Ruth, who was both an alien (Moabite) and a widow. Before going upon Boaz’s barley and wheat fields to glean for food, Ruth asked him “please”—perhaps an indication of her lack of privilege, but, alternatively, perhaps just a courtesy or an overture to the man she would later marry.126

C. A Landowner’s Protection from Expropriation

Confiscation is a far larger insult to the right to exclude than is trespass. In the ancient Near East, an alien invading force might suddenly seize lands.127 A conviction for treason could result in forfeiture of property to the palace.128 Potentially most worrisome of all was the risk of an unprincipled and land-hungry monarch.129 As Samuel put it, a king might be tempted to “take the best of your fields and vineyards and olive orchards and give them to his courtiers.”130 Nevertheless, royal officials may have been somewhat constrained by norms against “takings,” especially without compensation.131 Two anecdotes strongly suggest the existence of norms along these lines.

Postgate reproduces a translation of a letter from Hammurabi to his governor at Larsa, complaining of misconduct by someone who appears to have been a lower-level royal bureaucrat:

126. See Ruth 2. In addition, gleaners typically delayed coming onto a field until after the sheaves of harvested stalks had been gathered and taken away. Ruth’s request, “to glean and gather among the sheaves behind the reapers,” may have been uncommonly assertive. Borowski, supra note 60, at 61.

127. See, e.g., Jer. 39:10, 52:16 (reporting that Babylonian invaders had expropriated fields in Judah and redistributed them to the poor).


129. See Benjamin R. Foster, Early Mesopotamian Land Sales, 114 J. AM. ORIENTAL SOC’Y 440, 444 (1994) [hereinafter Foster, Land Sales] (referring to expropriations of land by Naram-Sim in Lagash during Sargonic Period); Postgate, MESOPOTAMIA, supra note 26, at 41 (confiscations by Sargon of Akkad in Sumer); Jac. J. Janssen, The Role of the Temple in the Egyptian Economy During the New Kingdom, 2 STATE AND TEMPLE ECONOMY IN THE ANCIENT NEAR EAST 505, 509 (Edward Lipinski ed., 1979) (pharaohs sometimes took temple property).

Kings also are reported occasionally to have “withdrawn” land previously granted. See, e.g., Hughes, supra note 102, at 1 (pharaoh’s withdrawals from nobles and soldiers); Heltzer, Mortgage, supra note 88, at 89, 93 (withdrawals in Ugarit). These sources do not make clear to what extent these withdrawals dashed landowners’ expectations.

130. 1 Sam. 8:14.

131. It is notable that even the most aggressive monarchs sometimes chose to buy, not confiscate, land. See Postgate, MESOPOTAMIA, supra note 26, at 41 (Sargon I’s land purchases on northern plain in the third millennium, perhaps from buyers he had put under duress); I.M. Diakonoff, supra note 74, at 17 (evidence that even Sargon II of Assyria rendered compensation when he took land).
May Adad [the God of Rain and Storms] keep you alive! About the field of Ahum-waqar: As you know, he has been enjoying the use of the field for 40 years, and now he is going on one campaign in the king’s corps, but Sin-imuranni has now taken the field away from him and given it to a servant of his. Look into the matter and don’t allow him to suffer an injustice.132

One of the Hebrew Bible’s memorable cautionary tales involves King Ahab’s forcible acquisition of his neighbor Naboth’s vineyard.133 “Because it is near my house,” Ahab desired to have the vineyard and convert it to a vegetable garden. Ahab began by offering Naboth compensation, either cash or in kind. These Naboth refused, saying “The Lord forbid that I should give you my ancestral inheritance.”134 Jezebel, Ahab’s wife, and presumably a staunch proponent of the garden project, then successfully conspired to have two scoundrels falsely accuse Naboth of blasphemy, and stone him to death. Although this homicide cleared Ahab’s path to possessing the vineyard, the biblical text stresses that the Lord was greatly angered by what Ahab and Jezebel had done.

D. A Landowner’s Privileges to Control Land Uses

Honoring a hallmark of private property in land, the three ancient civilizations appear to have permitted owners broad discretion over the use of their parcels.135 Nonetheless, the sources include some provocative examples of land-use controls that functioned to secure economies of scale and prevent activities with spillover effects harmful to neighbors.

1. Crop Selection and Fallowing

Even in Egypt, the most centralized of the three societies, the fragmentary evidence suggests that small-holders typically could decide what crops to plant and when.136 Virtually the only textual

132. Postgate, Mesopotamia, supra note 26, at 187.
133. 1 Kings 21:1-19.
134. 1 Kings 21:3. Although norms against alienation of ancestral lands undoubtedly helped motivate Naboth’s refusal (see infra text accompanying notes 381-402), it may also have been significant that Ahab’s taking was for “private,” not “public” use. For a modern perspective on this issue, see Thomas W. Merrill, The Economics of Public Use, 72 CORNELL L. REV. 61 (1986).
136. See Ward, supra note 77, at 76 n.24 (quoting this expansive language from Papyrus Turin 2021: “Pharaoh has said: Each should do as he wishes with his property.”).
sources on Egyptian agriculture prior to the New Kingdom are two letters that a prosperous farmer, Hekanakht, wrote to his sons in 2002 B.C., a few weeks prior to the onset of the planting season. Hekanakht appears to have been able to make farming decisions without the approval of any higher authority:

Now as for all the affairs of my estate and all the affairs of my farm in . . . wi,—I had planted them with flax—don't let anybody go down onto it (to rent it). . . . And you shall sow the farm with northern barley. Don't sow emmer there. But if it turns out to be a high inundation [of the Nile], you shall sow it with emmer.137

The degree of a farmer's autonomy in ancient Israel is difficult to divine. Biblical vignettes, such as the "Song of the Vineyard" (a depiction of a farmer's efforts to grow new vines), make no references to restraints on land users.138 The Torah codes, on the other hand, include a number of injunctions aimed at controlling farmers' practices, for example: to avoid sowing with two kinds of seed;139 to leave the crops at the edges of fields for the poor and alien;140 and to fallow the land every seventh year.141 Many of these may have been priestly exhortations that went largely unrealized. Several passages in the Hebrew Bible, for example, imply that Israelite farmers commonly failed to adhere to the fallow year.142

Postgate speculates that, in the heavily irrigated territories of southern Mesopotamia, villagers may have made communal decisions about when to fallow fields.143 Ur III texts suggest that a field typically was a long thin strip whose most elevated end abutted an irrigation canal. A narrow strip would have been an efficient shape for a field because plow oxen were extremely difficult to turn and because irrigation water could be relatively easily distributed once it had been introduced at a strip's higher terminus. By fallowing adjacent strips in the same year, villagers could open the whole area as a commons for

137. Klaus Baer, An Eleventh Dynasty Farmer's Letters to His Family, 83 J. AM. ORIENTAL Soc'y 1, 6 (1963) [hereinafter Baer, Eleventh Dynasty].
138. Isa. 5:1-7; see also Gen. 26:12 (in Canaan among the Philistines, Isaac sowed and reaped a hundredfold). See generally Silver, Prophets, supra note 58, at 19-23 (on agricultural practices).
139. Lev. 19:19.
140. Lev. 19:9 (quoted in supra text accompanying note 123).
142. Lev. 26:34-35 ("the rest [the land] did not have on your sabbaths when you were living on it"); 2 Chr. 36:21 ("until the land had made up for its sabbaths"). Hopkins speculates about how the Israelites might have honored the fallow year, and notes that, for proper soil conservation, they probably actually fallowed as often as every other year. See Hopkins, supra note 61, at 192-202.
143. Postgate, Mesopotamia, supra note 26, at 188-90.
grazing, thus achieving efficiencies of scale in fencing and herding (and perhaps also irrigation management).  

2. Building Projects

There is no evidence of legal constraints on a rural landowner's construction of dwellings and farm structures. Urban structures were another matter. Most houses in ancient cities were crammed closely together and separated by walls, which provided support and defense against trespassers. An inadequate wall could pose serious risks to neighbors or passersby. Ancient legal systems dealt with these issues not by requiring building permits, but by imposing after-the-fact sanctions, especially on someone who had been warned that his premises were subpar. A provision in the Laws of Eshnunna, probably written in response to a notorious incident, calls for a severe response:

If a wall is buckling and the ward authorities so notify the owner of the wall, but he does not reinforce his wall and the wall collapses and thus causes the death of a member of the awilu-class—it is a capital case, it is decided by a royal decree.  

The Laws of Lipit-Ishtar specify a civil remedy for a dispute likely to arise only in an urban context:

If a man—adjacent to whose house another man has neglected his fallow [bare?] land—(if this) house-holder declares to the owner of the fallow land: “Your fallow land has been neglected; someone could break into my house. Fortify your property!” and it is confirmed that this formal warning was given, the owner of the fallow land shall restore to the owner of the house any of his property that is lost.

Although the law of executory contracts was in its infancy at the beginning of the second millennium, there is some evidence that neighbors might occasionally coordinate by express agreement.

Design and construction defects in buildings pose risks to occupants as well as neighbors. In an early manifestation of products-liability law, the Code of Hammurabi calls for the death of a builder of a  

144. This paragraph is an elaboration of POSTGATE, MESOPOTAMIA, supra note 26, at 159, 188-90. Code of Hammurabi, supra note 44, ¶ 58 hints at communal shepherding. Historians may find it fruitful to compare Mesopotamian practices with those employed in medieval open-field villages. On the latter system, see CARL J. DAHLMAN, THE OPEN-FIELD SYSTEM AND BEYOND (1980).
146. Laws of Lipit-Ishtar, supra note 42, ¶ 11. Code of Hammurabi, supra note 44, gap ¶ e, is similar, and also addresses the situation where a neighbor's failure to maintain a wall has led to the wall being scaled by thieves.
147. See YARON, ESHNUNNA, supra note 47, at 223-24.
148. See, e.g., Sumerian Laws Handbook of Forms, supra note 45, at iii, 18-38 (agreement involving common wall).
house that collapsed and killed the owner who had hired the builder.\textsuperscript{149} The Deuteronomic Code cautions the builder of a new house to install a parapet to prevent anyone from falling off the roof.\textsuperscript{150} In general, however, the Hebrew Bible's many descriptions of building projects make no mention of land use controls.\textsuperscript{151}

3. Other Activities that Might Generate Harmful Spillovers

There appear to be no ancient precedents for a nuisance action to obtain relief from fumes, dust, noise, and odors. Several codes do deal, however, with invading floods and fires, two of the most traumatic of land-use spillovers. Paragraphs 53-56 of the Code of Hammurabi address liability when irrigation waters spill out and accidentally flood neighbors' lands. Foreshadowing the controversy that surrounded \textit{Rylands v. Fletcher},\textsuperscript{152} a famous torts case 3500 years later, the Code seems to waffle on whether liability is to be strict or instead turn on negligence:

\begin{quote}
\texttt{§ 55: If a man opens his branch of the canal for irrigation and negligently allows the water to carry away his neighbor’s field, he shall measure and deliver grain in accordance with his neighbor’s yield.}

\texttt{§ 56: If a man opens (an irrigation gate and releases) waters and thereby he allows the water to carry away whatever work has been done in his neighbor’s field, he shall measure and deliver 3,000 silas of grain per 18 ikus (of field).}\textsuperscript{153}
\end{quote}

\textsuperscript{149. Code of Hammurabi, supra note 44, \S 229; see also id. \S 230 (if the son of the owner is killed by the collapse, the son of the builder is to be put to death).}

\textsuperscript{150. Deut. 22:8 (without a parapet, “you might have bloodguilt on your house, if anyone should fall from it”).}

\textsuperscript{151. See, e.g., Gen. 33:17 (Jacob’s building of a house and cattle booths in Succoth); Gen. 33:20 (Jacob’s construction of an altar); 1 Kings 6-9 (Solomon’s numerous building projects); 1 Kings 12:25, 31 (Jeroboam’s construction projects).}

\textsuperscript{152. L.R. 3 H.L. 330 (1868).}

\textsuperscript{153. Code of Hammurabi, supra note 44. On these provisions, see 1 Driver & Miles, supra note 113, at 464-66 (doubting if true negligence principle was operative); Westbrook, Cuneiform Law Codes, supra note 48, at 206-11 (focusing on measures of compensation). Paragraph 31 of the Laws of Ur-Namma, supra note 41, a code some 400 years older than Hammurabi’s, implies a strict-liability approach: “If a man floods(?) another man’s field, he shall measure and deliver 720 silas of grain per 100 sars of field.” See also Sumerian Laws Handbook of Forms, supra note 45, at iv, 35-41 (calling for a man to make restitution to his neighbor when he has diverted water into a field the neighbor had harrowed).}
The Hittite Laws contain the earliest-known code provisions on the liability of a landowner who starts a fire that spreads to consume a neighbor's orchards and fields; they impose liability without regard to negligence.\(^{154}\)

III. Kinship Groups and Organizations as Landowners

In practice, contrary to the texts that assert overarching deistic claims,\(^{155}\) none of the three civilizations allocated all lands to a single owner, or even to a single type of owner. The land tenure patterns that emerged were attuned to the high risks that were present. People in a subsistence society live in fear of crop failures, illness, and attack by pillagers.\(^{156}\) Because ancient Mesopotamia, Egypt, and Israel all were semiarid, the denizens had to be especially anxious about drought. The Euphrates and even the Nile could be fickle, in one year inadequate for irrigation,\(^{157}\) in the next, overample enough to wash away crops and earthworks. For their part, Israelite villagers, who had to adapt to riverless highlands and rainless summers, strove to spread risks by diversifying crops and planting in varying ecologic niches.\(^{158}\)

A. The Theory of the Sizing of Landowning Entities

The economic theories of the firm and household can illuminate how members of ancient societies accommodated relevant considerations when deciding on mixes of landowning institutions.\(^{159}\) To simplify, a society prospers by having enterprises whose sizes serve to minimize the sum of (1) transaction costs\(^{160}\) and (2) deadweight losses arising out of coordination failures. A deadweight loss can arise in the land-tenure context when, for example, efficiencies of scale in produc-

155. *See supra* notes 72-73 and accompanying text.
157. *See McC. Adams*, supra note 26, at 3-7, 12-13 (on variability of river flows and rainfall in Babylonia); Baer, *Eleventh Dynasty*, supra note 137, at 5 n.33 (Egyptian farmer Hekanakht's worries that the Nile would be too low to permit irrigation of his fields).
tation are not exploited or risks that could have been spread among individuals are instead concentrated.\textsuperscript{161} There are two basic methods of preventing these sorts of deadweight losses. One is to create and manage organizations large enough to capture the advantages of size.\textsuperscript{162} The other is to utilize family households or other close-knit units that can most cheaply monitor against shirking and grabbing by members, and to depend on these small units to coordinate with one another by contract and norm to exploit scale-efficiencies and risk-spreading opportunities.\textsuperscript{163} Both approaches involve transaction costs: large firms give rise to (exponentially?) increasing costs of internal governance; on the other hand, a proliferation of small units entails greater exclusion and contracting costs. Economic theory generally predicts that the leaders of a landowning entity will attempt to adjust its size to minimize the sum of the transaction costs and deadweight losses that its members incur.\textsuperscript{164}

1. The Mixed Influence of the Rise of Civilization

The rise of civilization—of literacy, metallurgy, urbanization, and so on—tends to create countervailing pressures on the optimal sizing of landowning groups.

When a society first develops writing and mathematics, it is likely to achieve technological advances that create net economies of scale in military, legal, and water-control operations, among others. More concretely, in the earliest periods of ancient Mesopotamian and Egyptian history, innovations in engineering and organizational governance created new regional scale-economies in the management of the waters of the Euphrates and Nile, and also, at the village level, localized scale-economies in irrigation, fallowing, and plowing. All else equal, these new production possibilities would have tended to increase the scale of agricultural operations in these societies.\textsuperscript{165}

But the rise of civilization also introduces new opportunities for contracting and risk management, and these tend to reduce the scale of landowning entities. Civilization helps to free people from clan-nishness by enabling them to circulate in social networks larger than insular villages. As trustful relationships with outsiders multiply,

\textsuperscript{161} We assume that most ancients were risk-averse.
\textsuperscript{162} Property in Land, supra note 3, at 1332-44.
\textsuperscript{163} Id. at 1327-32.
\textsuperscript{164} Id. at 1325-26 & 1332-34.
\textsuperscript{165} Weber, supra note 9, at 106-07, implicitly recognizes this point in his discussion of Egypt.
trade and other cooperative interactions expand. "Civil society" matures, transaction costs of contracting fall, and people have less need to use membership in a close-knit village or hierarchical institution as a method of coordinating economic production.

Civilization brings other advantages. During the earliest historic periods, people tend to live in extended families on ancestral farmsteads in (rather reliably) close-knit villages. This age-old system helps spread risks, but locks participants into rigid economic and social roles and concentrates much of their wealth in a highly undiversified asset, the farmstead. Civilization affords people new and better ways to spread risks, for instance, by engaging in market transactions, diversifying investments, and creating broad-based charitable institutions.

2. Two Illustrative Cases: Southern Babylonia and Israel

Because the rise of civilization commonly has countervailing influences, its net effect on the size of landowning units depends on context. In at least two of the locales under examination, the presence of risk, scale-efficiencies, and coordination alternatives appears to have had the effects anticipated.

Conditions conducive to the emergence of large-scale landowning entities prevailed in the alluvial plain of Babylonia. The aridity and extreme flatness of this region gave rise to unusually great scale-economies in water management. A major canal, for example, was beyond the capability of a single village. Risks in southern Babylonia were unusually high, however, because water flows in the Euphrates were erratic. A flood could even displace a strand of the river into a far-distant channel. Excessive irrigation also could contaminate soil with salts brought up by capillary action. As anticipated, the palace and temple—two bureaucracies well adapted to exploiting scale effi-

166. See Campos & Root, supra note 22, at 97-100; see also Robert H. Bates & Amy F. Curry, Community versus Market: A Note on Corporate Villages, 86 AM. POL. SCI. REV. 457 (1992).

167. Stone speculates that, aside from a sharecrop arrangement, an agricultural tenant could obtain insurance by asking for aid from his tribe or working at a second job. Elizabeth C. Stone, Economic Crisis and Social Upheaval in Old Babylonian Nippur, in MOUNTAINS AND LOWLANDS: ESSAYS IN THE ARCHAEOLOGY OF GREATER MESOPOTAMIA 267, 283 (Louis D. Levine & T. Cuyler Young, Jr. eds., 1977). There appear to be no signs of overt insurance markets in any of the three ancient civilizations.

168. See supra note 28.

169. See McC. ADAMS, supra note 26, at 8, 155-70; Stone, supra note 167, at 285 (shift in Euphrates' channels may have caused the abandonment of Nippur in 1721 b.c.).

170. KNAPP, supra note 24, at 28-30; McC. ADAMS, supra note 26, at 4-5.
ciencies and spreading risks—during most periods owned far more land in the southern part of Babylonia than they did in the north.\textsuperscript{171}

In ancient Israel, by contrast, family farmsteads always dominated the landscape. Lacking rivers to feed irrigation canals, the Israelites had little use for entities capable of large engineering projects. The Israelites also seem to have been unusually successful in developing systems for spreading risks to entities larger than the extended household. Indicative are the biblical provisions that entitle the poor to glean in others' fields, and the Israelite clan's traditional obligation to help a member in need.\textsuperscript{172} Large landowning institutions, which held few advantages in Israel, were relatively absent there.

3. The Universality of Diverse Landowning Entities

Until recent decades, scholars of the ancient Near East, particularly of Mesopotamia, have been prone to imagine a stage of history in which a single type of entity controlled all land.\textsuperscript{173} The Soviet school, influenced by Marx's views,\textsuperscript{174} contended that extended patriarchal households dominated agriculture in Mesopotamia until the middle of the third millennium.\textsuperscript{175} Anton Deimel envisioned temples control-
ling all agricultural lands in Sumer prior to 2250 B.C., when he asserted a secular state took sway. Some have recklessly interpreted the undisputed rise of kingly influence during the Ur III dynasty as a full-blown system of "state socialism."

