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PROPERTY AND EXPROPRIATION: THEMES AND VARIATIONS IN AMERICAN LAW

Carol M. Rose

Most of us think that as a nation, the United States is and always has been very conscious of property. The most legendary of our revolutionary slogans was "no taxation without representation," which is fundamentally about taking property without consent. Almost from its inception, our Constitution has included a clause protecting property against takings for public purposes without compensation, whereas some other countries' constitutions hedge their property clauses with flexible language to take into account the "public interest," or—as in the case of our Canadian neighbors—dispense with constitutional property protection altogether.

We have received a particularly large dose of the constitutional takings clause in the last few years, as conservative public interest groups have used the property clause to attack many environmental and land use regulations as unconstitutional takings of property. Indeed, property-rights proponents now seem poised to use takings doctrine to demand compensation for all kinds of regulatory change, since almost any regulatory change has some impact on someone's property values. This question of regulatory takings is the main subject of this article, but my plan is to frame the regulatory takings issue in a larger context of expropriations in American law.

Given our history and proclivities toward property, it may seem a bit odd to talk of an American tradition of expropriation. But a large part of my argument is that, far from being unknown or highly unusual, expropriations have been very much a part of our property law—so much so that we generally do not even notice them as such.

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This is not to say, however, that the stability of property is unimportant. There is a longstanding and very powerful argument that the stability of property is essential to economic well-being. Security of property, it is said, induces people to work as nothing else does, because property allow us to take the rewards of our labor. Moreover, property rights identify the parties who are interested in given resources, and thus allow people to trade for what they want rather than arguing and fighting. Trade, in turn, makes labor all the more valuable, because, as Adam Smith noticed long ago, trade permits specialization, and all other things being equal, specialized labor produces higher quantities and qualities of goods. Hence not only does property induce people to labor directly, but by enabling trade to take place, property also makes everyone's labor more productive and valuable, a fact that indirectly induces still more labor—more thrift, more careful planning, more husbanding and skillful deployment of resources—moving us in a happy spiral towards general prosperity.

The idea that property induces labor, and hence wealth, has been contested, but it has nevertheless seemed very persuasive over a long time. The idea lies behind a point argued with only slight exaggeration by the Berkeley ecological historian Carolyn Merchant—that the classical economic writers expected property to restore humankind to a new Eden. Why property? Because it is property that yokes the sinful and self-interested nature of human beings to the Biblical injunction to labor.

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8See id.
All the same, property regimes do not come naturally to sinful, or as we now say, self-interested, human beings. Despite the sociobiological temptation to describe animal territoriality as a kind of proto-property, territoriality is not the same thing as property. We see territoriality in the way that animals constantly guard some area against challenge, but the distinctive hallmark of property, as opposed to territoriality, is the absence of challenge from others. That is, what makes something “property” is precisely that others routinely recognize and respect one’s claims; others refrain from grabbing your things and running away with them, and thus all of us are relieved of the debilitating expense and effort of constant vigilance. Naturally, these patterns of self-restraint and recognition sometimes fail, but when they do, the regime of property and commerce unravels, because individual property-holders no longer have the confidence to invest and trade and to undertake all those useful behaviors that property induces.

Even taking at face value the arguments for property, the origins and maintenance of property regimes are somewhat mysterious. Because property is a productive pattern of mutual self-denial, modern game would suggest that property relations present a prisoner’s dilemma, where people’s individual interests defeat their own larger collective good. But somehow or other, property regimes also represent the quintessentially human solution to this dilemma. David Hume thought that property was not natural in a primary sense, but was indeed natural in the sense that we human beings are naturally inventive, and that we tend to invent useful institutions. Indeed, he and that other great representative of the Scottish Enlightenment, Adam Smith, identified the recognition of property as “justice” itself.

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10See, e.g., RICHARD PIPES, HUMAN NATURE AND THE FALL OF COMMUNISM, BULLETIN OF THE AMERICAN ACADEMY OF ARTS AND SCIENCES, Jan. 1996, at 38, 41–44 (using animal territoriality as part of effort to show that Soviet inroads into private property were contrary to human nature).

11See CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 37 (1994) (noting that property requires participants to refrain from stealing, cheating, etc. in order to avoid impossible burden of policing).

12See id. at 35–37.


14See id.; ADAM SMITH, LECTURES ON JURISPRUDENCE 5 (R. L. Meek et al. eds., 1978) (identifying “justice” with recognition and maintenance of property rights).
In our more modern day, liberal Americans tend to be somewhat skeptical about such encomiums to property, particularly on political grounds: why accord such high praise to what seems to be a plutocratic institution? In answer to that, however, there is a long string of venerable arguments precisely about the political importance of property: that property gives owners the independence necessary for participation in the political order; that property acts as a concrete symbol for thinking about rights more generally; that property and commerce diffuse power; that experience with property and trade soften manners and make people attentive to one another’s needs, as of course they must be in a democracy; that the pursuit of property distracts people and disarms them from cruel and divisive ruptures over religion or ethnicity; and finally, that democratic government is in some ways a luxury good—that is, that free speech and press and voting only are meaningful values to people after they have built up some modicum of wealth—which they can only have through the security of property. I have described all these arguments at length elsewhere, and while none creates an unassailable case for the stability of property, the very amassing of all these assertions of property’s political virtues must give one pause. Even free speech might be hard put to rival the sheer number and persistence of property’s claims for political pre-eminence in democratic governments.

On the other hand, whether one looks at property as a “merely” economic matter or a political one, democracies have a problem making property secure, a problem rather akin to the prisoners’ dilemma of game theory. The classic concern about democratic governments is that they are ruled by majorities, that majorities can be taken over by factions, and that factions unsettle property rights by shortsightedly advancing their own projects at the expense of those who are out of power. The resulting insecurity of property, it is said, will sap the energy that created wealth in the first place, and the loss of this wealth-


16 See Carol M. Rose, Property as the Keystone Right?, 71 NOTRE DAME L. REV. 329, 333–61 (1996) (evaluating seven arguments regarding why property rights are the most important rights in liberal constitutional order).

17 See id. at 362–63.

creating drive may in turn undermine democratic government.19 That is why the great Utilitarian thinker Jeremy Bentham said, back around 1800, that in any conflict between equality and security of property, it is imperative that security prevail—even where the inequality is so striking as in the case of serfdom or slavery.20

Given the mixed political and economic roles for stable property, and given the widespread theoretical worry that democracies may be subject to systematic disruptions of property, it should not be a surprise that concerns about property actually loom fairly large in the law of democratic countries. The last decade’s flurry of global constitution-making has brought such concerns to the fore, particularly as nations have cast off authoritarian socialist regimes and attempted to locate property within newly democratized political principles.21 And it should also not be a big surprise that democratic governments often try to enforce limitations on themselves, in order to protect property.

My discussion of the subject of expropriation does not intend to say that those efforts are futile, but rather that they must be understood to have certain limits. My argument is that property as an institution in fact is packed with disruptions, and that legal property regimes routinely “build in” a variety of rights-disruptions that amount to expropriations. More than that, any regime that failed to do so would collapse of its own brittleness.

How, then, might legal regimes disrupt stable property relations? I will describe as “Type I” or “housekeeping” disruptions those stemming from the management of property’s routine business—buying, selling, settling in, and neighbor disputes over property. Property regimes are always subject to occasional conflicts and low-level altercations; there are routinely trespasses, nuisance claims, hitches and mistakes in transactions and contract obligations, along with occasional overreaching. We often call on government to contain these problems. But most interesting for my purposes, governmental authority sometimes vindicates those who disrupt formally correct claims, and it does so for reasons having to do with the overall housekeeping management of a property regime. So much are these governmental disruptions simply taken for

19See FEDERALIST 10, supra note 18, at 77–81; see also Rose, supra note 16 at 358 (describing arguments linking security of property, wealth, and continued democratic government).

20See Bentham, supra note 3, at 119. Bentham did go on to say that slavery might be gradually eradicated, but keeping the principle of property intact. See id. at 122–23.

granted that we barely even notice them, even though, in some sense, they amount to expropriations.

A second class of legal disruptions of property are the “Type II” changes that I will call “regulatory disruptions.” These are the alterations in property rights that occur when environmental, demographic, or technological changes necessitate readjustments of property rights, normally through regulation. For example, too much traffic on your street necessitates a traffic light. This means that you have to stop, and that you get slightly less value from your BMW. Too much traffic may also mean that you have to equip your car with a pollution control device, which costs you something, and diminishes your value a bit more. Both are Type II or regulatory rights disruptions.

Type III disruptions are what I will call “extraordinary.” These are the rights alterations that accompany revolutions and warfare or other upheavals that create massive overthrowings of existing property rights and resource uses.

Of these three kinds of disruption, I am most centrally interested in the second, the “regulatory disruptions,” since that is the current location for the battles over property and takings of property. But these Type II disruptions will take only a limited portion of this Article. The Article instead will attempt to illuminate Type II disruptions by comparison to Type I and Type III rights alterations—that is, the kinds of disruption that are either so routine that we tend not even to notice them, or so massive that we simply discount them as aberrations from normal governmental affairs. Those two other types of disruptions—everyday and revolutionary—frame what is at stake in the takings cases.

I. TYPE I DISRUPTIONS—EVERYDAY BUSINESS AND HOUSEKEEPING RULES

In the United States, the legal rules in everyday disputes—encroachments or noise, deals that fall through and the like—are not the subject of any great turmoil, at least not now. Most of these matters are managed informally or by state law, and while there are many minor variations, the basic ground rules are fairly clear. You are not supposed to trespass on your neighbor’s yard without permission, nor should you make too much noise at your Saturday night party; and if you arrange to make a business deal, or borrow money, or sell your house or your car, you are supposed to keep your promise, with some excuses for such matters as fraud, duress, and mistake. These everyday matters were not always so even-tempered, especially with regard to contracts. As is well-known, in the early days of the republic, state interference with contractual obligations—in the form of liberal debt relief and tinkering with currency—was a source of great consternation to commercial interests, and one
of the reasons for calling the Constitutional Convention. As for trespass, a great many of the original settlers in the West were in fact trespassers, as in the Gold Rush in California; their trespasses occurred on the public lands as well as on other private parties' claims, not to speak of the encroachments on the routinely-ignored claims of native peoples. Nevertheless, by the beginning of the 21st century, the ordinary contours of trespass law, nuisance, and obligation of contract are well-established, especially in instances of disputes between private parties.