All of these unitary conceptions of land-tenure patterns have fallen into disrepute. Archeologists have disproportionately found the artifacts of palaces and temples because those bureaucracies were particularly disposed toward record-keeping. Recognizing this bias in the textual sources, scholars of the ancient Near East have begun to stress that there also existed a relatively independent private sector. Indeed, the latest research indicates that households, temples, and palaces (when they existed) all owned some land in every period of ancient Near Eastern history for which evidence is available. To generalize, the palace was unusually prominent in Egypt; the temple, in Sumerian cities; and the private agricultural sector, in Israel. Within the private sector, kin-based units were central.

B. Kinship Groups

In order of increasing size, territorial social groups of the ancient Near East are conventionally classified as extended patriarchal households, clans (or communes or villages), and tribes. An extended mutual aid within the territorial community were increasingly pushed into insignificance by labour service and taxation [imposed by the emerging ruling class]." Id. at 32; see also id. at 17. This view has little evidence to support it and oddly presupposes, for example, that a patriarch invariably ruled benevolently and that a society could be "classless" even though slavery existed within it. Members of the Soviet School have tended to claim that communal ownership was characteristic of the most recent period of prehistory, an era that can provide no evidence to refute the claim.

176. See Foster, New Look, supra note 91, at 225 (devastating critique of Deimel's view, and also the variation on it in Falkenstein, supra note 80, at 18-19).

177. See Diakonoff, supra note 74, at 13-32 (rebutting notion that an ancient Near Eastern king owned all land in a proprietary capacity); Benjamin R. Foster, Commercial Activity in Sargonic Mesopotamia, 39 Iraq 31 (1977) [hereinafter Foster, Commercial Activity] (critique of "state socialism" thesis).

178. See sources cited in supra notes 91 & 94.

179. On Mesopotamia, see, e.g., Benjamin R. Foster, Administration and Use of Institutional Land in Sargonic Mesopotamia 225-41 (1982) [hereinafter Foster, Institutional Land] (criticizing more monolithic visions of land tenure in Sargonic Mesopotamia (c.2350-2150 B.C.), such as Deimel's temple-state hypothesis, Diakonoff's communal-ownership theory, and Gelb's private-enterprise model); Postgate, Mesopotamia, supra note 26, at 109, 183, 186 (attacking various unitary views). On diversity of owners within Egypt, where palace and temple control was more extensive but hardly total, see Katary, supra note 103, at xxi; Manning, supra note 80, at 21-28; Ward, supra note 77, at 64. On temple and palace landownership in Israel, see infra notes 214 & 225 and accompanying text.

180. The Hebrew Bible employs this sort of tripartite taxonomy of kinship groups. The three levels are the byt 'b (father's house, with one or two dozen members, including adult sons' families); the msphh (clan); and the sbt or mth (tribe). See Westbrook, Biblical Law, supra note 85, at 12-13, 20-22.
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Household contained more adults and more generations than did a nuclear-family household; in the prototypical case, not only were the patriarch and his wife present, but so were their adult sons and those sons’ wives and children.\(^{181}\) The ancient clan was a kinship-based aggregation of several extended households. A tribe, in turn, was an agglomeration of several clans, perhaps as much on the basis of territorial propinquity as on kinship.

1. Patriarchal Extended Households

As Part II stressed, in all three civilizations the family household was the basic provider of food and shelter, and also the key production unit in agriculture.\(^{182}\) Within a household, whether nuclear or extended, intimate kinship ties could be expected to foster a strong ethic of sharing of internal resources, a primordial method of risk spreading. In general, theory suggests that the ratio of extended-family households to nuclear households would be higher in earlier historical periods than later ones, and in rural areas than in cities.\(^{183}\) Technological progress and urbanization give rise to both easier contracting and alternative techniques for risk-spreading, which in turn tend to reduce household size. In Mesopotamia, which has provided an unequaled quantity of evidence on the issue, there was indeed some evolution from extended-family to nuclear-family (and individual) ownership between the third millennium and the middle of the second.\(^{184}\) The Mesopotamian pattern was hardly tidy, of course; even

\(^{181}\) Compare the discussion of ancient communes in Diakonoff, supra note 74, at 30-59. Diakonoff envisions the members of a “family commune” as a father (the ruling patriarch) and mother; their unmarried children; their married sons and those sons’ wives and children; other patriarchal relatives; debt slaves; and chattel slaves. Id. at 37-39. Diakonoff defines a “territorial community” as an aggregation of several family communes. Id. at 47.

\(^{182}\) See supra notes 78-106 and accompanying text. On multigenerational extended households in rural Israel in c.1250-1050 b.c., see Hopkins, supra note 61, at 252-54 (citing an estimate that size usually ranged from 10 to 30 persons). The extended patriarchal household (oikos) was also the basic social unit of Ancient Greece. A community (polis) allotted a household inheritable rights in a land lot (kleros). See Alison Burford, LAND AND LABOR IN THE GREEK WORLD 15-17, 33 (1993).

\(^{183}\) See Becker, supra note 159, at 237-44; Postgate, MESOPOTAMIA, supra note 26, at 91 (observing, however, that extended families may have occupied some city houses in c.2500 b.c. in Sumer).

\(^{184}\) See Benjamin R. Foster, The Late Bronze Age Palace Economy: A View From the East, in THE FUNCTION OF MINOAN PALACES 11, 12, 12 n.8 (Robin Hagg & Nanno Marinatos eds., 1987) [hereinafter Foster, Palace Economy]; Foster, Land Sales, supra note 129, at 70 (supporting Diakonoff’s notion that the size of land-owning entities in Akkad probably trended from extended-family to immediate-family); Carlo Zaccagnini, The Price of Fields at Nuzi, 22 J. Econ. & Soc. Hist. ORIENT 1, 27 (1979) [hereinafter Zaccagnini, Price of Fields] (asserting trend in Nuzi from extended-family communes to individually owned estates).
in the early second millennium, members of extended families were still routinely leasing fields in Ur.185

There is little direct historical evidence about household governance. Members of a group who share occupancy of a parcel of land generate internal rules to govern their substantive rights and decision-making procedures. Especially when co-occupants are few and kin-related, these rules are highly likely to be informal (not expressed in written contracts) and based on custom, not law.186

An overarching issue was the right, if any, of a patriarch to govern without the consent of others in the household. In general, a patriarch is thought to have possessed vast powers even when his adult sons resided with him.187 Despite the obvious demerits of autocracy, the custom of dictatorial patriarchy reduced the transaction costs of both internal decision-making and bargaining with outside entities.

Scholars of Mesopotamia have attempted to infer patterns of household ownership and governance from names listed on land sale documents.188 After a mid-third-millennium Sumerian land sale, payments and gifts commonly were distributed to one or more “primary sellers,” and also (in smaller amounts) to various “secondary sellers” who were kinsmen of the primary sellers; single sellers became more typical in later periods.189 It is unclear whether these additional signatories had full ownership interests, had only vestigial powers (say to veto a transfer outside the family or clan), or were merely functioning as witnesses.190 Conversely, when an ancient tablet identifies a single

185. See Postgate, Mesopotamia, supra note 26, at 94-96, 184 (relying primarily on Diakonoff).

186. See Robert C. Ellickson, Order Without Law 273-75 (1991) [hereinafter Order Without Law]. Mesopotamian codes say rather little about rights among co-owners of land. But cf. Middle Assyrian Laws, supra note 117, Tablet B, ¶ 4 (on a cultivator’s remedy when a co-owning brother has reaped what the cultivator had sown). To some interpreters, ¶ 38 of the Laws of Eshnunna grants a brother the preemptive right to purchase the share of another brother who is selling. See Yaron, Eshnunna, supra note 47, at 227-32. Martha Roth’s recent translation, however, renders this provision as governing a partner’s right of first refusal when his partner intends to sell a partnership share. Laws of Eshnunna, supra note 43, ¶ 38.

187. See Diakonoff, supra note 74, at 37-40 (Mesopotamian patriarch’s powers included the power to marry off his children for bride-money and to sell them into slavery); Westbrook, Biblical Law, supra note 85, at 14 (on Israel).

188. See Postgate, Mesopotamia, supra note 26, at 94-96; Silver, Economic Structures, supra note 3, at 96-102.

189. See Gelb et al., Ancient Kudurrus, supra note 75, at 16-17. The authors nevertheless envision these early sellers as “at best, nuclear families. This, in our view, precludes any possibility of the existence of a truly familial/communal ownership of land during [3100-2008 B.C. in Mesopotamia].” Id. at 17; see also supra note 93 and accompanying text; infra text accompanying notes 367-69.

190. Although Silver, Economic Structures, supra note 3, at 96-97, stresses the last of these possibilities, it is likely that the secondary sellers had at least veto power. See infra text accompanying notes 390-93.
individual as the seller or buyer, that person might be acting not on his
own but rather as the agent of a number of household members. Foster concludes that during the Sargonic period (c.2350-2150 B.C.)

191 members of some extended households had rights of apportionment; some of these households diversified their risks by assembling a varied collection of holdings and then entering into leases with professional

192 farmers.

2. Clans

Clan ownership of land and labor gives rise to greater internal monitoring costs than does household ownership. But communal ownership also affords various benefits, among them, risk-spreading, efficiencies of scale, elimination of the costs of policing the boundaries of household claims, and solidary relations. Villagers in the ancient

193 Near East appear to have turned to clan ownership in instances where it promised net advantages. For instance, low-quality pasturelands, which would not have been worth fencing, may have been used as commonses for grazing. Diakonoff has adduced evidence that a Mesopotamian clan (or village) was likely to be governed by a council of elders, one of whose functions was to deal with legal problems. Especially on the alluvium of southern Babylonia, villages were key social units, much involved in irrigation operations and perhaps in decisions on the falling and grazing of irrigated fields. A Mesopotamian text suggests that a village might sometimes itself be a land claimant:

An official and the judges of Larsa write to “the mayor and elders of Bulum: Watar-Shamash has informed me that he bought an orchard five years ago and that the village is claiming it from him.

191. A bureaucratic authority such as the palace might prefer to deal with only one person as a matter of administrative convenience. Postgate, Mesopotamia, supra note 26, at 96. On the predominance of single buyers, see Gelb et al., Ancient Kudurrus, supra note 75, at 15-16.

192. Foster, Land Sales, supra note 129, at 71.


194. Unfortunately, especially in comparison to palaces and temples, ancient villages have left meager historical traces.

195. Mesopotamian villagers may have used unirrigated lands for communal grazing. Cf. Postgate, Mesopotamia, supra note 26, at 159-63 (on Mesopotamian shepherds). In Ugarit, however, the king appears to have controlled all pastureland and granted villages and groups of royal dependents access to it only on a conditional basis. Heltzer, Royal Economy, supra note 71, at 476-78 (contrasting this practice with the widespread supposition that ancient pasturelands were communally owned).

196. Diakonoff, supra note 74, at 47-48.

197. See Postgate, Mesopotamia, supra note 26, at 82-83, 189-90. Some family groups even had their own gods. Id. at 101.
Examine his case and pass judgment according to the edict. If it is too difficult (?) for you, send him and his adversaries to us."198

In the same vein, the Hittite Laws that governed northern Mesopotamia provided that a land parcel exempt from royal duties reverted to the "village" in the event that the landholder disappeared or defaulted from his local obligations.199

Ancient Egypt's society may have been even more village-based than Mesopotamia's.200 In Israel, villagers pooled labor at harvest time, shared work on terracing projects, and rendered emergency aid to a household that had fallen on hard times.201 The Israelites also may have had communal threshing floors and communal grazing lands.202

3. Tribes

Tribes, the largest of the informal social groups, appear to have been the least consequential in land management.203 Although the Hebrew Bible reports that each of the twelve tribes of Israel had been allotted a broad territory,204 in practice the Israelite clan was the far more significant institution.205 Indeed, a tribe was not necessarily even the product of decentralized social forces. A palace or temple might designate a particular territory as a tribe (or equivalent administrative unit) to make the group's members jointly responsible for contributing revenues needed to support the army and court.206

198. Id. at 276-77 (quoting a translation by Frankena); see also id. at 83 (other examples of land ownership by clans and villages).
199. See O.R. Gurney, The Hittites 103 (1952); Hittite Laws, supra note 46, ¶ 40; see also id. ¶¶ 46 & 47b, (contemplating the idea that the "men of the village" may own and transfer land).
201. See Hopkins, supra note 61, at 225, 254-59; see also Westbrook, Biblical Law, supra note 85, at 20-22.
202. Hopkins, supra note 61, at 225-26 (threshing floors), 247 (children and old people might have shepherded villagers' livestock on fallowed fields and marginal lands).
203. For a possible exception, see Knapp, supra note 24, at 157 (on Kassite period in Babylonia (c.1600-1150 B.C.)).
205. Hopkins, supra note 61, at 258-60 (hypothesizing that tribe played a role in risk-spreading); Westbrook, Biblical Law, supra note 85, at 22-23.
206. Weber, supra note 9, at 139; see also Foster, Palace Economy, supra note 184, at 12; Silver, Economic Structures, supra note 3, at 98 (communes may arise in response to state imposition of joint responsibility for taxation).
C. Organizations as Landowners

The advance of civilization gave rise to new hierarchical institutions whose activities came to partially eclipse the extended household, clan, and tribe.

1. Types of Hierarchical Landowners

The organizational owners can be loosely classified as temples (usually the first to appear\(^{207}\)), palaces, and private owners of large estates (latifundia). Before describing their land management strategies, we introduce these institutions.

a. Temples

A temple typically was staffed by members of a hereditary priestly class and support workers. The temple's basic comparative institutional advantage lay in the relative literacy of its leaders and its credibility in divine affairs. Morris Silver surmises that the devout would have been relatively trustful of temple-affiliated enterprises.\(^{208}\)

Temples unquestionably played central roles in ancient Near Eastern economies, accumulating assets through gifts, offerings, and other methods.\(^{209}\) In Mesopotamia, especially in the earliest historical periods, temples were significant landholders.\(^{210}\) During Egypt's Old Kingdom period (2695-2160 B.C.), a professional priestly class took root and pharaohs made large grants of arable land in perpetuity to temples. Both priests and others holding these temple estates were exempt from the fiscal obligations the crown imposed on other landowners.\(^{211}\) By the late New Kingdom (late second millennium), temples had increased their landholdings; the Harris Papyrus shows them possessing fully one-third of Egypt's arable land at the time of the

\(^{207}\) See Knapp, supra note 24, at 70-71; Postgate, Mesopotamia, supra note 26, at 137 (Mesopotamian temple predates palace). But cf. Foster, New Look, supra note 91, at 240-41 (pre-2350 B.C. evidence of Sumerian land designated "for the maintenance of the city ruler").

\(^{208}\) Silver, Economic Structures, supra note 3, at 19. See generally id. at 7-31 (on "Gods as Inputs and Outputs of the Ancient Economy").

\(^{209}\) Postgate, Mesopotamia, supra note 26, at 109-36.

\(^{210}\) See Knapp, supra note 24, at 44-46, 70-72 (fourth- and early third-millennium Mesopotamia). Some works on Mesopotamia echo the Deimel thesis that until the late third millennium, the temple owned most or all arable land, and rented it to farmers on a share-cropping basis. See, e.g., Lloyd, supra note 27, at 122; Sagos, Babylon, supra note 80, at 46, 162-66. This overly simple thesis has given way to a conception of mixed forms of landownership in third-millennium Mesopotamia. See supra text accompanying notes 173-79. Much later in the second millennium, Hittite temples held land of the king and they, in turn, let out their estates to farmers in exchange for in-kind ground-rents. Gurney, supra note 199, at 102-03.

\(^{211}\) Hans Goedicke, Cult-Temple and "State" During the Old Kingdom in Egypt, 1 State and Temple Economy in the Ancient Near East 113, 127-31 (Edward Lipinski ed., 1979).
reign of Rameses IV. 212 By then, some wealthy ancient Egyptian donors were making gifts of land to priests in a mortuary cult to endow the costs of the cult's providing the donor, after his death, with an eternal stream of offerings, prayers, and ceremonies. 213 Israelite temples also relied on land donations; the Holiness Code addresses redemptive rights of a family member whose ancestral lands had been given to priests. 214

b. Palaces

A palace can be envisioned as a ruler (king, pharaoh), perhaps supported by regional rulers (governor, nomarch, vizier), and sustained by a network of royal agents. The palace had a military arm and hence a comparative advantage in force. Kings tended to foster the belief that gods had legitimated their rule. 215 The manifest advantages in Mesopotamia and Egypt of having a strong state to assist hydraulic and surveying activities also no doubt allayed potential opposition to the rise of these authorities. Nevertheless, contrary to extreme extensions of Wittfogel's "hydraulic society" thesis, even in these settings the palace did not emerge solely to manage water projects, and kings of the ancient Near East rarely sought, much less achieved, total control over economic affairs. 216 Instead, a royal bureaucracy typically had unencumbered ownership of only selected territories. On some additional lands, it could require feudatories to perform special services to the crown. Beyond that, the palace had to content itself with imposing various forms of taxes. 217

The amount of crown-owned land appears to have fluctuated widely over time. In Mesopotamia, the Sargonic kings were particularly aggressive in pursuing land acquisitions. 218 This burst of state

212. O'Connor, supra note 99, at 226-27. Text A of the Wilbour Papyrus enumerates obligations owing in 1142 B.C. from 2800 holders of plots of agricultural land sparsely scattered within a 140 kilometer stretch of the Nile. Some 91.8% of the smallholders' payees were specific temples, most of them funerary cults and ordinary cults affiliated with temple groups. See Katary, supra note 103, at 297, 302. Many of the secular institutions listed among the payees—e.g., "Landing-Places of Pharaoh" and "Royal Harems"—were crown-related. Id. at 17-18, 298-99.

213. This priestly obligation ran with the land and burdened subsequent transferees of the parcel. Ward, supra note 77, at 65-67 (three examples from period c.2500 to 1950 B.C.).

214. Lev. 27:14-25. On priestly land in Israel, see Borowski, supra note 60, at 29-30.

215. Knapp, supra note 24, at 71, 88-90, 102. In the extreme case, Egypt, the pharaoh was seen as descended from gods.

216. See supra note 28.

217. See infra text accompanying notes 302-19.

218. Gelb et al., Ancient Kudurrus, supra note 75, at 26. Floods that caused radical changes in the courses of strands of the Euphrates would have tended to centralize land tenure. Even when the fields near a braid's former course had been privately owned, the palace (or
enterprise and regulation is conventionally seen as peaking in the Ur III period. Many centuries later, the Hittite royal domains are thought to have been unusually vast because feudatories of that empire had large holdings. Even as early as the Early Dynastic period of Egypt (3050-2695 B.C.), royal officials were holding landed estates, perhaps as a result of kingly grant, but also perhaps as a result of inheritance. The pharaonic palace owned considerable agricultural land during the Old and Middle Kingdoms, but apparently somewhat less by the New Kingdom. There was much crown land in Ugarit and some in Israel.

c. Private latifundia

A rise in foreign trade for agricultural products may have stimulated land consolidations in Sumer and Akkad, Egypt, and Israel. Egyptian records indicate that during the Fourth Dynasty (c. twenty-sixth century B.C.) one Metjen assembled 6000 arouras (about 4000 acres) through purchases from what appear to be freeholders. temple) would likely have the power to allocate lands riparian to the new channel. Postgate, Gelb et al., Ancient Kudurrus, supra note 75, at 26 (during Ur III dynasty, kings became “de facto owners of southern temple estates”). The numerous administrative and court documents of the Ur III period make no reference to the sale of agricultural lands between private parties. Knapp, supra note 24, at 96, improbably takes this as evidence that the state (and temple?) must have controlled agriculture then, cultivating land through tenants. Gelb, Household and Family, supra note 94, at 69-70, offers the more straightforward interpretation that the Ur III dynasty only suspended the rights of private owners to sell fields. See also supra note 94; infra note 323.

224. An Ugarit archive has revealed the king’s holdings of real property, and also his conditional land grants to dependents. Heltzer, Royal Economy, supra note 71, at 469-78.

225. Israel’s kings emerged as significant landowners after establishment of the monarchy. Borowski, supra note 60, at 26-29; Davies, supra note 67, at 358-59; see, e.g., 1 Chr. 27:25-31 (David), 2 Chr. 26:10 (Uzziah), 2 Chr. 32:27-29 (Hezekiah). The notion that Yahweh had given the land to the tribes and family groups may have somewhat deterred, however, the emergence in Israel of land regimes involving duties to the crown. See Johnstone, supra note 71, at 317.

226. For analysis of the economic stimulus provided by the opening of the Indo-Pakistan subcontinental market during the Old Sumerian period, see Elisabeth C.L. During Caspers, Sumer, Coastal Arabia and the Indus Valley in Protoliterate and Early Dynastic Eras, 22 J. Econ. & Soc. Hist. Orient 121, 122-23 (1979). For subsequent periods, see Silver, Economic Structures, supra note 3, at 147-57 (reviewing supportive evidence from Sumer, Old Kingdom Egypt, and Babylonia); Silver, Prophets, supra note 58, at 259-63 (Israel). Silver attributes land consolidation to scale economies, including in the storage of foodstuffs. A shortcoming in Silver’s theory is that wholesalers could have emerged to exploit efficiencies in storage operations.

There is evidence from eighteenth century B.C. Mesopotamia that a few unrelated investors sometimes did pool capital in a partnership dedicated to the acquisition of large acreages. Nonetheless, large private landowning bureaucracies are relatively inconspicuous even well into the second millennium. The surviving portions of the Code of Hammurabi include only two provisions relating to partnerships.

The first half of the first millennium appears to have been a time of private land-consolidation. Large manorial estates emerged in the Neo-Assyrian empire, and Israelite priests denounced land assemblages that threatened ancestral land holdings in the Canaan highlands.

2. Management of Agricultural Operations on Large Tracts

An entity that owns large arable acreages can manage agricultural activities hierarchically through a supervised workforce, or decentralize operations by granting or leasing portions of its holdings to others. Because efficient industrial organization is highly dependent on context, it is not surprising that institutional owners in the ancient Near East employed variations on all these approaches.

a. Hierarchical administration

Top-down management might involve the hiring of wardens to supervise teams of slaves, corvee laborers, or hired hands. Mesopota-

228. See Rivkah Harris, Ancient Sippar 235-37 (1975). In Old Babylonian Sippar, profits from trade were sometimes invested in real estate worked by slaves imported expressly for this purpose. Parallels may be drawn to the rise of latifondisti in ancient Rome. See Charles DiA. Thorland, Rascals and Runaways: Old Babylonian Law and the Insubordinate Slave 13 (1992) (unpublished M. Phil. dissertation, Oxford University, on file in the Bodleian Library).

229. An early example is reported in Mario Fales, A Survey of Neo-Assyrian Land Sales, in Land Tenure and Social Transformation in the Middle East 1, 7 (Tarif Khalidi ed., 1984) (instance in which a governor and three of his subordinate officials co-owned land).

230. Code of Hammurabi, supra note 44, gap ¶ 1 c (“If a man gives silver to another man for investment in a partnership venture, before the god they shall equally divide the profit or loss.”); id. ¶ 38 (providing partner preemptive option when other partner intends to sell share).

231. Fales, supra note 229, at 7-9 (on expanding latifundia, often on noncontiguous lands, in 900-700 B.C.); Renger, Arable Land, supra note 36. at 307-08.

232. See infra notes 400 & 466 and accompanying text. Morris Silver has chastised these priests for failing to realize that a land consolidation that exploited new trade opportunities might benefit all affected. Silver, Prophets, supra note 58, at 74-78.

233. On the general problem, see Williamson, supra note 159. Leasing arrangements are discussed infra text accompanying notes 283-301.

234. See, e.g., Postgate, Mesopotamia, supra note 26, at 186-87 (on how a Mesopotamian temple might mix farming its own fields, granting land to staff (“prebend” land, and renting fields to tenants); Renger, Arable Land, supra note 36, at 284-86, 298-302.
mian examples of hierarchical administration are best attested. Shulgi (c. 2095 B.C.) and other kings of the Ur III Dynasty undertook "a massive programme of bureaucratic control," which undoubtedly increased the centralization of field management. During the same era, the Namhani temple referred to its centrally managed acreages as "ox fields"; the label hints that scale efficiencies arising from technical innovations in plows and plowing may have been prompting experiments in large-scale grain cultivation. The overly centralized Ur III system collapsed, however, by 2020 B.C. Hierarchical administration of crown lands again became pronounced after 1600 B.C., when various parts of Mesopotamia came under the sway of the Kassites, Hittites, and Hurrians; their systems also failed to endure, breaking down entirely by the end of the second millennium.

Harris has provided a rich description of agricultural organization in Old Babylonian Sippar during the first portions of the second millennium. Sippar investors tended to hire a steward to manage their lands. This steward in turn would hire laborers, for example, "5 men on 8 days for the third ploughing." Free men were paid in silver (plus a barley ration); slaves, in barley only. As rational-actor models anticipate, the problem of agent opportunism appears to be timeless. Belijatim, the steward about whom Harris gathered the most evidence, was accused by an employer, in a letter, of being "not trustworthy (since) every year at harvest time concealed barley and stolen amounts intended for payment for my oxen are discovered in his possession."

b. Subdivision by tenurial grant

The owner of an extensive tract of land can use various methods to subdivide it. One is to sell (or give away) subparcels uncondition-

235. In Egypt, the Wilbour Papyrus of 1142 B.C. identifies not only many (lease-like?) arrangements with smallholders, but also a number of hierarchically managed farms. Katary, supra note 103, at 11; see also Silver, Economic Structures, supra note 3, at 158 (Egyptian temples practiced both direct management and leasing of agricultural land holdings). Israelite kings are asserted to have used slaves and forced laborers to farm their royal estates. Borowski, supra note 60, at 28; see also 1 Chr. 27:25-31 (David's use of stewards to administer crown land).

236. Postgate, Mesopotamia, supra note 26, at 42.
237. Id. at 186.
238. Id. at 42.
239. See Foster, Palace Economy, supra note 184, at 12-14.
240. Harris, supra note 228, at 209-57.
241. Id. at 236.
242. Id. at 246.
243. Id. at 237.
ally. Although institutional owners in the ancient Near East sometimes did this, they were more likely to attach strings to lands grants. When transferring pieces of its holdings to members of its own circle, a palace or temple commonly required the grantee and his successors to meet special tenurial obligations. This sort of "feudal" system served to perpetuate, and hence cement, interpersonal relationships within the institution's clique.

Many ancient Near Eastern institutions engaged in the practice of granting land to compensate staff. Conditional grants to loyalists are in evidence in the Sargonic period in and after the Ur III Dynasty, in Old Babylonia, among the Hittites, and in Egypt. Ugarit, and Israel.

The Mesag estate reveals the potential complexities of conditional land transfers. Sargon I of Akkad, who ruled c.2350 B.C., became a great landowner, buying up much arable land from extended

244. Feudal can be a highly misleading label in this context, however, because it not only evokes inapt medieval images but also obscures the important fact that in most ancient contexts much land was not held in service to the king. Evidence of "freehold" land is adduced in Postgate, Mesopotamia, supra note 26, at 242 (landowners in Old Babylonia with traditional tenures did not have duties to serve the king); Manning, supra note 80, at 26-28 (freeest Egyptian farmers merely owed pharaoh taxes payable in grain); supra text accompanying note 84 (reference to Ugarit house which is to have "no corvee from it"); supra note 86 (on general Israelite aversion to tenurial arrangements).

245. Ben-Barak, supra note 128, at 74-75. For other possible advantages of conditional sales, compare infra text accompanying note 296 (on coordination by lease).

246. GELB ET AL., ANCIENT KUDURRUS, supra note 75, at 26.


248. Paragraphs 27-41 of the Code of Hammurabi, supra note 44, address the rights and obligations of those who held land from the king. This detailed coverage suggests that these arrangements were widespread.

249. A complex, if partial, feudal system existed in the Hittite domains of northern Mesopotamia and Asia Minor. The Hittite laws touch on the complex subject of whether the burden of rendering royal services runs to a successor who has inherited only a portion of the burdened land. See, e.g., Hittite Laws, supra note 46, ¶ 46: "If in a village someone holds fields as an inheritance share, if the [larger part of] the fields has been given to him, he shall render the luzzi-services. But if the sm[aller part] (of) the fields [has been given] to him, he shall not render the luzzi-services: they shall render them from the house of his father."

250. There is ample evidence, for instance, that New Kingdom pharaohs granted land to both native veterans and foreign mercenaries. See Kemp, ANCIENT EGYPT, supra note 53, at 228. The conditions attached to these grants, however, are less clear.

251. Ugarit's kings granted fields to craftsmen, skilled agricultural workers, and local royal bureaucrats, typically on condition of future services and in-kind payments. Heltzer, Royal Economy, supra note 71, at 463 n.83, 469-76. For the text of an apparently unconditional royal grant to a foreigner, see H.W.F. SAGGS, CIVILIZATION BEFORE GREECE AND ROME 192 (1989) [hereinafter SAGGS, CIVILIZATION].

252. Ben-Barak, supra note 128, at 89-90 (conditional royal grants).

253. See Foster, INSTITUTIONAL LAND, supra note 179, at 61-65.
households and then parcelling it out to his followers.\textsuperscript{254} Mesag, a provincial bureaucrat in Sargonic Sumer, came to control over 2500 acres, probably only a portion of a yet larger royal plantation. The royal administration appears to have granted Mesag 33\% of his acreage as "domain land," part of whose yield he was to keep for his sustenance, and part to deliver to the palace.\textsuperscript{255} Mesag is thought to have paid in some fashion for the remaining 67\%.\textsuperscript{256} Mesag in turn subdivided his large holdings, allocating parcels both to subordinates as compensation for their services and to teams of field workers (who received collective grants). These recipients were free to further sublease and subdivide.\textsuperscript{257}

\textbf{D. Open-Access Lands}

A complex society inevitably has a network of roadways and other public lands to enable citizens to travel and socialize with one another.\textsuperscript{258} During the Ur III period, serviceable highways were already sources of pride, as well as great aids to monarchs undertaking demanding cultic pilgrimages.\textsuperscript{259} Archeologists not surprisingly find that ancient cities had streets.\textsuperscript{260} The Akkadian language included a word for \textit{square}, which was used roughly in the manner of the Sumerian term for "wide street." The area just within the city gate appears often to have been a key public space.\textsuperscript{261} In sum, ancient Near Eastern civilizations, which on the one hand consistently recognized private property in houses and gardens, on the other opened selected lands to the general public.

\textsuperscript{254}. POSTGATE, MESOPOTAMIA, supra note 26, at 39, 41.
\textsuperscript{255}. FOSTER, INSTITUTIONAL LAND, supra note 179, at 69.
\textsuperscript{256}. See id.
\textsuperscript{257}. On Mesag, see Bridges, supra note 135, at 133-34, 148-50; FOSTER, INSTITUTIONAL LAND, supra note 179, at 1-17, 52-69.
\textsuperscript{258}. See Property in Land, supra note 3, at 1381-87. These open-access lands should be distinguished from the limited-access communal lands discussed supra text accompanying notes 193-202.
\textsuperscript{259}. The hymn \textit{Shulgi A} commemorates King Shulgi's (c.2094-2047 B.C.) fast march from Nippur to Ur and back again in a single day to celebrate new-year's festivals in both cities. The hymn glowingly describes the king's construction of caravan-serai at measured intervals along the roads of Sumer. These rest-houses were said to be manned and provided with shady gardens so that "[t]he wayfarer, who passes the night upon the road, / May seek safe haven there, like in a well-built city." JACOB Kt.EN, THREE SHULGI HYMNS: SUMERIAN ROYAL HYMNS GLORIFYING KING SHULOI OF UR 179, 191-93 (1981); see also SILVER, ECONOMIC STRUCTURES, supra note 3, at 63 (on ancient roads); SILVER, PROPHETS, supra note 58, at 41-43 (on highways in Israel).
\textsuperscript{260}. See, e.g., LLOYD, supra note 27, at 163 (map of residential quarter of Ur); POSTGATE, MESOPOTAMIA, supra note 26, at 77 (map of Eshnunna).
\textsuperscript{261}. POSTGATE, MESOPOTAMIA, supra note 26, at 79; see also SILVER, ECONOMIC STRUCTURES, supra note 3, at 119-21 (on public spaces used for open-air markets).
IV. TIME SPANS OF STANDARD LAND INTERESTS

A society tends to recognize private land rights of infinite duration when: its land is scarce; it has developed a system of writing; and its members have technologies that enable them to permanently alter land conditions. The last of these factors is particularly important. When land is modifiable, nonperpetual land tenures such as usufructs and life interests tend to lead to both underinvestment in land improvements and wasteful overexploitation of natural resources. By the earliest historical periods, ancient Mesopotamia, Egypt, and Israel all were conferring perpetual private land rights.

A. HERITABLE RIGHTS IN LAND

Inheritance, which allows the lands of decedents to pass to heirs (instead of, say, escheating to the state), creates family entitlements of infinite duration. Several Mesopotamian codes include detailed provisions regarding the inheritance of “fields,” “orchards,” and “houses”—solid evidence of perpetual ownership interests in these sorts of properties. Numerous surviving records of estate divisions corroborate that real property was a major component of paternal estates during the Old Babylonian period. A father’s estate was usually divided among his sons, either in equal shares or with an extra share for the eldest, depending upon the region. Sons sometimes took as undivided co-owners, and sometimes as sole owners of specific

262. See Property in Land, supra note 3, at 1364-71. The Anglo-American legal term for a temporally infinite property interest is fee simple.

263. Id. at 1367.

264. In ancient Greece, similarly, a family estate descended to members of the household that possessed it. See Burford, supra note 182, at 33.

265. On inheritance in the ancient Near East, see Westbrook, Biblical Law, supra note 85, at 17-23, 118-41.

266. Code of Hammurabi, supra note 44, ¶¶ 150, 165, 178-79; Middle Assyrian Laws, supra note 117, Tablet B ¶ 1, Tablet O ¶ 3; Sumerian Laws Exercise Tablet, supra note 45, ¶ 4; see also Postgate, Mesopotamia, supra note 26, at 96-99 (inheritance of city houses) and at 187 (some lands conferred by palace or temple came to be inheritable); Foster, Land Sales, supra note 129, at 71 (in Sumer, use rights in land were heritable).


268. A father may also have had limited powers, before death, to control succession among his sons. See Code of Hammurabi, supra note 44, ¶ 150 (father may grant wife power to appoint which son is to succeed to land); ¶ 165 (father may give field, orchard, or house to his first-born son); ¶ 169 (father may disinherit son who has committed two grave wrongs). Conversely, a father might be entitled to increase the number of his heirs. See id. ¶ 170 (father may acknowledge sons by one of his slaves); ¶¶ 185-93 (father may adopt sons).
portions of the father’s holdings. Despite the Mesopotamian legal bias against inheritance by daughters, there are many instances of Mesopotamian women—even married women—owning land in their own right.

In ancient Egypt, it is undisputed that as early as the Old Kingdom private possessors of lands could pass their holdings to descendants. Of the three civilizations, Egypt appears to have granted private land owners the greatest freedom of testation, and is said to have been the only one of the three not to have disfavored inheritance by daughters or other female kin. The Egyptian “lawsuit of Mose” in the mid-thirteenth century B.C. illustrates how agricultural land might descend for generations within a family line. In that instance, Mose claimed to own land that the pharaoh had given three centuries previously to Mose’s ancestor as a reward for war services as a ship

269. Practical incentives not to fragment agricultural land, however, particularly where irrigation and fallowing practices militated against subdivision, tended to perpetuate joint ownership by brothers and other family members. Compare Middle Assyrian Laws, supra note 26, at 95. Compare Middle Assyrian Laws, supra note 117, Tablet B ¶ 1 (contemplating in-kind division of land among brothers), with id. Tablet B ¶ 4 (rights among brothers who are undivided co-owners of a field). For practice during the Old Babylonian period, see Thorland, One Heir, supra note 267, at 41, 75-79.

270. Texts from the Old Babylonian period reveal a few circumstances in which a daughter might share in the estate of her deceased father and then dispose of that inheritance as she pleased. See Code of Hammurabi, supra note 44, ¶ 182 (on priestess of Marduk of Babylon whose father had not provided her with a “dowry”); Laws of Lipit-Ishtar, supra note 42, ¶ b ("If a man dies without male offspring, an unmarried daughter shall be his heir.").

271. See Gelb et al., Ancient Kudurrus, supra note 75, at 17 (“Women participate very frequently in sale transactions, both as buyers and sellers (primary and secondary).”); Postgate, Mesopotamia, supra note 26, at 279 (text of Nippur document describing long-running litigation between two women, at least one of whom was married, over a house-purchase transaction); see also Silver, Economic Structures, supra note 3, at 41-48, 95 (on the significant role of women in ancient economies). For general analysis of the Code of Hammurabi’s rules of inheritance, and a synthesis of what may be gleaned from them in conjunction with other legal, administrative, and literary texts of the period, including some discussion of the possibilities of inheritance by women, see Thorland, One Heir, supra note 267; see also 1 Driver & Miles, supra note 113, at 324-58.

272. For a general analysis of Egyptian rules of inheritance, see Pestman, supra note 56. In an arbitration text from the New Kingdom, a son’s claim to the hut of his father prevails over that of the current occupant, despite the improvements made to the hut by the latter. See Andrea G. McDowell, An Incised Hieratic Ostracon (Ashmolean HO 635), 81 J. Egyptian Archaeology 220 (1995) (officials deciding case appear to have compromised to the extent of ordering the rightful owner to pay the present occupant compensation for these improvements). Interestingly, this text appears in the guise of an elaborately prepared limestone ostracon, which the translator suggests may have been installed in the wall of the owner’s hut to assert his right to the building. Id.

273. Ward, supra note 77, at 67-69; see also Knapp, supra note 24, at 173. From the beginning of the second millennium, children and heirs had a qualified right to inherit their father’s property (an interest somewhere between a forced share and a remainder interest), but sales, inter vivos gifts, and quasi-testamentary bequests by “fictitious sale” were common and disinheritance not unknown. Pestman, supra note 56, at 61-63, 66-68.
Mose's forebears had occupied this land until a greedy official had tricked Mose's mother out of it. The lawsuit of Mose also illustrates that, as in Mesopotamia, land was sometimes taken undivided by co-heirs.

The Israelites also recognized the heritability of a decedent's estate. Paralleling the pro-male practices found in Mesopotamia, the Deuteronomic Code provided that a deceased father's estate was to descend to his sons, with the eldest taking a double share. This tradition is an essential backdrop to the well-known story of Jacob duping his brother Esau into selling the birthright to their father Isaac's estate. Unlike the Mesopotamians and Egyptians, the Israelites may have barred women from owning property in any capacity.

B. Subdivision of Land Ownership in Time

An owner commonly finds it desirable to divide up a perpetual land interest into time blocks and to transfer those blocks separately. Like a subdivision in space, a subdivision in time can augment aggregate value. Among the many possible methods of dividing ownership in time, two of the most obvious are to create: an interest that terminates on the death of the transferee (e.g., the English "life estate"); and a lease for a specific term. Both forms were used in the ancient Near East, most notably in Mesopotamia, the civilization that has left the most traces.

1. Life Estates

Various provisions of the Code of Hammurabi recognize life interests. Several paragraphs indicate that a widow was entitled to re-

274. Ward, supra note 77, at 64-65, 71.
275. The estate of Neshi described in the case was managed intact by successive trustees for the benefit of members of the family for over two hundred years. See James, supra note 57, at 95. A juridical instruction from the so-called Code of Hermopolis (third century B.C.) ordains that "If a man dies leaving lands [or] gardens ... it is the eldest son who takes possession of the property of his father." The eldest son, unless the testator had stipulated otherwise, was to manage the undivided property on behalf of the joint heirs. Pestman, supra note 56, at 64-65.
277. Gen. 25:29-34. The birthright included the eldest son's power to lead the family and right to take a double share of the inheritance. Oxford Bible, supra note 59, at 32 n.25.31-34.
278. See Westbrook, Biblical Law, supra note 85, at 64-65.
279. Property in Land, supra note 3, at 1372-73.
side in the home of her deceased husband, enjoying until her own
death the usufruct of either any "marriage-gift" that her spouse had
formally given her while both were alive, or a sort of forced share in
his estate. The Code also includes elaborate provisions governing
trust-like arrangements through which a father could confer upon a
priestess daughter (barred from marrying) a lifelong interest in the
income from particular assets, such as fields or orchards; the sons
owned a remainder that became possessory after both the father and
daughter had died. The existence of analogous time-limited interests
in real property in Egypt is less clear.

2. Leaseholds

Anthropological evidence indicates that members of preindustrial
societies tend to engage in land-leasing at an earlier stage than land-
selling. Rental arrangements respond to land-occupancy demands
of relatively transitory or capital-poor persons. In addition, leases can
serve to spread risks and to structure future interactions in a manner
that enhances cooperation.

In Mesopotamia, the leasing of both houses and fields was com-
monplace beginning no later than the middle of the third millen-
nium. Evidence of leasing practices elsewhere is scantier. In Egypt,
land rentals may have been prevalent no later than 2000 B.C.
Egypt's institutional landowners appear to have rented fields to small-
holder-tenants, who either performed the fieldwork, hired others to
perform it, or subleased their holdings to cultivators. Some Egyp-

281. Id. ¶¶ 178-181.
282. See Théoridridés, supra note 56, at 295-300.
283. Pryor, supra note 12, at 143.
284. See J.V. Henderson & Y.M. Ioannides, A Model of Housing Tenure Choice, 73 AM.
ECON. REV. 98 (1983); infra text accompanying notes 292-98. In some ancient legal systems, a
landlord may have been able to evict a tenant at the end of the term more expeditiously than a
creditor would have been able to oust a landowner who had failed to pay user fees. Cf. infra text
accompanying note 437. All else equal, a legal asymmetry of this sort would make contractual
arrangements between landlords and tenants more efficient than arrangements between institu-
tional service-providers and landowning service-users. If so, an institutional owner that provided
irrigation or other special benefits might prefer to lease portions of its land than to sell portions
unconditionally.
285. See Steinkeller, Renting of Fields, supra note 94, at 129-39 (on share-tenancy arrange-
ments on fields during pre-Sargonic and Sargonic times); Stone, supra note 167, at 268 (leasing
of fields, orchards, and houses during Ur III period).
286. There are indications of the leasing of grain fields in 2002 B.C. See Baer, Eleventh Dy-
nasty, supra note 137, at 3-4, 6, 9 (farmer's letters). The earliest extant Egyptian lease documents
date from the sixth century B.C. See Hughes, supra note 102, at 2, 6.
287. Only 20% of the smallholders listed in P. Wilbour are identified as cultivators, herd-
smen, or beekeepers—the persons most obviously qualified for fieldwork. Baer, Eleventh
tian temples leased out their arable lands for less than the usual fraction of the harvest to temple dependents and military personnel. In part because it was costly to hire a scribe, written leases (if necessary at all) tended to be short and to the point. A rental agreement for an Old Babylonian house is typically pithy:

Mashqum, the son of Rim-Adad, has rented for one year from Ribatum, a hierodule of Shamash. As the rent per year he shall pay 1-1/2 shekels of silver, with 2/3 shekel of silver received as the initial payment on his rent.

This spareness suggests that many of the rights and remedies of landlords and tenants during the term of a lease were determined by custom. The Code of Hammurabi contains a number of what appear to be gap-filling provisions for leases. For example, where a lessee had prepaid in full a year's rental for a house and the lessor had evicted him before the full year had expired, the Code states that the lessor must "forfeit" (i.e., return) the entire year's prepaid rent. Hammurabi, like other rulers, also seems to have periodically attempted to control rents and crop shares.

The leasing of fields and orchards creates distinct problems and is suited to governance by tailored norms. Economists have generated a rich literature on land and labor contracting in agricultural settings. Someone who owns a field, and wants to keep it but not cultivate it himself, can:

1. hire wage labor (which would keep the risk of crop failure with the owner); or
2. lease for a fixed rent (which would shift this risk to the tenant); or

Dynasty, supra note 137, at 15-16; see also Katary, supra note 103, at 16, 223-25, 299-301. This papyrus hints that nuclear households dominated actual cultivation activities in New Kingdom Egypt. Id. at 225.


289. Ancient Near Eastern Texts Relating to the Old Testament 218 (James B. Pritchard ed. & Theophile J. Meek trans., 1955) [hereinafter Pritchard, ANET]. A lease of course might include additional terms. See 1 Driver & Miles, supra note 113, at 138 (lease provisions in Sippar that specify a tenant's duty to cultivate); Silver, Economic Structures, supra note 3, at 93-94 (examples of Mesopotamian lease clauses on tenant duties).

290. Code of Hammurabi, supra note 44, gap ¶ g. It is unclear whether this implies that a tenant was obliged to vacate at the landlord's request. See also id. ¶ 47 (appearing to empower tenant to renew his field lease for an additional year, on the same terms, where tenant "did not recover his expenses" in the previous year); for competing interpretations, see 1 Driver & Miles, supra note 113, at 142-44.

291. See, e.g., Code of Hammurabi, supra note 44, §§ 60, 64 (specifying, perhaps as default rules only, fractional divisions of croplands and crops in certain transactions between plantation owners and gardeners); see also Harris, supra note 228, at 226 (example where an agricultural lessee was to pay "according to the rate established by the city").

292. This suggests that field rentals would have been relatively more common in relatively low-risk circumstances. Seemingly supportive is W.F. Leemans, The Role of the Landlease in
(3) enter into a sharecropping arrangement, which would split the risk between landlord and tenant.

Although far from universal, sharecropping arrangements were prevalent in the irrigated regions of both Mesopotamia and Egypt. Typically, the landlord's share was set at either one-third or one-half of the yield.

There are two principal theories for the widespread use of sharecropping throughout human history. The first is that its risk-splitting feature appeals to cultivators, who are assumed to be more risk-averse than landlords. The second theory stresses that the success of a farming venture commonly depends on both the landowner and tenant providing streams of inputs into the production process. According to this latter theory, crop-sharing is a workable mechanism for deterring both sides to the bargain from shirking on their responsibilities. On the one hand, the prospect of sharing in a harvest promises to make a cultivator more conscientious than a wage-earner would be. On the other, compared to a flat rent, a crop-share helps ensure that a landlord will faithfully provide inputs that he can supply more efficiently than the tenant could—services such as irrigation, diking, following, and post-flood surveying.

Evidence from the ancient Near East provides some support for both the risk and joint-production theories of sharecropping. For example, of the many provisions of the Code of Hammurabi that touch on sharecropping, a startling number directly address the concerns that the two theories highlight. Several Code paragraphs deal with how damage from storms is to be allocated among landlords, tenants,
and lenders.\textsuperscript{297} Notably, paragraph 46 requires parties to a share-
cropping agreement to split any pre-harvest storm losses as they had
agreed to split the harvest itself. Other provisions address the danger
of shirking on the part of a tenant who has leased a field on a crop-
share basis. For instance, Code of Hammurabi paragraph 42 states:

If a man rents a field in tenancy but does not plant any grain, they
shall charge and convict him of not performing the required work in
the field, and he shall give to the owner of the field grain in accord-
ance with his neighbor’s yield.\textsuperscript{298}

The Hebrew Bible makes little or no mention of leaseholds. This
pattern has prompted some scholars to infer the existence of an Israe-
lite norm against the renting of land.\textsuperscript{299} Various pieces of circumstan-
tial evidence cast doubt on this thesis.\textsuperscript{300} On the other hand, it does
seem that the institution of sharecropping—so prominent in southern
Mesopotamia and Egypt—was not transplanted to ancient Israel. The
two theories of sharecropping suggest answers to this puzzle. Partly
because the Israelites had developed other mechanisms for loss-
spreading,\textsuperscript{301} they had less use for this method of splitting risks.
Moreover, since their agriculture did not depend on irrigation canals
and other outside services, they had less reason to employ a mecha-
nism suited for coordinating the joint inputs of a landlord and a ten-
ant-cultivator.

\textsuperscript{297} Code of Hammurabi, supra note 44, §§ 45-46, 48. For commentary, see 1 Driver &
Miles, supra note 113, at 139-45. § 45 states that, if the lessor were already to have received his
rent, the tenant is to bear any losses incurred when a storm or flood ravages the leased field.
This provision has been called “eminently unjust” and proof that “the rich man had advantage
over the poor,” despite the fact that the same allocation prevails in contemporary Anglo-Ameri-
can law. See Albert Kocourek & John H. Wigmore, Sources of Ancient and Primitive
Law 400 (W.W. Davies trans., 1915). This criticism is unsound. Under the usual sharecrop ar-
rangement, a tenant does not pay rent until after the harvest. See 1 Driver & Miles, supra note
113, at 140. In the usual instance, the tenant would be far better able than the landlord to
prevent storm damage to crops already harvested. See generally Guido Calabresi, The Costs
of Accidents (1970). Ex ante, it would be in the interest of both parties to terminate, at har-
vest time, the “insurance” aspect of their relationship.

\textsuperscript{298} Code of Hammurabi, supra note 44; see also id. §§ 43-44, 61-63, 65; Laws of Ur-Namma,
supra note 41, § 32 (specifying, in units of grain, tenant’s penalty for failing to cultivate field).

\textsuperscript{299} See Boecker, supra note 276, at 89-90.

\textsuperscript{300} Leases seem to have been used in nearby Ugarit. See Baruch Halpern, A Landlord-
Tenant Dispute at Ugarit?, 2 Ma‘arav 121 (1979-1980). The Jubilee provisions of the Book of
Leviticus explicitly contemplate a field owner’s “sale” of “crop years” to a neighbor. Lev. 25:14-
16. The Talmud (written many centuries after the Torah), contains provisions on farm leases and
sharecropping, an indication that these sorts of transactions were not then seen as a violation of
a fundamental principle of Jewish law. Weber, supra note 9, at 255-56; see also Menachem

\textsuperscript{301} See supra text accompanying note 172.
V. THE ROLE OF LAND IN THE SYSTEM OF PUBLIC FINANCE

The ancient Near East provides the earliest empirical window on institutions of public finance. In all three civilizations, land was a primary form of wealth, typically overshadowing even slaves and livestock. Landowners both benefitted from the services rendered by the various public providers—palace, village, and others—and in return were commonly called upon to help finance the operations of those institutions.

In ancient times, as in other times, the state was a mixed blessing. A rational-actor optimist might interpret the rise of the ancient palace as an adaptive social innovation that helped solve the problem of providing “public goods.” The theory of public finance holds that only an entity with coercive powers of taxation can provide services such as a legal system, national defense, flood control, and open-access transportation arteries such as canals. Private entrepreneurs, it is thought, will provide insufficient quantities of these services because they cannot exclude freeriders who reap the benefits of the service without paying for it. A rational-actor pessimist, on the other hand, might envision the “king’s people” primarily as a clique of self-interested rentseekers who deployed crown power to enrich themselves at the expense of all they could coerce.

In most ancient contexts, both unalloyed pessimism and unbridled optimism about the role of the state would be simplistic. The king’s people typically did deliver some highly valued public goods, a strategy that helped them enlarge their tax base and enhance the legitimacy of their regime. (Indeed, royal quests for tax revenues appear to have stimulated early advances in writing and record systems.) Still, because few competing institutions had the power (or, in the case of temples, perhaps the inclination) to curb palace excesses, the king

302. For a “neoclassical theory of the state,” see NORTH, supra note 8, at 20-32.
304. Either the service is consumed in a nonrival fashion, or the service provider has no feasible way of excluding freeriders from using the service. Id. The Middle Assyrian Laws, supra note 117, indicate an awareness of problems of freeriding. See id., Tablet B, ¶ 17 (landowners who contribute to work of bringing in well water for irrigation are only persons entitled to use the water); Tablet B, ¶ 18 (fieldowner may petition mayor and noblemen of the city to flog neighbor who had failed to cooperate in effort to harness surface waters for irrigation).
305. Egyptian records of the annual level of the Nile flood, censuses of populations, and biennial censuses of “gold and fields,” dating from c.2900 B.C., were all presumably tax-driven. See Théodoridès, supra note 56, at 292. The administrative reforms of Shulgi in late third-millennium Mesopotamia led to improvements in both writing methods and recording practices. MICHAEL ROAF, CULTURAL ATLAS OF MESOPOTAMIA AND THE ANCIENT NEAR EAST 102 (1990).
and his allies commonly were able to extract large amounts of surplus from their subjects.\textsuperscript{306} This led to widespread grumbling about taxes\textsuperscript{307} and invited an incoming monarch to start his reign with a populist gesture.\textsuperscript{308}

Two types of governmental fiscal charges on landowners should be distinguished.\textsuperscript{309} General taxes are obligations that a state imposes on all (or almost all) landowners without attempting to rationalize the charge as a fee for the conferral of particular benefits. User charges, by contrast, are special fiscal obligations a state imposes because it provides special services to discrete lands.\textsuperscript{310} In the ancient Near East, fiscal obligations of either sort could take the form of: periodic payments of fixed quantities of grain or metal; delivery of a specified fraction of the crop harvested on the land; or performance of periodic stints of military or corvee labor.

A. General Public Services and General Taxes

Public goods that radiate pervasive benefits are typically financed out of general taxes. A central function of the ancient palace was to recruit, manage, and equip a military force and, by inference, to handle relations with alien regimes.\textsuperscript{311} There is evidence of a Mesopotamian royal justice system, at times memorialized in decrees and codes, and partially integrated with local councils operating at the village level.\textsuperscript{312} The maintenance of land records sometimes involved interplay among crown, temple, and village participants.\textsuperscript{313} Some of the ancients' most ambitious public works, such as long levees in Mesopotamia and landings for boats on the Nile, conferred broad benefits and were candidates for being financed through widely imposed corvee-

\textsuperscript{306} See 1 Driver & Miles, supra note 113, at 112-13 (on balance, holding a king's fief was advantageous); Foster, Palace Economy, supra note 184, at 12 (in many Bronze Age societies, king's people held land in return for services owed king, and shared in surplus produced by serfs and slaves).

\textsuperscript{307} For example, Solomon's tax and forced-labor programs created widespread resentment. Knapp, supra note 24, at 14; see also Neh. 5:4, quoted infra at text accompanying note 432 (referring to burdens of "the king's tax").

\textsuperscript{308} See infra text accompanying notes 453-57. In the first known legal code (c.2100 B.C.), Ur-Namma boasts of ending onerous exactions that various powerful cliques had been imposing upon boatmen and stockmen. Laws of Ur-Namma, supra note 41, Tablet A, lines 87-124.

\textsuperscript{309} For a brief introduction to principles of taxation, see Musgrave & Musgrave, supra note 303, at 229-324.

\textsuperscript{310} The tenurial obligations that a state might levy on selected land grantees are conceptually different. The state imposes these obligations in its capacity as a transferor of assets, not in its capacity as a provider of public services. See supra text accompanying notes 244-57.

\textsuperscript{311} See Foster, Palace Economy, supra note 184, at 12-13.

\textsuperscript{312} Postgate, Mesopotamia, supra note 26, at 275-78.

\textsuperscript{313} See infra text accompanying notes 367-80.
labor duties. An Old Babylonian king boasted that, after gathering the people of his many villages, "I made them work by my great power. I fashioned the (canal's) two banks like awe-inspiring mountains. . . . I called the canal Tuqmat-Erra, and thus restored the eternal waters of the Tigris and Euphrates."314 Much evidence from Mesopotamia, Egypt, and Ugarit supports the notion that ancient kings commonly did impose general taxes to help finance the provision of royal services.315

B. User Charges Imposed on Recipients of Special Services

User fees were employed in the financing of village irrigation systems in southern Mesopotamia, a civilization dependent on the provision of these services.316 An official called a gugallum appears to have been in charge of maintaining a village's canals and regulators and rotating the flow of irrigation waters among field ditches. Before the start of the Mesopotamian growing season, a field tenant—even one leasing from a palace or temple—might have to make an advance payment to the central "irrigation office" for water services.317 In some situations the king appears to have borne some responsibility for ensuring the success of village arrangements; in a letter, Hammurabi commanded a subordinate to investigate an irrigation controversy that had arisen and make certain that the elders of the city and tenants of the irrigated district convened a court to gather evidence on the matter.318 Because palace administrative texts seldom mention the gugal-

314. Postgate, Mesopotamia, supra note 26, at 179 (quoting inscription of Rim-Sin I of Larsa (c.1800 B.C.)).
315. See Foster, Palace Economy, supra note 184, at 13, 15 (Late Bronze Age palace imposed taxes and exactions on members of "free community" in Nuzi, Ugarit, Alalakh, and Matti); Gelb et al., Ancient Kudurrus, supra note 75, at 19 (one c.2500 B.C. sale tablet for a house identifies the buyer as a "field assessor"); Ward, supra note 77, at 64-65 (evidence of Egyptian tax-assessment records); Heltzer, Royal Economy, supra note 71, at 475-76 (Ugaritic villagers owed taxes and corvee).
316. Owners and lessees of temple estates often were exempt from general taxes. Silver, Economic Structures, supra note 3, at 19-20 (on tax exemptions that favored temples); Goedicke, supra note 211, at 127-31; Janssen, supra note 129, at 509-10 (Egyptian exemptions for temples). In some situations, however, Egyptian temples did make payments to the crown. See Baer, Low Price, supra note 100, at 33 (temples owed land taxes to Pharaoh, at rate of approximately one-tenth of crop); Hughes, supra note 102, at 5 (Ptolemaic leases of temple lands allocated duty to pay Pharaoh's tax). The pharaonic levies mentioned in the last two sources conceivably may have been user charges, perhaps for surveying and irrigation services.
318. Cited in 1 Driver & Miles, supra note 113, at 152.
lum, however, a village appears to have had considerable autonomy in managing its local irrigation operations.319

VI. LAND TRANSFER

The Marxian conception of a progression of historical stages has fostered the erroneous notion that land was not “commodified” until a postulated transition from feudalism to capitalism, a transformation that Karl Polanyi asserted did not occur in Europe until after the Middle Ages.320 In fact, ancient documentary sources are full of references to negotiated land sales. All three civilizations developed routine procedures for land transfers and established systems for maintenance of land records. On the other hand, ancient regimes commonly did restrain alienation, especially of ancestral or feudatory lands.

A. Evidence of Land Sales

The oldest legal documents ever unearthed involve land sales in Mesopotamia. These are pictographic and date from the beginning of the third millennium.321 For the Fara Period (c.2600-2450 B.C.), Gelb and his co-authors assembled twenty-five documents showing field sales, and another seventeen showing house sales.322 Thereafter, with certain exceptions during the Ur III (c.2150-2000 B.C.)323 and Middle Babylonian (c.1600-1150 B.C.) periods, there is abundant evidence of the sale and leasing of privately owned land in Mesopotamia.324 By
the latter portion of the third millennium, silver (or some other precious metal) had become the default medium of exchange there.\textsuperscript{325}

As always, documentary data from beyond Mesopotamia are more fragmentary. There are a few fragments of evidence of land sales during Egypt's Old Kingdom,\textsuperscript{326} and more for the New Kingdom.\textsuperscript{327} Ugarit records reveal sales of privately owned agricultural lands in the late second millennium.\textsuperscript{328} Although the Hebrew Bible includes broad injunctions against the sale of ancestral lands, in practice the ancient Israelites had a number of devices for transferring land among themselves.\textsuperscript{329}

\textbf{B. Land Sale Procedures}

In all eras, two risks make a land purchaser potentially anxious about handing over a large sum to a land seller:

(1) the risk of \textit{seller breach} (e.g., that the seller will fail to cede possession of the land, or later reclaim it, or falsely assert that purchase payments are still owing); and

(2) the risk of superior \textit{third-party claims} (because the seller does not have a clear title (or even any title) to the land).

The civilizations of the ancient Near East slowly developed procedures to protect land buyers from these two risks. Postgate has imaginatively portrayed how forms of land transactions may have evolved in Mesopotamia between 5000 and 1600 B.C. as literacy developed and spread, and courts, temples, and other relevant institutions matured.\textsuperscript{330}


326. \textit{See Baer, Eleventh Dynasty}, supra note 137, at 13 (Metjen's vast purchases c.2600 B.C.); \textit{see also supra note 80 (house sale)}.

327. \textit{See, e.g., supra note 83 (sale of house plot)}. Under the \textit{Siècle Juridique} from Karnak (c.1600-1570 B.C.), the state gave parties to a land sale a year to fulfill their conveyancing obligations, with a possibility of further extensions. Théoridoridès, \textit{supra} note 56, at 293. The Wilbour Papyrus's smallholders, some of whom appear to have been freeholders (\textit{see supra} note 105), apparently could alienate their interests. \textit{Katary, supra} note 103, at 206 (reporting Bernadette Menu's interpretation). \textit{Gen.} 47:18-26 states that Joseph "bought" lands for Pharaoh from destitute Egyptians, and then rented it back to them for a 20\% crop-share.

328. \textit{Silver, Prophets, supra} note 58, at 73.

329. \textit{Fager, supra} note 151, at 120 (Jubilee was planned as an institution that would counter Canaanite tradition of treating land as a commodity); \textit{Matthews & Benjamin, supra} note 88, at 202 (Israelite households seem to have rather easily lost both land and freedom); \textit{Silver, Prophets, supra} note 58, at 73-77 (adducing evidence of a market in land in ancient Israel); \textit{see also} sources cited later in this Part.

330. \textit{See Postgate, Mesopotamia, supra} note 26, at 282-87 (especially chart at 283). As in most other contexts, the best evidence on the topic at hand is from Mesopotamia.
1. Preliterate Procedure: A Mass Gathering

Face-to-face rituals appear to have been the norm before the era of written sales documents. For instance, a land seller might have to utter appropriate words and carry out symbolic acts in the presence of a large number of relatives and other witnesses, some of whom might receive baksheesh as part of the transaction.331

The first real estate transaction in the Book of Genesis hints at preliterate procedures of land transfer. Abraham, who had come to Canaan as an alien, sought to purchase land in Hebron from Ephron, a Hittite.332 Abraham needed a burial place for Sarah, his recently deceased wife. Ephron "owned" a field whose boundaries encompassed the Cave of Machpelah, a suitable site that, after Abraham had purchased it, eventually became the tomb of Abraham and Sarah, Isaac and Rebekah, and Jacob and Leah.333 Abraham opened the negotiations by offering Ephron the "full price" of the field. Ephron responded, however, by offering the land as a gift:

Ephron the Hittite answered Abraham in the hearing of the Hittites, of all who went in at the gate of his city, "No, my lord, hear me; I give you the field, and I give you the cave that is in it; in the presence of my people I give it to you; bury your dead." Then Abraham bowed down before the people of the land. He said to Ephron in the hearing of the people of the land, "If you only will listen to me! I will give the price of the field; accept it from me, so that I may bury my dead there." Ephron answered Abraham, "My lord, listen to me; a piece of land worth four hundred shekels of silver—what is that between you and me? Bury your dead." Abraham agreed with Ephron; and Abraham weighed out for Ephron the silver that he had named in the hearing of the Hittites, four hundred shekels of silver, according to the weights current among the merchants.

... The field and the cave that is in it passed from the Hittites into Abraham's possession as a burying place.334

Because Abraham sought a burial site, he wished a title that would be secure for eternity. That all the Hittites in Ephron's city were reported to have observed the transaction helped provide Abraham the two assurances that any land buyer seeks. First, the large number of witnesses lessened the risk that Ephron would later disavow the sale by claiming, for example, that he had never received the

331. Id. at 283.
332. For a masterful essay on this transaction, see WESTBROOK, BIBLICAL LAW, supra note 85, at 24-35. Although some scholars attribute this text to the P-source, Westbrook regards its roots as ancient. Id. at 34-35.
purchase money. Second, the ceremony had provided each witness a chance to speak up if he believed that he held a title to the Cave of Machpelah that was concurrent with, or superior to, Ephron's; that none in the throng had spoken helped assure Abraham that the risk of third-party claims was low.  

Abraham's insistence on paying for the land is also notable. Because accepting a gift typically obligates a donee to later repay the donor's generosity in some fashion, a donee bears a greater risk than a purchaser does that the transferor will seek the return of property. The passage in Genesis teaches that an Israelite should be wary of accepting land as a gift, particularly from an alien. Having learned this lesson, when King David acquired the site of what later became Solomon's Temple from Araunah the Jebusite, he declined the alien's offer to give the land along with oxen and wood, saying, "No, but I will buy them from you for a price," fifty shekels of silver in that instance.

2. Written Sales Documents and Land Descriptions

The refinement of writing and the spread of scribal skills gave rise to ever simpler procedures for protecting land buyers. Mesopotamian scribes eventually came to be schooled in preparing clay tablets to memorialize these transactions.

335. A Sargonic obelisk refers to a land sale attended by 30 witnesses, and concluded by a ceremonial feast at which 94 local men "ate bread." Gelb et al., Ancient Kudurrus, supra note 75, at 129. On these rites, see id. at 243-44.

336. Ephron may have been obligated to distribute portions of the silver to his heirs and clansmen, because they may have had inheritance rights or authority to veto the transfer. See infra text accompanying notes 382-93. Compare Gen. 23:20; 25:9-10; 49:32 (all of which refer to "the Hittites" as the sellers), with Gen. 23:9, 17 (referring to Ephron as the seller).


340. See 2 Sam. 24:16-24; 2 Chr. 3:1; 1 Kings 9:20 (identifying Jebusites as aliens); see also Gen. 33:18-20 (Jacob's payment of one hundred pieces of money to aliens for site for an altar); 1 Kings 16:24 (King Omri's purchase of site of city of Samaria for two talents of silver).

341. Oaths and other ritual observances typically complemented the procedure. See Foster, Land Sales, supra note 129, at 442. The clay tablet itself came to symbolize the transaction; the Code of Hammurabi, when it called for invalidation of a transfer, stated that the buyer's "tablet shall be broken." Code of Hammurabi ¶ 37, as translated in 2 Driver & Miles, supra note 113. But cf. Martha Roth's version in Code of Hammurabi, supra note 44 (offering "deed shall be invalidated," a less archaic translation).
A cuneiform land-sale text typically covered only the basics: identity of the parties; barebones land description; price paid; revendication clause; and witnesses. 342 For example:

1-1/2 sar (of land) with a house built on it, next to the house of Kununu and next to the house of Irraya, Arad-Zugal has bought from Arad-Nanna. He has paid him 8-1/2 shekels of silver as its full price.

Arad-Nanna has taken an oath by the king that he will not in the future say “it is my house.”

[The names of witnesses, and the date, follow.] 343

This document, like many others, includes an estimate of land area. Specialists in land surveying show up in the most ancient historical records. During the Fara Period (c.2600-2450 B.C.), a “master house surveyor” and “(field) scribe” were responsible for surveying (and perhaps also registering) house and field properties, respectively. 344 A Sumerian tablet (c.2350 B.C.) documenting a land sale identifies one witness as a surveyor and another as the son of a surveyor. 345 Beginning in the late-third millennium, survey maps of fields were being incised on clay tablets. 346 During the Middle Babylonian period, explicit land measurements appear in recorded documents. 347 Paintings in five Eighteenth Dynasty Egyptian tombs portray land measurers at work. 348 Over 90% of the grain fields listed in Text A of the Wilbour Papyrus contain either 3, 5, 10, or 20 arouras — a regularity of sizing that suggests coordinated surveying and land subdivision during the New Kingdom.

Procedures for written land transactions in ancient Israel are suggested by Jeremiah’s 587 B.C. purchase of his cousin Hanamel’s rights to a field at Anathoth. In what the Oxford Bible calls “the most detailed account of a business transaction in the Bible,” 350 Jeremiah reports that he:

weighed out the money to him [Hanamel], seventeen shekels of silver. I signed the deed, sealed it, got witnesses, and weighed the money on scales. Then I took the sealed deed of purchase, contain-

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343. Saggs, Babylon, supra note 80, at 293-94.
344. Gelb et al., Ancient Kudurrus, supra note 75, at 237; see also the reference to a “purchase rope” in the text quoted at infra note 360.
345. Foster, Land Sales, supra note 129, at 452.
347. Knapp, supra note 24, at 159.
348. Hughes, supra note 102, at 41-42 (scenes show ripe grain, implying that measurers were working for landlords or tax collectors).
349. Katary, supra note 103, at 309. An aroura equals approximately two-thirds of an acre.
350. Oxford Bible, supra note 59, at 1011-12 n.32.1-44.
ing the terms and conditions, and the open copy; and I gave the deed of purchase to Baruch [Jeremiah’s own personal secretary\(^{351}\)] ... , in the presence of my cousin Hanamel, in the presence of the witnesses who signed the deed of purchase, and in the presence of all the Judeans who were sitting in the court of the guard. In their presence I charged Baruch, saying, Thus says the Lord of hosts, the God of Israel: Take these deeds, both this sealed deed of purchase and this open deed, and put them in an earthenware jar, in order that they may last for a long time. For thus says the Lord of hosts, the God of Israel: Houses and fields and vineyards shall again be bought in this land.\(^{352}\)

This passage implies (despite its final sentence\(^{353}\)) the existence of a routinized system of land transfer that involved an official deed that was written on papyrus, rolled up, and sealed; an open copy kept for more ready reference; witnesses; and household archives for the keeping of permanent records. It is notable that, even though Jeremiah’s transaction was between relatives, procedural formalities were strictly observed. The centrality of written documents in this transaction contrasts strikingly with their absence in Abraham’s transaction.

3. Protecting Buyers from Breaching Sellers

A clay sales tablet included the names of witnesses and the impress of the seller’s seal.\(^{354}\) If safely deposited, perhaps in a temple or the buyer’s family archive, copies of this tablet would be available to help prove that the seller had indeed consented to the transfer. The sales document might also include a revendication clause (a boiler-plate cuneiform entry) in which the seller took an oath against reopening the transaction in the future.\(^{355}\) Officials might also be present to witness and affirm the seller’s consent;\(^{356}\) for example, in c.2350 B.C. the city herald of Girsu apparently consummated a house

\(^{351}\) Jer. 36:4-8.

\(^{352}\) Jer. 32:9-15.

\(^{353}\) Raymond Westbrook has suggested that the final sentence probably refers to a hiatus in land sales on account of a siege by the Babylonian army. Letter from Raymond Westbrook to Robert Ellickson (Nov. 15, 1995) (on file with recipient) [hereinafter Westbrook Letter].

\(^{354}\) Postgate, Mesopotamia, supra note 26, at 61, 285-86.

\(^{355}\) See Gelb et al., Ancient Kudurrus, supra note 75, at 244-47 (calling this a “no-contest clause”). Some revendication clauses covered both parties. Saggi, Babylon, supra note 80, provides an example at 294: “They have taken an oath by Ishtar and by Ibal-pi-El the king that neither will in future return against the other. He who makes a claim (at law) shall pay two minas of silver and his tongue shall be torn out.” In some contexts a revendication clause might have been intended as a waiver of the seller’s right to redeem.

\(^{356}\) See Gelb et al., Ancient Kudurrus, supra note 75, at 237 (in mid-third millennium Mesopotamia, official surveyors and heralds were typically involved in the sale of a house or field, and received small gifts from the buyer).
sale by driving a peg into the house's wall and then surrounding the peg with a clay collar into which he impressed his seal.\textsuperscript{357}

An Old Babylonian lawsuit nicely illustrates the value of these procedures in the event of a seller's breach. Ilusha-hegal, a priestess who had sold her house at Nippur to Addi-liblut's wife, complained in a lawsuit that she had not received the full purchase price.

\[\text{Addi-liblut did produce the sealed deed for 1 } \text{sar} \text{ of house, and the judges read it, and questioned the witnesses who were written in the deed and they gave evidence before the judges in front of Ilusha-hegal that she had received 15 shekels of silver as the price of 1 } \text{sar} \text{ of built house, and Ilusha-hegal conceded it. The judges examined their case, and because Ilusha-hegal had disowned her seal they imposed a penalty on her and made out this tablet renouncing her claim.}\textsuperscript{358}

\textbf{C. Protecting Buyers from Third-Party Claimants}

Methods of protecting buyers from encumbrances were varied and increasingly sophisticated.

1. Early Procedure: Buyer Side-Payments to Seller's Kin

During the mid-third millennium, a buyer commonly made minor "gifts" to the primary seller's heirs or other possible claimants, payments that would help estop them from later challenging the validity of the transfer.\textsuperscript{359} A stone tablet from c.2400 B.C. illustrates this system:

Lummatur, son of Enanatum, the governor of Lagash, bought 9 1/4 iku of land, (measured?) by the "purchase rope," from B and C, sons of A, the "lords of the field" (= primary sellers). The rate is 1 iku of land at 2 gursaggal of barley. B . . . received 18 1/2 gursaggal of barley as the price of the field and x commodities as the gift. C, the "lord of the field," . . . and b\textsubscript{1}, b\textsubscript{2}, b\textsubscript{3}, b\textsubscript{4}, [four] sons of B, and c\textsubscript{1}, c\textsubscript{2}, c\textsubscript{3}, c\textsubscript{4}, c\textsubscript{5}, c\textsubscript{6}, c\textsubscript{7}, [seven] children of C . . . , the "sons of the field,"

\textsuperscript{357} Postgate, Mesopotamia, \textit{supra} note 26, at 61 (photograph of seal), 286.
\textsuperscript{358} Id. at 279; see also Thorland, One Heir, \textit{supra} note 267, at 69-73 (describing Old Babylonian probate litigation in which the size of the inheritance was to be decided by evidentiary production of deeds to real property).

Nevertheless, the role of documentary evidence in litigation over land ownership is uncertain, even in the Old Babylonian period. Some lawsuits appear to have been resolved by the taking of oaths. See, e.g., Pritchard, ANET, \textit{supra} note 289, at 218 (example where oaths to god are reported to have been used to decide competing claims to house). Court records are terse, however, and may underreport decisionmakers' consideration of underlying documents. Postgate, Mesopotamia, \textit{supra} note 26, at 281.
\textsuperscript{359} See also \textit{supra} text accompanying notes 182-92 (families as owners).
received x commodities per person as the gift. B . . . drove this nail into the wall and spread the oil on the side.360

In this transaction, B's and C's children were surely more than mere witnesses, but also less than full co-owners. By paying off these secondary sellers, a buyer was probably seeking to extinguish their rights (if any) to inherit or redeem patrimonial land, or veto its alienation.361

2. Seller Warranties of Title

Some sale documents came to include an express warranty against title defects. A "defension clause" memorialized a seller's promise to appear in court to defend the buyer's title against third-party claimants and possibly to clear the title of these claims.362 In some Pre-Sargonic versions, should a third-party prevail over the buyer, the warranty called for the clay purchase nail to be driven through the seller's mouth; in later versions, a seller in breach was to provide compensation to the buyer.363

3. Quieting Title Through Publicity of an Impending Sale

In some eras it appears to have been conventional for a buyer contemplating a land purchase to arrange for a public herald to publicize the impending transaction.364 The Middle Assyrian Laws (c.1076 B.C.) describe a highly sophisticated variation of this method of title protection:

[B]efore he purchases the field or house, he shall have the herald make a proclamation three times during the course of one full month within the City of Ashur [the Assyrian capital], and . . . [also] within the city of the field or house which he intends to purchase, as follows: "I intend to purchase the field or house, within the common irrigated area of this city, belonging to so-and-so, son of so-and-so. Let all who have a right to acquire (the property) or a contest (against this transfer) bring forth their tablets and present them..."
before the officials, let them thus contest (the purchase), let them clear (the property of other claims), and let them take it . . . .” When the herald makes his proclamation . . . [certain specified royal and city officials are to be present, who, at the end of the process are] to write their tablets and give (them to the purchaser, saying) as follows: “The herald has made proclamations three times during the course of this full month. He who . . . has not presented [his tablet] before the officials forfeits (any claims to) the field or house; it is cleared for the benefit of the person who had the herald make the proclamation.”365

The ensuing portion of the excerpt directs the “judges” to prepare three tablets attesting to the herald’s proclamations; the source then breaks off, just as it seems to be about to identify to whom the tablets are to be delivered. Note that a buyer could invoke this Middle Assyrian procedure—strikingly analogous to the modern quiet title action—in order to be able to buy with confidence from an adverse possessor.366

4. Official Land Records and Possession as Methods of Providing Notice to Bar Third-Party Claims

There is ample evidence of land-records depositories in ancient Mesopotamia and Egypt.367 Archeological evidence from Shuruppak suggests that clay tablets memorializing land sales were stored together in records offices as early as 2500 B.C.368 During the Middle

365. Middle Assyrian Laws, supra note 117, Tablet B, ¶ 6 (parenthetical material appears in original translation; bracketed material and ellipses have been added by authors).

366. On American law, see Comment, Enhancing the Marketability of Land: The Suit to Quiet Title, 68 YALE L.J. 1245 (1959); DUKEMINIER & KRER, supra note 1, at 121-68 (adverse possession).

None of the known codes sets out generally applicable requirements for obtaining title by adverse possession. A number of provisions do touch on the problem, however. For instance:

If either a soldier or a fisherman abandons his field, orchard, or house because of the service obligation and then absents himself, another person takes possession of his field, orchard, or house to succeed to his holdings and performs the service obligation for three years—if he then returns and claims his field, orchard, or house, it will not be given to him; he who has taken possession of it and has performed his service obligation shall be the one to continue to perform the obligation.

Code of Hammurabi, supra note 44, ¶ 30. Bui cf. id, ¶ 31 (a feudatory’s absence for one year is not sufficient to deprive him of possessory rights). For analysis, see 1 Driver & Miles, supra note 113, at 119 (resisting analogy to adverse possession because the second occupier’s possession appears to have been based from the outset on a royal grant). See also Laws of Lipit-Ishtar, supra note 42, ¶ 18 (When the owner of an estate has failed to honor tax obligations, a person who has assumed that tax burden for at least a three-year period acquires an entitlement to possess the estate.); supra text accompanying note 119 (on rights of good-faith improvers under Middle Assyrian Laws).

367. On the prevalence and nature of land-records systems in Mesopotamia, see STEINKELLER, THIRD-MILLENNIUM TEXTS, supra note 323, at 89; Foster, Land Sales, supra note 129, at 441-42.

368. POSTGATE, MESOPOTAMIA, supra note 26, at 285-86; see also GELB ET AL., ANCIENT KUDURRUS, supra note 75, at 19 (various sale documents identify land sellers as holding the
Babylonian period, a system for registering royal land is well attested.369 There is suggestive, if not conclusive, evidence that the Neo-Assyrian palace (c. ninth to seventh centuries B.C.) maintained registries of land purchase documents, perhaps in part to aid the palace’s administration of its taxation system.370

According to one source, during all historical periods the Egyptian state was registering land sales, acting through local councils and witnesses.371 By the Middle and New Kingdoms, a form of fictitious lawsuit may have been used to effect a sale, a method that would have assured official recordation.372 The lawsuit of Mose, referred to above, provides an illuminating glimpse at the extent of records systems in the New Kingdom.373 Khay, an unscrupulous government official, had bribed colleagues working in the archives of three pharaonic organizations—the Royal Treasury, Bureau of the Granaries, and Royal Judgment Hall—to alter in his favor records pertaining to Mose’s ancestral land. Mose nevertheless managed to prevail in court by presenting, along with various depositions, “family records going back 300 years; a copy of the official land-register which named his parents as the owners; [and] a copy of the official tax-assessment records showing his family had paid the taxes on the land . . . .”374

Why would ancient Near Eastern regimes establish public archives of land-sale documents? While these documents would be relevant to disputes over alleged breaches by sellers, a household archival system such as Jeremiah’s might well be adequate for that purpose.

369. Small stelae, called kudurrus in Akkadian, were prepared to memorialize royal land grants. The original stone was deposited in a temple, where it would be accessible for public viewing, and a clay copy was delivered to the grantee. A kudurru described the land being granted and listed tenurial obligations due. The text also included a list of witnesses and elaborate curses to deter tampering with both the stela and the grantee’s interest. See GELB ET AL., ANCIENT KUDURRUS, supra note 75, at 21-24; KNAPP, supra note 24, at 157.

370. Fales, supra note 229, at 2-3.

371. See Théoridoridès, supra note 56, at 292-93; see also Baer, Low Price, supra note 100, at 45 (in the later New Kingdom, land transfers were recorded in local courts). Cf., McDowell, supra note 272, at 222 (at Deir el-Medina “property disputes were taken particularly seriously, and were decided by the oracle or the representatives of the vizier” rather than the local court).

372. See Pestman, supra note 56, at 62-63. During the Predynastic period and the Old Kingdom, there is some suggestion that an oral agreement sufficed to effect a land sale, with a written record produced only in the event of a legal dispute. Théoridoridès, supra note 56, at 292-93. This may have evolved into the fictitious-lawsuit procedure.

373. See supra text accompanying notes 274-75.

374. Ward, supra note 77, at 65.
In some contexts, a buyer might regard a temple as a safer depository than a house, particularly if the deity could be expected to safeguard the temple compound.\textsuperscript{375} It is also conceivable, but unlikely, that public-records systems functioned in part to protect land purchasers from hidden title encumbrances.\textsuperscript{376} This a private archive could not do. For example, by producing Hanamel's deed, Jeremiah could protect himself against Hanamel, but not necessarily against a third-party, for example, yet another cousin to whom Hanamel had previously sold the identical property at full price.

An appropriately designed public land-records system can enable a buyer to allay risks of almost all third-party claims. This is one of the primary functions of American recording statutes, for example. In general, these contemporary laws deem a land purchaser to have \textit{constructive notice} of information that could be obtained either by inspection of the premises being sold, or by examination of public land records.\textsuperscript{377} A buyer who purchases with notice—actual or constructive—of a pre-existing claim, takes subject to that claim. On the other hand, a purchaser or mortgagee without actual or constructive notice (in legal parlance, a "bona fide purchaser") generally prevails over hidden claims, even ones that were prior in time.\textsuperscript{378} This set of rules greatly reduces a purchaser's risks of being victimized by a double-dealer. Prior to closing, when it would still be possible to back out of the deal, a Jeremiah can search for third-party claims by inspecting both public land records and the land itself; after closing, a Jeremiah can immediately take possession and/or record the deed of purchase, thereby freezing out anyone to whom a Hanamel might subsequently sell the land.

There appears to be no textual evidence bearing on the existence of such a system in the ancient Near East. The cuneiform codes and Hebrew Bible say nothing about the relevance of constructive notice arising out of either possession or recordation in a public archive. The procedures in use, however, indicate that possession \textit{did} have legal relevance—perhaps, that a land purchaser would be charged with notice of what an on-site inspection would have revealed. This doctrine would provide a rationale, for example, for the Mesopotamian ritual

\textsuperscript{375} Westbrook Letter, \emph{supra} note 353.

\textsuperscript{376} Landbuyers' anxieties about title quality would be capitalized (negatively) into land values. As a result, all landowners and tax collecting institutions would have an interest in devising institutions to allay these risks.

\textsuperscript{377} See generally DUKEMINIER \& KRIER, \emph{supra} note 1, at 687-754.

\textsuperscript{378} This outcome is efficient because a party who first acquires an interest has far better information and ability to prevent double-dealing than does a subsequent purchaser for value.
of driving a "clay nail" into the wall of a purchased house. Moreover, as explained below, the widespread use of antichretic pledges (as opposed to mortgages) suggests that lenders regarded taking possession to be the one and only legally reliable method of barring subsequent third-parties claims.\(^{379}\)

Palace and temple staffs had reason enough to create central records depositories to facilitate their collection of taxes, tenurial obligations, and rents.\(^{380}\) To make a public-records system also serve to protect good-faith purchasers from third-party claimants, public authorities would have had to: devise systems to deter tampering, forging, and fraudulent dating of documents; provide adequate storage facilities and usable indexes for documents; and have a legal system capable of resolving disputes involving complex documentary records. None of the three ancient Near Eastern civilizations appears to have been capable of this combination of institutional achievements.

D. Restraints on the Alienation of Land

Throughout history, preliterate societies have tended to limit the power of private owners to transfer land holdings. This policy serves to cement a society's members more closely together, but at the cost of creating economic and social rigidities.\(^{381}\) Although evidence of functioning land markets is available for almost every period of ancient Near Eastern history, informal and legal norms tended to constrain land transfers, particularly of ancestral estates.

1. Varieties of Restraints on Alienation

   a. Village power to veto a land sale

Territorially-based clans and villages were important intermedi-ate groups in the ancient Near East.\(^{382}\) Cooperation at the village level would benefit residents in many endeavors, such as: defending against marauders; maintaining irrigation facilities and communal pastures; pooling labor for harvests; and spreading the costs of disease and household-specific crop failures.\(^{383}\) Cooperation within a social group is more likely when its members are close-knit—that is, well informed about one another and enmeshed in long-term relationships

\(^{379}\) See infra text accompanying notes 427-40.
\(^{381}\) See Property in Land, supra note 3, at 1375-80.
\(^{382}\) See supra text accompanying notes 193-202.
\(^{383}\) See HOPKINS, supra note 61, at 225, 256-60 (on the Israelite clan/village).
that enable each member to readily administer informal rewards and punishments. If a village landowner were to sell out to an alien household, that event might create external costs that the seller would not directly bear. Compared to most long-time residents, most aliens would have less village-specific social capital and fewer local kinfolk. With fewer "hostages" at stake, an alien would be less apprehensive about the prospect of village retaliation against opportunism on his part. In general, then, an alien would be less likely than a longtime resident to act cooperatively.

During preliterate and protoliterate eras of the ancient Near East, a land sale might not be effective unless witnessed and explicitly (or tacitly) approved by members of a tribe or village, a power that enabled these social units to screen against transfers to untrustworthy persons. Abraham's purchase of the Cave of Machpelah, one will recall, is reported to have been negotiated in the presence of all the Hittites living in the seller's city. These onlookers appear to have been entitled to prevent the sale.

b. Family power to veto a land sale

A smaller entity, the extended family household, was the basic social unit in the ancient Near East. Customary and legal norms favored the perpetuation of a patrimonial home base. For example, the Mesopotamian custom of burying a dead person beneath the ground floor of his ancestral house served to deter alienation beyond the family, certainly by enhancing a would-be seller's contrition, and perhaps also by dampening interest on the part of potential purchasers. During the Early Dynastic period (c.2900-2400 B.C.) in Mesopotamia, each member of an extended family is thought to have had the power to veto the transfer of family land. Nevertheless, in a time of severe economic distress, senior family representatives might nego-

384. See ORDER WITHOUT LAW, supra note 186, at 177-82.
386. After the Kassite invasion (c. sixteenth century B.C.) had reinvigorated communal ownership in Babylonia, it is thought that a tribal consensus was a prerequisite for the alienation of communal land. KNAPP, supra note 24, at 157.
387. A contemporary analogy is the screening of prospective buyers by members of a cooperative housing association, who would bear the consequences if a newcomer defaulted on financial or other obligations. See DUKEMINIER & KRIER, supra note 1, at 934-35.
388. See supra text accompanying notes 332-36.
389. See WESTBROOK, BIBLICAL LAW, supra note 85, at 32-34 (casting Hittite community in role of consenting sovereign).
390. See supra text accompanying notes 182-92.
391. LLOYD, supra note 27, at 72, 96, 163.
tiate to sell patrimonial land, and the other adult family males would indicate their assent by serving as witnesses.\textsuperscript{392} As previously noted, by the middle of the third millennium, Mesopotamian land buyers were commonly paying small sums not only to the primary seller(s) but also to the seller’s relatives.\textsuperscript{393}

c. *Unwaivable prohibitions on transfers outside the family*

Members of a single family-line often owned a specific parcel of land for many generations. Even in Old Babylonian times, when land markets appear to have been liveliest, 31\% of house sales and 48\% of field sales at Nippur were made to a close relative of the seller’s.\textsuperscript{394} In Egypt, the aforementioned lawsuit of Mose involved land that had passed down within a single kinship line for three centuries.\textsuperscript{395} According to the Torah, every household in Israel was entitled to a plot of land as a tangible fulfillment of Yahweh’s promise to Abraham.\textsuperscript{396} In theory, this land was to be held by an Israelite family-line in perpetuity, a conception that called for immutable restraints on both sales and pledges to creditors.\textsuperscript{397} Many verses of the Hebrew Bible excoriate sellers of ancestral lands, consolidators of agricultural acreage, and creditors who acquire the farmsteads of defaulting debtors.\textsuperscript{398} Some Torah provisions purport to confer unwaivable powers on family members to redeem ancestral lands previously sold to non-kin.\textsuperscript{399}

While villagers would understandably be apprehensive about alienation to an outsider, why would they also seek to prohibit a prosperous insider from consensually buying out the ancestral home of an impecunious extended family? Land consolidation, which emerged as a central political issue in Israel, was associated with perceptions of an increasingly unequal social structure. Some Israelite priests sought to prevent land alienation to slow the trend toward larger agricultural estates.\textsuperscript{400} Sympathizers might chalk this up to the priests’ view that

\textsuperscript{392} Saggs, *Civilization*, supra note 251, at 38-39; see also Gelb et al., *Ancient Kudur-rus*, supra note 75, at 17 (During the 2600-2340 B.C. period, an individual or nuclear household could not alienate land in the absence of familial, and perhaps communal, consent.).

\textsuperscript{393} See supra text accompanying notes 188-92, 359-61.

\textsuperscript{394} Stone, *supra* note 167, at 276, 279.

\textsuperscript{395} See supra text accompanying notes 274-75, 373-74.

\textsuperscript{396} *Gen.* 12:7 (“To your offsprin I will give this land.”).

\textsuperscript{397} Matthews & Benjamin, *supra* note 88, at 202. Recall that Naboth told King Ahab, “The Lord forbid that I should give you my ancestral inheritance.” 1 *Kings* 21:3.

\textsuperscript{398} See infra note 466 and accompanying text.

\textsuperscript{399} See infra text accompanying notes 441-52.

\textsuperscript{400} On anti-latifundist sentiment in Israel, see Fager, *supra* note 151, at 85-88, 112-13; infra note 466. On trends in the distribution of wealth in Israel in 800-600 B.C., compare Silver,
egalitarian land distribution was desirable in and of itself. Cynics might suspect that priests opposed the emergence of plutocratic landlords to prevent any diminution in the relative social status of the priestly class.

Apart from addressing concerns about distributive justice, the compelled maintenance of a broad distribution of family farmsteads could be expected to have a number of benefits. The wide diffusion of economic power would likely enhance village solidarity. More specifically, because owner-occupants would have more at stake, they could be expected to defend their lands more ferociously than tenants, debt slaves, or hired workers would; as a result, restraints on the consolidation of ancestral farmsteads might constitute a sound defense policy. The perpetuation of ancestral farmsteads also ensured an economic base for the decentralized provision of social insurance to the infirm and elderly. It is harder for a household to dissipate the value of a land parcel than to squander the purchase money it has received as a result of a land sale. Paternalist policies that made family farmsteads inalienable and exempt from attachment by creditors might be thought appropriate to prevent a household from destroying its financial base and thereby shifting the cost of caring for its needy to the larger community.

d. Special restraints on the transfer of lands burdened with tenurial duties

Palaces and temples tended to impose particularized restraints on the alienation of lands carrying service obligations. These restrictions helped an institution ensure both the quality of feudatory services and the promptness of rent payments. In addition, attentive regulation of the transfer of tenurial duties could help an institution enhance the solidarity of its members. Predictably, the Code of Hammurabi imposes elaborate restrictions on the alienation of royal lands

PROPHETS, supra note 58, at 111-18, 248 (doubting that income inequality was increasing), with FAGER, supra note 151, at 86-88 (criticizing Silver's position).

401. See HOPKINS, supra note 61, at 241; ORDER WITHOUT LAW, supra note 186, at 179 n.42 (on how the broad distribution of power fosters cooperation).

402. Israel, where restraints on alienation seem to have been strictest, was the most militarily vulnerable of the three civilizations. Cf. HOPKINS, supra note 61, at 140-41 (some observers interpret the layouts of Israelite villages as defense-oriented).

403. During the Ur III Dynasty, the state may have supervised all land sales in some fashion. See GELB ET AL., ANCIENT KUDURRIS, supra note 75, at 17.
that had been allotted in return for services to the king. The Code strictly forbids an ordinary vassal ("a soldier, fisherman, or a state tenant") from selling his royal lands, assigning them to a creditor, or giving them to his wife or daughter; these provisions seem to have been addressed to situations where military service was due. By contrast, "a nadiitu [priestess], a merchant, or holder of a field with a special service obligation" (higher-status and perhaps more trustworthy persons) could sell their royal lands, with the purchaser assuming the "service obligation on the field, orchard, or house which he purchases."

2. Devices for Evading Restraints on Alienation

With a bit of imagination an owner might be able to skirt legal rules that prohibited the sale of an ancestral farmstead to a would-be buyer (presumably, someone better able than the owner to put the land to remunerative use). Most obviously, the owner could lease the farmstead to this transferee. Old Babylonian rules against the alienation of lands impressed with military obligations were sidestepped in this fashion, perhaps because the lessor could still perform the military obligation.

A sale of land could also be disguised as a loan. As explained more fully below, under an antichretic lease (pledge) arrangement, a lender took over possession of the borrower's land in order to secure a loan that the lender had made. Unless legal authorities were adroit at closing loopholes, the parties could privately agree that the loan would never be repaid and that the lender would remain permanently in possession. In effect, the delivery of the principal of the

404. See generally Code of Hammurabi, supra note 44, ¶ 26-32, 34-41, gap ¶ c (on transfer of service obligations and tenurial lands); see also Hittite Laws, supra note 46, ¶¶ 39-41, 46-56 (specifying land transferees who owe services to the king).

405. Code of Hammurabi, supra note 44, ¶ 36-38. However, feudal duties of a father "taken captive while serving in a royal fortress" automatically passed to a son "able to perform" those obligations. Id. ¶ 28.


407. Code of Hammurabi, supra note 44, ¶ 40. This is an ancient example of the burden of an affirmative covenant running with the land.

408. See Renger, Arable Land, supra note 36, at 300; Postgate, Mesopotamia, supra note 28, at 187. Beginning with the Ur III period, temple staff members who had been compensated with prebend land similarly began to lease out their holdings. Id.

409. See infra text accompanying notes 426-40.
“loan” would have functioned as payment of the full purchase price.\textsuperscript{410}

In Mesopotamia, conveyancers were particularly ingenious at overcoming legal restraints on land alienation. At Mari during the Old Babylonian period, sellers dodged rules against the sale of tribal property by falsely claiming that the buyer was receiving a share of a division of common property.\textsuperscript{411} After the economic crisis of 1739 B.C. at Nippur, some buyers may have evaded restraints on alienation by deceitfully asserting that they were kinfolk of former owners and were taking the land as redeemers.\textsuperscript{412} The most notorious evasionary tactic was the fictitious adoption, widely employed in the Nuzi area of the upper Tigris Valley during the fifteenth and fourteenth centuries B.C.\textsuperscript{413} Perhaps as a result of the influence of less civilized Hurrian invaders, Nuzi lawmakers had made arable land nominally inalienable outside the ancestral family. As so often happens, markets triumphed over law. Because transfers within a family were permitted, the transaction simply included a document by which the seller adopted the prospective buyer as his child.\textsuperscript{414} The tablet recorded the buyer’s “gift” (purchase payment) to the adoptive father, and noted the buyer’s receipt of the parcel in question as an “inheritance.”\textsuperscript{415}

3. The Trend Toward Greater Alienability

The widespread use of these sorts of evasions in second-millennium Mesopotamia indicates that traditional norms of inalienability were losing their grip. Restraints on alienation are perverse when they prevent, without sufficient justification, exchanges mutually advantageous to buyer and seller. As a labor force becomes capable of being more specialized, the cost of binding rural folk to ancestral farmsteads increases. In addition, the main benefit of the traditional restraints—enhancement of village close-knittedness—becomes less

\textsuperscript{410} Davies, \textit{supra} note 67, at 360-61 (noting that a borrower’s unwaivable right to redeem might help close this loophole by creating uncertainty about whether the transfer would stick).

\textsuperscript{411} Saggs, \textit{Babylon}, \textit{supra} note 80, at 294-95.

\textsuperscript{412} Stone, \textit{supra} note 167, at 281.


\textsuperscript{414} \textit{Id.}

\textsuperscript{415} Silver, \textit{Economic Structures}, \textit{supra} note 3, at 140-41, 159-60; Zaccagnini, \textit{supra} note 413, at 81-83. Many of these adoptee-buyers were creditors of the sellers. Renger, \textit{Arable Land}, \textit{supra} note 36, at 305. Adoptions were also used to evade Hittite Law restraints on the transfer of feudatory lands. See Gurney, \textit{supra} note 199, at 102-03 (referring to such adoptions as a “legal fiction”).
consequential after the emergence of a state capable of providing military and criminal-justice services over a broad territory.

A general, if hardly unidirectional, consequential trend toward greater legal alienability of land is evident in Mesopotamia and Israel as literacy, technology, and scarcity developed. In Mesopotamia, the rights of remote members of extended families to control ownership of ancestral lands generally ebbed after the middle of the third millennium. By the latter part of the first millennium, privately owned fields in Mesopotamia were “freely sold or bought.”

As mentioned, the Hebrew Bible reports numerous instances in which Israelites bought lands from aliens for currency. Although the biblical text is full of injunctions against Israelites’ selling patrimonial lands, Jeremiah’s purchase of a field from his cousin Hanamel in 587 B.C. symbolized that the devastation of the recent Chaldean invasion was to be remedied by freeing up land markets generally:

Fields shall be bought in this land of which you are saying, it is a desolation, without human beings or animals; it has been given into the hands of the Chaldeans. Fields shall be bought for money, and deeds shall be signed and sealed and witnessed, in the land of Benjamin, in the places around Jerusalem, and in the cities of Judah, of the hill country, of the Shephelah, and of the Negeb; for I will restore their fortunes, says the Lord.

In the end, Jewish law came to authorize land sales between persons unrelated by kinship.

VII. LAND FINANCE

Loans, especially of silver and barley, were commonplace in the ancient Near East. Particularly during early historical periods,

416. For example, communal land ownership and family-veto powers blossomed again after the Kassite invasion of Mesopotamia. See Knapp, supra note 24, at 157.

417. Egyptian sources are too thin to reveal trends.

418. See supra text accompanying notes 184-85. By the early second millennium even close family members seem to have had little practical influence over a landowner’s ability to sell or let his property. See W.F. Leemans, The Family in the Economic Life of the Old Babylonian Period, 5 Oikumene 15 (1986).

419. Renger, Arable Land, supra note 36, at 309.

420. See supra notes 337-40 and accompanying text.

421. Jer. 32:6-44.

422. Jer. 32:43-44; see also Jer. 32:15 (“Houses and fields and vineyards shall again be bought in this land.”).

423. Talmudic texts do not restrain the transferability of land. Weber, supra note 9, at 256; see also 1 Elon, supra note 300, at 196 (on use of Cave of Machpelah transaction as precedent in later Jewish Law).

however, institutional barriers and norms against the alienation of patrimonial holdings appear to have limited the use of a parcel of land as security for a loan. Instead, an ancient lender tended to obtain security by exacting an executory promise of "debt slavery," the borrower would promise that if he were to fail to repay the loan, either he, his wife, his children, or other members of his family would "enter the house" of the lender (or the lender’s assignee) to work for subsistence rations. A debt slave might serve either for a fixed term, or until the debt had been paid or canceled by royal edict. Although far inferior to a free worker, the status of a debt slave nevertheless was distinctly superior to that of a chattel slave, who had no crystallized prospect of freedom.

A. Land as Security for Loans

If legal rules were to allow, the owner of an unencumbered parcel could generate funds by entering into any one of a number of basic types of transactions:

1. a sale of the land for a lump sum;
2. a lease (converting the asset into a stream of incoming rents);
3. a mortgage loan (an arrangement that would enable the owner to remain in possession, with the lender entitled to take over possession in the event the borrower defaulted on loan repayment); and
4. an antichretic pledge (essentially, a rent-free lease for a fixed (or possibly indefinite) term to a lender in consideration for a loan).

In the ancient Near East, antichretic arrangements—unfamiliar in present-day real-estate circles—appear to have been used far more commonly than mortgages.426

1. The Antichretic Pledge

As just noted, under an antichretic arrangement, a lender immediately occupied a parcel of the borrower’s land on a rent-free basis.427 Therefore, at minimum, the borrower would be making, as long as the

425. See, e.g., Code of Hammurabi, supra note 44, ¶¶ 114-119 (regulating these arrangements); Silver, Economic Structures, supra note 3, at 89-92; Silver, Prophets, supra note 58, at 68-72.

426. Some cuneiform texts from Ugarit appear to reflect modern mortgage arrangements; in several of these, the buyer of mortgaged property seems to be clearing its title by using part of the purchase funds to release the debt the seller owed to a prior mortgage lender. Heltzer, Mortgage, supra note 88, at 92-95.

lender remained in possession, implicit payments in amounts equal to the rental value of the land. For example, suppose a borrower were to desire a loan of thirty silver shekels for a term of one year and were willing to pay annual interest of 33-1/3%. In one possible antichretic arrangement, the borrower would give the lender possession, for exactly one year, of land whose annual rental value was forty shekels. Observe that the lender, who would recoup not only interest but also the entire loan principal during the first year, would profit handsomely by holding over for an additional growing season. An antichretic borrower therefore had a strong incentive to deal with a lender who could credibly commit to relinquishing possession on time.

As another example, suppose a borrower were to seek a loan of thirty shekels at an annual interest rate of 33-1/3%, but could only pledge land with an annual rental value of ten shekels. Under these circumstances, an antichretic lease might entitle the lender to possess the land rent-free until the borrower had repaid the principal.

2. Why Antichretic Pledges and Not Mortgages?
An antichretic transaction is a form of pledge, in the sense that the lender actually takes possession of the security. A pledge arrange-

Many civil-law systems recognize the arrangement, and refer to it as antichresis, a word less accessible than the phrase antichretic pledge. For remnants in Louisiana law and practice, see LA. CIV. CODE ANN. §§ 3134-35, 3176-81 (West 1994); Ralph Slovenko, Of Pledge, 33 TUL. L. REV. 59, 128-32 (1958); Leonard Oppenheim, Comment, Antichresis: An Ancient Security Device Revived, 13 TUL. L. REV. 131 (1938).

428. An archival study of transactions in Nuzi in the mid-second millennium revealed that antichretic loans there tended to involve specific commodities (such as metals, domestic animals, farm produce, and manufactured goods) that the debtor was obligated to return in kind after some minimum term (typically 3 to 10 years) had elapsed. Zaccagnini, Price of Fields, supra note 184, at 8-11. Jordan, who also studied Nuzi transactions, reports that typical contract clauses required the debtor to clear the title of the field of fiscal encumbrances and liens, and prevented the debtor from reclaiming a field after plowing but before the harvest (presumably to protect the creditor’s investment in field preparation). Gregory D. Jordan, Usury, Slavery, and Land-Tenure: The Nuzi tidennu Transaction, 80 ZEITSCHRIFT FÜR ASSYRIOLLOGIE UND VORDERASIATISCHE ARCHAEOLOGIE 76, 79-83 (1990).

Antichretic arrangements are also in evidence in Assyria during both the Middle Assyrian and Neo-Assyrian periods (c. fourteenth to seventh centuries, b.c.). See Zaccagnini, Price of Fields, supra note 184, at 21-22, 24-26. Some Middle Assyrian loan contracts entitled the debtor to remain in possession of his real estate, at least prior to the expiration of the fixed term. On the issue of whether these arrangements can be characterized as mortgages, see id. at 21 & n.36. During the Neo-Assyrian period a creditor typically was entitled to possess pledged land for a fixed number of years. It is uncertain whether the term was calculated to provide the lender the return of his capital as well as the interest and, if it was not, what occurred at the end of the term if the debtor could not repay the principal. J.N. Postgate, FIFTY NEO-ASSYRIAN LEGAL DOCUMENTS 51 (1976).

429. A realistic market interest rate for the ancient Near East. See infra text accompanying notes 476-80.
ment is inherently costly because it places the security in the hands of someone who is likely to be less capable than the borrower/pledgor of putting the asset to productive use. For example, a farmer typically could cultivate a patrimonial field more skillfully than an average lender could. A pledgee of course might lease the pledged property to a third party, or, if the original owner were to be the optimal land manager, even lease it back to the debtor. These additional arrangements would entail transactions costs, however. Indeed, the basic problem with the pledge is that putting a lender in possession tends to be an awkward (high transaction cost) method of providing notice that a secured claim exists.

Why then were antichretic arrangements so pervasive? Scraps of textual evidence support the view, embraced by many historians, that lenders simply had the market power to force harsh terms on borrowers. The Code of Hammurabi placed a number of restrictions on the profits of antichretic lenders; these provisions hint that these capitalists were popularly viewed as greedy and abusive. This also seems to have been the opinion of the reformist priests in Israel:

There were also those who said, “We are having to pledge our fields, our vineyards, and our houses in order to get grain during the famine.” And there were those who said, “We are having to borrow money on our fields and vineyards to pay the king’s tax... We are powerless, and our fields and vineyards now belong to others.”

Historians should be wary of this simple exploitation hypothesis, however. The antichretic transaction evolved over many centuries, and it is implausible that borrowers were blind to its shortcomings.

A somewhat more promising hypothesis is that, given the legal procedures of the era, allowing the lender to take immediate possession tended to be an efficient (mutually advantageous) term in a loan

430. Many scholars regard antichretic arrangements as highly unfavorable to debtors. See, e.g., Jordan, supra note 428, at 82 (creditor is “true beneficiary” of these transactions); Zacccagnini, Price of Fields, supra note 184, at 11-12, 26. The fact that interest rates were high does not in itself prove lender overreaching. See infra text accompanying notes 475-80. Nevertheless, although there is no direct evidence on the point, some lenders no doubt possessed monopoly power or committed frauds on unsophisticated borrowers. These practices would have given fuel to the anti-lender sentiment that pervaded the ancient Near East.

431. See Code of Hammurabi, supra note 44, ¶¶ 49-50, gap ¶ a. These paragraphs address situations in which the crop grown on the secured land is bountiful enough to more than repay the lender in possession both principal and interest. These provisions state that the debtor/owner is entitled to reap the crop, repay both principal and interest, and keep any overage. Although this treatment suggests some movement in the direction of a mortgage arrangement, a pledge-like feature remains: the lender is still entitled to have possession during the growing season.

432. Neh. 5:3-5.
contract. This might have been so for two reasons. First, awkward as it was, taking possession may have been the only feasible way for a lender to protect himself from claims by subsequent third-party purchasers. By turning over the security to a particular lender, the antichretic lease largely eliminated the risk that the borrower would be able to defraud creditors by repeatedly marketing the same property as unencumbered security. For example, if there were no effective recording system and lenders were incautious, a venal Naboth might be able to mortgage his vineyard ten times over and abscond with the proceeds of the multiple loans, leaving his lenders squabbling over a vineyard far insufficient to satisfy all their claims. If an antichretic pledge were the customary arrangement, by contrast, Naboth's initial lender could take immediate possession of the vineyard, presumably in conspicuous fashion, thereby giving subsequent lenders legally decisive notice that Naboth had already promised that security.

The chief advantage of a mortgage system is that it leaves the borrower in possession. To establish a viable mortgage system, however, legal authorities must: (1) provide a simple way, short of taking possession, for a mortgage lender to provide notice of his security interest in a manner readily discernable to subsequent buyers and liens;ors; and (2) declare that the claim of a lender who has complied with this notice requirement is to prevail over the claims of all subsequent claimants (on the ground that they should have known what they were getting into). Later civilizations were able to make use of on-site monuments or central land-records systems to accomplish this notice function. In ancient Athens, for example, a lender came to be able to give authoritative notice of a land security interest by driving an engraved stone (horos) into the ground at the site in question. After a civilization achieves that sort of institutional milestone, the mortgage is likely to begin to supplant the pledge. And, when that has come to pass, land—a conducively valuable and immobile asset—becomes capable of outrivaling debt slavery as a means of loan security.

As mentioned, none of the three ancient civilizations seems to have succeeded in developing a simple procedure by which a lender could provide authoritative notice of a land-security claim short of taking actual possession. Even in an instance in which a lender was to look only to a crop for security, provisions of the Code of Hammurabi

433. See supra text accompanying notes 377-79.
suggest that the lender conventionally would take possession of the land (perhaps to rent it to a third-party tenant). 435 Ancient land-record archives reveal little or no hint of mortgage-like documents. 436 There seems to be no evidence of litigation between lenders over loan priorities. It appears, then, that taking possession was an ancient lender's only surefire way of barring the claims of subsequent third-party purchasers. Under those circumstances, an antichretic pledge awkward as it was, could have been a more efficient transaction than a mortgage.

Second, if lenders on the whole could commit to keeping promises more credibly than borrowers could, an antichretic pledge would reduce the expected costs of breach by the party in possession—the one who could do the most damage. Both mortgage and antichretic-pledge arrangements require the party in possession of the land security to depart from it under specified circumstances. A mortgage transaction calls for a debtor who has defaulted to relinquish the property. In the case of an antichretic arrangement, by contrast, the lender is to turn over possession once the debtor has satisfied the terms of loan repayment. In the ancient Near East, lenders may have been more likely than borrowers to voluntarily leave land on the occasions they had promised they would. Merchants, members of temple cliques, and others who specialized in lending would have been repeat players, concerned about maintaining reputations for promise-keeping. In addition, because of the populist political culture and the tradition against alienation of patrimonial lands, lenders may have doubted that state force would have been reliably available to assist them in ousting a mortgagor in default. The forcible eviction of an extended household from an ancestral farmstead would have been a potentially explosive event. The prevalence of antichretic arrangements (not to mention redemptive rights) 437 suggests that ancient norms may have been more tolerant of evictions of “land consolidators” than of longtime family possessors. Recognizing this, the parties to a loan may have seen mutual advantage in an antichretic arrangement that gave possession of the security to the party who, if in breach, would be easier to oust.

435. Code of Hammurabi, supra note 44, ¶¶ 49-50, gap ¶ a (all dealing with situations in which a lender had taken possession of agricultural land). For more on these provisions, see supra note 431.

436. On records systems, see supra text accompanying notes 367-80.

437. Redemptive rights (see infra text accompanying notes 441-52) would be toothless unless someone in authority would be prepared to evict a creditor or purchaser who refused to relinquish a redeemer’s ancestral holding.
The hypothesis that antichretic pledges were inherently more efficient than mortgages is difficult to reconcile, however, with the pervasive institution of executory debt slavery, a transaction with the same basic disadvantages of a mortgage. Because there seem not to have been systems for recording security interests in persons,\textsuperscript{438} an unscrupulous borrower might promise a number of unwary lenders that his children would exclusively secure each of their loans. A forcible eviction from an ancestral farmstead might be a traumatic event, but so surely might be a creditor's seizure of a wife or child after a father's default. If executory debt-slavery arrangements could persist in the teeth of these drawbacks, why couldn't mortgage arrangements as well?

Perhaps the most plausible hypothesis for the widespread use of the antichretic pledge is that, like many other facially awkward transactions, it was used primarily to evade legal rules that prohibited specific types of contractual arrangements. As previously noted, an antichretic pledge was a simple means to disguise a sale that would otherwise violate restraints on land alienation.\textsuperscript{439} An antichretic pledge also could readily be structured to provide returns in excess of the usury limits that were routinely in force in the ancient Near East.\textsuperscript{440} In the sample transactions presented above, the implicit annual interest rate is 33-1/3\%, but that figure is nowhere stated as such. This hypothesis generates a positive prediction: the erosion of restraints on alienation and usury laws should be associated with a decline in antichretic arrangements.

B. Relief for the Financially Distressed

For reasons to be explored in the next Part, members of palace and temple elites often exercised legal influence on behalf of debtors.

\textsuperscript{438} But cf. SAGGS, BABYLON, supra note 80, at 170-71 (discussing markings on persons already in slavery).

\textsuperscript{439} See supra text accompanying notes 408-10.

\textsuperscript{440} See, e.g., Laws of Eshnunna, supra note 43, ¶ 18A, 20-21 (specifying rates of interest on loans of silver and grain); Code of Hammurabi, supra note 44, gap ¶¶ t-v (similar); SILVER, PROPHETS, supra note 58, at 230 (720 B.C. Egyptian example of limits on interest rates). On Hebrew Bible norms and laws against charging interest, see Exod. 22:25 (ban on exacting interest from Israelites); Lev. 25:36-37 (prohibition on taking interest in advance from kinfolk); Deut. 23:19-20 (interest can only be charged of foreigners); Neh. 5:10-12 ("Let us stop this taking of interest."). See generally SILVER, PROPHETS, supra note 58, at 236-41.
1. Redemptive Rights

Ancient legal norms commonly entitled a person (or his relative⁴⁴¹) to redeem formerly owned land. These (nominally unwaivable⁴⁴²) redemptive rights were premised on the notion that patrimonial land lost on account of temporary financial distress should be reclaimable. Typically, these rights could be exercised against purchasers, purchasers’ transferees, and lenders who had taken possession under antichretic leases. Redemptive rights appear to have existed in third-millennium Mesopotamia, and were perhaps temporarily revived in an ordinance of Rim-Sin (c.1800 B.C.).⁴⁴³ The Israelites’ Holiness Code treated redemptive rights as fundamental and sought to regulate them in great detail.⁴⁴⁴ In territories where maintaining close-knittedness was especially essential for defense (i.e., outside walled cities), the Holiness Code proclaimed perpetual redemptive rights.⁴⁴⁵

Redemptive rights foul land markets by dampening land sales and discouraging buyers from improving redeemable lands. The authors of the Holiness Code were sensitive to these negative economic consequences. They set a time limit for redemption of urban property: “If anyone sells a dwelling house in a walled city, it may be redeemed until a year has elapsed.”⁴⁴⁶ Notably, the Holiness Code also systematically protected landholding priests from the consequences of redemption. A donor who had consecrated a house or field to the Lord but then elected to redeem it was required to pay a 20% premium over the value that the receiving priest had originally placed on the gift.⁴⁴⁷ In addition, if the priest were to have sold the consecrated

⁴⁴² Some commentators intimate that redemptive rights could be waived or destroyed. Fager implies that patrimonial agricultural land could be permanently alienated if all members of the relevant extended family promised to respect the transfer. Fager, supra note 151, at 28; see also Westrook, Biblical Law, supra note 85, at 15-16, 100-02 (arguing that a buyer who paid full price to a father would defeat sons’ patrimonial interests). If redemptive rights were indeed waivable, one might expect a buyer to insist on an express clause to that effect in the deed.
⁴⁴³ See Sags, Babylon, supra note 80, at 220-21 (citing a legal dispute in which a son appealed to a royal edict to reclaim real property that his father had sold).
⁴⁴⁴ Lev. 25:24: “Throughout the land that you hold, you shall provide for the redemption of the land.” See generally Lev. 25; Westrook, Biblical Law, supra note 85, at 58-68.
⁴⁴⁵ Compare the time-limited statutory rights of redemption that about half the American states make available to persons who have lost real estate as a result of foreclosure. See generally Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 609-22 (3d ed. 1994).
⁴⁴⁶ Lev. 25:29.
⁴⁴⁷ Lev. 27:14-20.
field to a third party, the donor lost his redemptive rights. These rules could be expected to increase the value of priestly assets.

Ancient legal codes seldom pinpoint the price that a reclaimer had to pay to redeem. Allowing the original land-seller to redeem by tendering the original sale price would be unjust in inflationary times, and would discourage a purchaser from later improving the land. This may explain why some redemptive rights apparently were formulated as preemptive options. Consider, for example, Laws of Eshnunna, paragraph 39: “If a man becomes impoverished and then sells his house, whenever the buyer offers it for sale, the owner of the house shall have the right to redeem.” One reason for waiting for the sales offer is that that offer could be used to dictate the redemption price, an approach that would enable the outgoing owner to recoup investments in improvements.

2. Debt Cancellation by Edict

Perhaps as early as the mid-third millennium, Mesopotamian kings episodically tended to proclaim a misharum—an act of “justice” or “equity.” A typical edict of this sort canceled specified debts and tax claims, and ordered the release of debt slaves. Some of these edicts apparently also decreed that specified landholdings (typically those lost on account of financial distress) were to be returned to their prior owners at no charge—in effect, enabling land redemption at a price of zero. (The nature of the tradition is only dimly understood because there is but one fully preserved example of a Mesopotamian

448. Lev. 27:20.

449. See, e.g., the ambiguous formula in Lev. 25:27. For detailed discussion, see Westbrook, Biblical Law, supra note 85, at 90-117 (concluding that the redemption price was most likely set to equal the original sale price).

450. On these devices, see Dukeminier & Krier, supra note 1, at 933-34. For an apparent case in point, see Ruth 4:3-10 (Boaz’s exercise of a preemptive option to purchase the land of Elimelech, his deceased kinsman), discussed in Westbrook, Biblical Law, supra note 85, at 63-68.


452. It is perhaps significant that ¶ 38, the immediately prior provision in the Laws of Eshnunna, supra note 43, authorizes a remaining partner “to match any outside offer” that a departing partner had received for his share.

453. See Postgate, Mesopotamia, supra note 26, at 196-98; Westbrook, Biblical Law, supra note 85, at 45-49; The Ancient Near East: Supplementary Texts and Pictures Relating to the Hebrew Bible 526 (James B. Pritchard ed., 2d ed. 1969) [hereinafter Pritchard, Supplementary Texts]. Many of these edicts are known only because royal year-names and private legal documents refer to them. Id.
misharum: the Edict of Ammisaduqa, the ruler of Babylon in 1646-1626 B.C.\(^{454}\)

The practice diffused to other lands. In 720 B.C., Bakenranef canceled various debts outstanding in the Egyptian delta.\(^{455}\) The Deuteronomic Code called for the nullification, “every seventh year,” of any debts that Israelites owed to one other.\(^{456}\) In early sixth-century Athens, Solon canceled the debts of agriculturists.\(^{457}\)

The frequency of ancient debt-relief edicts is uncertain. It is thought that a Mesopotamian king typically would declare a misharum at the outset of his reign, and thereafter perhaps at intervals of seven or more years.\(^{458}\) The more frequent these land-return edicts, the less important redemptive rights would be. Why pay to redeem one’s ancestral lands if a misharum would soon deliver those lands back for free?

3. The Jubilee Legislation in Leviticus 25

The Jubilee provisions of Leviticus 25:8-55 show the strong influence of the priests who are thought to have authored the late strata of the Torah.\(^{459}\) On paper, Jubilee was the most radical land legislation of ancient times—so radical that most scholars have concluded that it was never implemented.\(^{460}\) In essence the authors of these laws attempted to regularize the misharum tradition, which, to the great dismay of egalitarian prophets such as Jeremiah, Israelite kings had been neglecting.\(^{461}\) According to the key verse, every fiftieth year (i.e., after seven-times-seven years):

455. SILVER, PROPHETS, supra note 58, at 230.
456. Deut. 15:1-2. The Torah also called for the freeing of Hebrew debt slaves after six years of service. See Exod. 21:2 (male slaves); Deut. 15:12 (male and female slaves).
457. BURFORD, supra note 182, at 50-51.
458. For sources on frequencies, see WESTBROOK, BIBLICAL LAW, supra note 85, at 45. Hammurabi is thought to have issued debt-relief edicts in the 1st, 12th, 20th, and some time after the 30th year of his reign. Id.
459. On the literary strata of the Leviticus 25 text, see FAGER, supra note 151, at 123-25. Westbrook believes that the Jubilee laws may have been drafted as late as the sixth-century Babylonian exile. See WESTBROOK, BIBLICAL LAW, supra note 85, at 55-57.
460. FAGER, supra note 151, at 13 n.3, 34-36 (1993) (citing sources); WESTBROOK, BIBLICAL LAW, supra note 85, at 38-52; Davies, supra note 67, at 361, 365 n.13 (Because the mass reshuffling of lands would have been highly disruptive, Jubilee was abandoned at an “early stage” and many owners in fact lost their ancestral lands.); OXFORD BIBLE, supra note 59, at 158 n.25:23 (“[T]here is no evidence that the jubilee program was ever carried out.”).
461. See WESTBROOK, BIBLICAL LAW, supra note 85, at 16, 50-51.
you shall proclaim liberty throughout the land to all its inhabitants. It shall be a jubilee for you: you shall return, every one of you, to your [patrimonial] property and every one of you to your family.\textsuperscript{462}

By entitling a prior owner to repossess his ancestral lands without charge,\textsuperscript{463} Jubilee would have made ancestral land alienable not in fee simple but only for the time period up to the next Jubilee year.\textsuperscript{464} The priestly critics of Israelite society were explicit about this aim; in a key verse in \textit{Leviticus} 25, the Lord declares that "[t]he land shall not be sold in perpetuity, for the land is mine."\textsuperscript{465}

The priests who radicalized the Holiness Code sought to prevent the assemblage of large landholdings and stem the alienation of ancestral property.\textsuperscript{466} Their program also would have provided the Israelites exiled in Babylon a stronger legal basis for reclaiming ancestral lands upon their eventual return to Canaan.\textsuperscript{467}

Jubilee, by impairing land alienation and pledge, would have ossified Israelite society and periodically triggered cataclysmic reshapings.\textsuperscript{468} None of the historical narratives in the Hebrew Bible refer to either the shadow of an impending Jubilee or the event itself.\textsuperscript{469} The Israelites seem to have had the good sense not to follow the priests' utopian program.

\textsuperscript{462.} \textit{Lev.} 25:10.
\textsuperscript{463.} \textit{Lev.} 25:28; \textsc{Fager, supra} note 151, at 104.
\textsuperscript{464.} A dwelling house in a walled city (other than a Levite city) was exempt from Jubilee. \textit{Lev.} 25:29-33. \textsc{See Fager, supra} note 151, at 88-89 (interpreting this exception as an effort by the reformist priests to make the Jubilee program politically acceptable to city residents). Because an occupant could be expected to shirk on maintenance as a Jubilee year approached, Jubilee would have had especially dire consequences for complex structures such as city houses. In addition, the advantages of maintaining close-knit neighborhoods was more important in the relatively defenseless open country beyond city walls. Indeed, some commentators interpret the Jubilee legislation as applying only to cultivated lands. \textsc{See id.} at 89.
\textsuperscript{465.} \textit{Lev.} 25:23.

\textsuperscript{466.} \textsc{Boecker, supra} note 276, at 90-91 (purpose was to impede creation of a proletariat); \textsc{Fager, supra} note 151, at 87-88, 93-95, 98-111 (Jubilee provisions were aimed to preserve a kinship group's command of ancestral lands, and prevent abuses of rich against poor.). For prophets' sentiments in this vein, see, e.g., \textit{Isaiah} 5:8 (condemning those who "add field to field"); \textit{Micah} 2:1-2 (assailing the wicked who "covet fields, and seize them; houses, and take them away; they oppress householder and house, people and their inheritance").
\textsuperscript{467.} \textsc{Fager, supra} note 151, at 61, 110-11; \textsc{see also id.} at 61-63 (describing, but regarding as too cynical, Sharon Ringe's theory that the Jubilee text was an attempted power play by exiled priests who sought to control the land-distribution process after their return to Canaan).
\textsuperscript{468.} \textsc{See id.} at 97 (Jubilee "might have been economically disastrous").
\textsuperscript{469.} \textsc{But cf.} the references to Jubilee in the abstract in passages in \textit{Num.} 36:4, \textit{Isaiah} 61:1-3, and \textit{Ezek.} 46:16-17.
VIII. THE POLITICS AND ECONOMICS OF LEGAL RESTRICTIONS ON LAND TRANSACTIONS

The scapegoating of real-estate investors and moneylenders generally played well in the politics of the ancient Near East. Although the Jubilee legislation itself had no bite, many populist policies may have temporarily aided persons in financial straits. Some may even have contributed to long-run economic and social well-being. On the other hand, usury laws, perpetual redemptive rights, and debt cancellation edicts probably were perverse in most contexts, provoking time-consuming evasionary tactics, discouraging capital formation, and otherwise misallocating resources. Just as the prevalence of rent controls and usury laws in the mid-twentieth century cries out for social-scientific explanation, so do the enduring presences of comparably misguided ancient policies.

A. Causes of Populist Politics

Public-choice theorists would suppose that members of ancient elites adopted populist policies to preserve their power and social status. By issuing an edict that canceled debts, for example, a newly crowned king could anticipate that he would immediately earn the favor of current debtors. An insecure king might give great weight to these short-term political benefits, and heavily discount any long-term economic mischief that a debt-cancellation edict would cause. Similarly, members of a priestly class, desirous of maintaining their relative status and power, might oppose private land consolidations to forestall the emergence of powerful rivals in the private sector.

Path-dependence may also have been at work. An incoming monarch might be chary of dashing debtors’ expectations if the prior several kings had remitted debts immediately after assuming the throne.

470. Cf. Knapp, supra note 24, at 72-73 (on how the Pre-Sargonic king Uru-inim-gina shored up his power by championing ordinary citizens against “petty officials and noble landowners”).
471. See infra text accompanying note 481 (on inalienability of patrimonial land).
472. See Silver, Prophets, supra note 58, at 213-28, 249 (on “disastrous” progressive social reforms under Jeroboam II, Hezekiah, and other Israelite kings of the eighth century B.C.). See generally North, supra note 8. “The security of property rights has been a critical determinant of the rate of saving and capital formation.” Id. at 6.
473. But cf. Eric A. Posner, Contract Law in the Welfare State, 24 J. LEGAL STUD. 283 (1995) (arguing that, contrary to conventional economics texts, a usury law may be a desirable mechanism for restricting the extension of credit to high-risk borrowers).
The political influence of ideology, which in the ancient era was thoroughly permeated with religious belief, also cannot be ruled out. Some Israelite prophets no doubt favored populist measures not only on account of their wariness of emerging plutocrats, but also on account of theistic beliefs and genuine compassion for the poor.

B. Economic Effects of Populist Politics

1. Interest Rates

Ancient lenders could hardly be expected to ignore the risk that the palace (or temple) would annul outstanding debts. The Deuteronomistic Code, after proclaiming that debts between Israelites were to be forgiven every seventh year, went on to send a warning to would-be lenders:

> Be careful that you do not entertain a mean thought, thinking, "The seventh year, the year of remission, is near," and therefore view your needy neighbor with hostility and give [i.e., lend] nothing: your neighbor might cry to the Lord against you, and you would incur guilt.475

Not surprisingly, lenders responded to debtor-relief measures by charging high interest rates, their most straightforward method of obtaining financial compensation for the risks they had to run.476 Postgate reports that in Old Babylonian times annual interest rates were roughly 20% on loans of silver and 33 1/3% on loans of barley.477 A few hundred years later, in Nuzi in northern Babylonia, rates appear to have been even higher, perhaps exceeding 50%.478 Egyptian lenders, from the New Kingdom onwards, normally required rates of return in the range of 100% per annum.479 In 720 B.C., rates were so

476. If faced with a usury ceiling, a lender might be able to evade it with a device such as an antichretic lease.
477. Postgate, Mesopotamia, supra note 26, at 193. Postgate offers no comment on the disparity between the two figures. Perhaps, on average, borrowers of barley tended to be worse credit risks. Perhaps silver was usually lent to merchants, whose loans might be exempted from effects of debt-cancellation edicts. See Pritchard, Supplementary Texts, supra note 453, at 526-28 (Edict of Ammisaduqa did not cancel loans—whether of barley, silver, or other goods—to certain commercial enterprisers.). During the Old Babylonian period, the basic relationship of a merchant-venturer to his subordinate traders appears to have been that of creditor to debtors. See Code of Hammurabi, supra note 44, gap 11 cc, ¶ 100-07.
478. See Jordan, supra note 428, at 83; Zacagnini, Price of Fields, supra note 184, at 11 (antichretic lenders realized roughly 100% annual return (before expenses)).
479. Baer, Low Price, supra note 100, at 45.
high that Bakenranef, a ruler in the Nile Delta, decreed a prospective usury ceiling of 33 1/3% per annum.480

2. Land Prices

The market value of a parcel of land is determined by the present value of the expected flows of benefits and burdens that attach to it. Legal norms and institutions affect these flows and, in turn, land values. For example, improvements in institutions for maintaining land records, resolving title disputes, financing land transactions, and deterring trespassers and encroachers would all tend to boost the value of real estate. Conversely, a palace could depress land values by engaging in uncompensated expropriations, conferring overly generous re-demptive rights upon kin of ancestral occupants, and issuing edicts that authorized the uncompensated ouster of persons who had bought from, or lent to, the financially distressed. By increasing title risks, these sorts of measures would also deter land improvements. A landowner might decline to erect cattle booths or cultivate a vineyard if a redeemer could retake the land without paying for these improvements.

The net influence of a legal policy depends heavily on context. For instance, a traditional restraint that prohibited alienation of patrimonial land outside the family might raise the value of a parcel sited in a village where the maintenance of close-knittedness was essential.481 However, this same sort of restraint would lower market value wherever the negative effects of limiting the pool of eligible buyers outweighed the benefits of the restraint.

Although price controls were familiar in ancient Near Eastern economies, Morris Silver has adduced evidence of floating land prices in many contexts.482 Wide variations in real estate prices per unit of area are well-documented for third-millennium Mesopotamia483 and early second-millennium Sippar,484 Nippur,485 and Nuzi.486 When

480. Silver, Prophets, supra note 58, at 230. For sources on interest in the ancient Near East, see id. at 77 n.3. The Hebrew Bible, which sought to suppress the charging of interest, reveals nothing about market interest rates.
481. See supra text accompanying notes 400-02.
482. Silver, Economic Structures, supra note 3, at 92-96. A restored letter fragment from the Canaanite city of Tel Aphek suggests an understanding that scarce items sell at higher prices. Id. at 95-96 (citing William H. Hallo, A Letter Fragment from Tel Aphek, 8 Tel Aviv 18 (1981)).
483. Gelb et al., Ancient Kudurrus, supra note 75, at 251-74.
484. Harris, supra note 228, at 26-27 (house sale contracts), 217-20 (field sale contracts), & 242 (orchard sale contracts).
485. Stone, supra note 167, at 267, 272-76 (prices of fields, houses, and temple offices).
King Ahab sought to acquire Naboth’s vineyard, he did not refer to any administered price, but instead stated, “I will give you a better vineyard for it; or, if it seems good to you, I will give you its value in money.”

Many scholars have asserted that ancient Near Eastern fields sold for “low” prices, given their crop yields. At Old Babylonian Nuzi, for example, fields sold for approximately the value of one year’s grain harvest. Evidence from the New Kingdom (1540-1070 B.C.) suggests that Egyptian fields sold for 1 to 1-2/3 times the value of the annual crop.

These figures in themselves do not prove that land prices were low. The market value of a field is set not by its gross yield but by the capitalized value of the net rental income it generates. Average annual net rental income was likely to be far smaller than the value of one year’s crop. A landlord typically was entitled to only 1/3 or 1/2 of the crop as rent, might have had to incur a variety of maintenance expenses, and was likely to owe land taxes to the crown. In addition, to remain fertile, fields periodically had to be left fallow; indeed, irrigated fields in ancient Mesopotamia tended to be fallowed as often as every other year. Lastly, in calculating the present value of the net rental income a field would generate, an investor would take into account the risks of losing the land on account of a misharum, a redemptive claim, or an expropriation. If those risks would be roughly comparable to the risks faced by ancient lenders, the proper capitalization rate would equal the annual market rate of interest: on the order of 30%-to-50%.

With these considerations taken into account, the ratio of field sales prices to gross rents in the ancient Near East does not seem out of line. Suppose, for example, that a landlord’s average annual net rental income from a particular field were to be 1/6 of the average

486. Zaccagnini, Price of Fields, supra note 184, at 4-7 (Per unit of area, prices of fields varied widely, with irrigated fields at the high end.).
487. 1 Kings 21:2.
488. See, e.g., Diakonoff, supra note 74, at 44-45 (asserting that the price of land was extremely low at all times in Mesopotamia).
489. Zaccagnini, Price of Fields, supra note 184, at 7 (regarding this “a very low valuation”).
491. By analogy, a supermarket’s gross receipts are a poor indicator of the market value of the enterprise.
492. Postgate, Mesopotamia, supra note 26, at 159, 175, 294.
494. See also the discussion in Baer, Low Price, supra note 100, at 30-45.
annual crop (counting fallows), and the applicable discount rate were to be 33-1/3%. In that case, simple mathematics indicates that the field's expected sales value would be equal to one-half the value of the field's average annual crop. If the field were fallowed in alternate years, its sales value would be equal to the value of the crop harvested in a nonfallow year. In essence, the "low" sale price of land in the ancient Near East (like the high rate of interest) was largely a function of a legal environment deeply hostile to investors.

IX. Conclusion

The Introduction identified four general schools of theory on the process of historical change: rational-actor optimists, rational-actor pessimists, stage theorists, and cultural pluralists. On the whole, how does the assembled evidence on land regimes in the ancient Near East harmonize with these alternative conceptions?

Rational-actor optimists generally anticipate that individuals will be successful—within the constraints of their limited resources and knowledge—in creating institutions that will assist them in achieving cooperative outcomes. Rational-actor pessimists stress how path-dependencies or the machinations of powerfully placed interest groups may prevent members of a society from coordinating to mutual advantage.495 We ourselves conclude that, in general, the evidence from ancient Mesopotamia, Egypt, and Israel supports a hybrid of the optimistic and pessimistic views of institutional development.

Much of the evidence adduced seems consistent with our initial hypothesis that a small, close-knit social group will typically succeed in devising land-tenure institutions that maximize the welfare of the group's members.496 When free from outside coercion, ancient villagers appear to have adopted the marble-cakes of land-tenure arrangements that law-and-economics theory predicts: private ownership of houses, gardens, and small arable lands plots; communal or institutional ownership of arable and grazing lands where that arrangement was necessary to exploit efficiencies of scale or spread risks; and a

495. Most scholars who use the rational-actor approach decline to be pure optimists or pessimists, of course, and instead adopt a hybrid approach such as the one we discuss below.

496. At least one major caveat is in order. Villagers in ancient civilizations had scant success in controlling activities that caused diffuse environmental damage. Excessive irrigation caused severe salinization of lands in southern Babylonia and eventually helped make the area uninhabitable. Like others in the ancient Near East, the Israelites destroyed most native forests. But even societies that have possessed scientific knowledge far superior to the ancients have had difficulty developing institutional responses to activities with pervasive spatial consequences. See Property in Land, supra note 3, at 1334-35.
The record suggests that the social impetus toward these arrangements was universal—i.e., present regardless of a society's religion, ethnic make-up, and other cultural features.

The optimistic branch of our hybrid assessment also has a dynamic dimension. As land became scarcer, technology advanced, and literacy spread, these ancient civilizations tended to develop more efficient land-sale procedures and tended to relax traditional restraints on alienation that were ill-adapted to an urbanizing economy. These innovations, however, hardly occurred smoothly or in predictable stages.

The pessimistic element of our assessment is consonant with public-choice theory. In the ancient Near East, a powerful hierarchy (state, temple, or conquering invader) commonly imposed plainly inefficient land institutions. While the ancient state could earn legitimacy by providing a variety of public goods, it also often tended to push counterproductive measures that would enrich well-positioned constituencies at the expense of those less powerful. Examples are the Ur III dynasty's experiment in a centrally managed economy, the ancient Near Eastern traditions of usury laws and debt-relief edicts, and the Israelite priests' Jubilee program and related populist policies. Economic theory suggests that these hierarchical interventions, when effective, would have impaired the evolution of customary land institutions and reduced overall welfare. In sum, in the boldest of strokes, the ancient record tends to support the relative efficacy of civil society and both the necessity for, but utter unreliability of, the state.

These generalizations have implications for the remaining two schools of theory of historical evolution. Stage theorists, such as Marx and Weber, have sought to discern regular historical progressions. We side with the critics from many camps who have assailed this once fashionable idea. To be sure, the history of the ancient Near East does reveal cross-cultural trends, for instance the movement toward greater land alienability. But stage theory implies more static and dynamic regularities than the evidence supports. Snapshots of land institutions in the three ancient civilizations do not show the monolithic

497. For this theory, see source cited supra note 5.
498. See, e.g., McC. Adams, supra note 26, at 243-44 (attacking Wittfogel for exaggerating smoothness of temporal evolutions of institutions); Karl Polanyi, The Livelihood of Man, liii-lv, 42-43 (Harry W. Pearson ed., 1977) (offering criticisms of stage theory that seem in tension with Polanyi's own notion of a "great transformation" (see supra note 320)); Silver, Economic Structures, supra note 3, at 158.
land-tenure regimes that scholars such as Deimel and Diakonoff have hypothesized existed during periods of third millennium Mesopotamia.\textsuperscript{499} Instead, these snapshots show a multiplicity of arrangements. Most dynamic change, moreover, was erratic. For example, there was no consistent trend from communal toward private property.\textsuperscript{500} The histories of these civilizations—especially Mesopotamia and Israel—are punctuated with unpredictable cataclysms such as coups and invasions. The erratic political environment of the ancient world eviscerates any attempt to successfully construct a stage theory.

More concretely, ancient Near Eastern history provides no support for the belief, harbored by utopians, that human societies once enjoyed a pacific period of reliable reciprocal altruism, with little strife and evil, only to then fall from innocence.\textsuperscript{501} *Pace* Marx, Engels, Rousseau, and the Genesis account of Adam and Eve, institutions such as private property in land and social classes can be found in the most remote portions of the historical record. Those who keep pushing the "classless stage" of social organization back to the latest period of *pre*-history reveal an impulse to insulate this dream from risks of falsification.\textsuperscript{502}

These criticisms partially tar Karl Polanyi and Moses Finley, historians of ancient economies whose work was highly influential at least through the 1970s. They asserted that land markets did not exist in the ancient world\textsuperscript{503} and believed that ancient man, unlike modern "economic man," was motivated primarily by considerations of status and solidarity.\textsuperscript{504} This is a milder version of the same utopian sentiment. Four millennia ago, ancient peoples conferred land entitlements in bundles much like the current fee simple, and engaged in transactions—land sales, leases, sharecropping arrangements, and usury-law evasions—that a modern-day real-estate lawyer can readily recognize.

\textsuperscript{499} See supra text accompanying notes 173-77.
\textsuperscript{500} See also Field, supra note 193, at 319-20 (In Europe, the partially communal open-field system followed a more individualistic agriculture.).
\textsuperscript{501} For expressions of this belief, see, e.g., Engels, supra note 11, at 162-63 (quoting Lewis Henry Morgan) (Before the introduction of private property created distinct social classes, ancients lived in solidary clans.); Diakonoff, supra note 74, at 17, 31-32, 43 (Emergence of social classes during and after third millennium in ancient Near East weakened nonexploitative kin-based communes.).
\textsuperscript{502} See also supra notes 174-75.
\textsuperscript{503} See supra notes 21, 320, and accompanying text.
Cultural pluralists, the members of the fourth and final school, stress not stages of history but the plasticity of human institutions. Many facets of the three civilizations undeniably were distinctive enough to sustain the current disciplinary specializations in Assyriology, Egyptology, and Biblical Studies. But, in practice, the elaborate religions and mythologies of these societies seem not to have had much effect on their basic land institutions.

Much scholarship on the ancient Near East has stressed the influence of cultural differences on land regimes. Knapp and Saggs, for example, reiterate the common view that the Sumerians had a tradition of communal (and institutional) land ownership, which was thrown over by Akkadians who honored a Semitic tradition of private property in land.\(^5\) We are skeptical of this stress on the influence of ethnic traditions. People on the ground, recognizing that functional land institutions are essential to their daily survival, are unlikely to voluntarily decide to reshape them to comply with idiosyncratic cultural precepts. We doubt that ethnic variations per se have counted for much in the land context. For example, the “Sumerian” and “Akkadian” systems of land tenure appear basically to have been functional adaptations to environments dominated, respectively, by irrigated and rain-fed agriculture.

The evidence adduced suggests that law-and-economics can be a timelessly valuable heuristic for analyzing human affairs. Frank Michelman has brilliantly argued for the possibility that the efficiency of private property is socially contingent.\(^6\) The historical record indicates, however, that this institution has existed, as far back as one can see, for houses, gardens, and more. As a practical matter, ancient villagers’ diverse and undogmatic responses to land scarcity were tightly constrained, not highly plastic.

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505. See sources cited supra note 90; see also Renger, Arable Land, supra note 36, at 280-81, 283, 295, 305 (giving significant weight to influence of ethnicity, ideology, and religion on land institutions).

SYMPOSIUM ON
FEE SHIFTING

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