One of the tasks of government is simply to enforce property rights in all these dimensions—that is, to enforce a property regime's necessary requirements of forbearance and mutual respect for rights against disruptive individuals. But there is considerably more than that to government’s activities in the area of everyday disruptions. Governments also quietly but unobtrusively perform a great number of functions that permit people to transact with their property in a reasonably secure way. For my purposes, the most interesting aspect of these governmental reassurances is that, in fact, they do not always vindicate the rights of the true owner. Instead, they allow the disrupter to claim some disputed property right—resulting in Type I housekeeping expropriations.

Let me give an example: state governments all provide recording systems for land so that potential buyers or lenders have a public source of information about prior claims. This is particularly important to smooth transfers of property, since buyers and lenders need some way to find out about prior claims against land, as well as some way to publicize their own interests in the relevant property. But observe that if Buyer Bart fails to record his claims, he runs the risk of losing his property to a later purchaser, Lydia, who

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25 See id. at 74–76 (describing importance of secure title in trade and link between title security and information system).
subsequently buys same property without notice of Bart’s earlier claim. Thus the recording acts publicize and simplify property transactions, but they do so at the cost of occasionally destroying formal rights. If Bart fails to use government-provided publicizing devices, he will find that the government’s courts will ignore his claims and hand his rights over to Lydia, even if her formal claim is vastly weaker.26

These mundane recording issues give us some clues about the reasons why governmental actions sometimes elevate the claims of the party with an inferior claim over the formally superior one: the pattern arises in large part from the fact that most property is alienable. This means that any given property—and especially a durable property like land—may have a succession of owners, or it may be encumbered by a variety of claims. It is imperative that the legal status of such property be kept relatively simple and transparent in order to avoid confusion to these multiple or successive interest holders.27 Recording or registration schemes are designed to make claims transparent; hence unrecorded claims may be wiped out for the sake of transparency. Literary critics may argue that transparency is a myth,28 but if so, it is a myth very much alive in the governmental management of property—and the imperatives of transparency sometimes demand the sacrifice of perfectly good formal claims.

There are other examples of this phenomenon. State governments and their courts provide a number of ways to clear title to property when it is encumbered by obsolete or uncertain claims. The best-known of these is the doctrine of “adverse possession,” a judicial elaboration of statutes of limitations on actions to regain possession of land. Let us suppose that Lydia grows petunias on a strip of Bart’s land, mistakenly thinking that the strip


27See Carol M. Rose, What Government Can Do For Property (and Vice Versa), in THE FUNDAMENTAL INTERRELATIONSHIPS BETWEEN GOVERNMENT AND PROPERTY 209, 213 (Warren J. Samuels & Nicholas Mercurio, eds., 1999) (describing necessity of clarity where property may have multiple or successive ownership).

28See, e.g., Robert Scholes, Is There a Fish in This Text, in ON SIGNS 308, 309–310, 318 (Michael Blonsky ed., 1985) (describing deceptiveness and partiality of what seems to be “perfectly transparent language”).
belongs to her. If she continues without interference from Bart for some fairly extended statutory period (anywhere from six to twenty years), she may well be able to claim the strip for herself, despite Bart’s superior formal title. To be sure, Bart will be protected if Lydia actually knew about his superior claim; in general, adverse possession law will not protect the willful trespasser, who could have asked permission but decided to barge in without asking. But so long as she simply makes a reasonable mistake, Bart may lose his property.

One major reason for this divestment is to protect third parties: outsiders may rely on what appears to be Lydia’s ownership. In one such scenario, third party Thadeus may buy Lydia’s house thinking that the yard includes the petunia garden. In order to protect Thad, the courts will retrospectively accord ownership to Lydia, the trespasser, so that the innocent purchaser (Thad) can trump the claims of the true owner (Bart). While adverse possession and similar prescriptive claims come as something of a shock to beginning law students, they are in fact quite routine elements of property regimes. Indeed, every property regime must find some way to deal with questions of squatters, and where squatters hang on for long periods, they and their successors tend to displace formal owners.

Adverse possession can represent a quite drastic and complete divestment of one’s rights to a given property, but everyday property transactions entail numerous other examples of less drastic, partial divestments. Among these partial expropriations are remedies that take the form of damages. Let us suppose, for example, that neighboring Lydia, relying on a mistaken survey, inadvertently builds a garage over Bart’s property boundary, an act that is technically a continuing trespass. But because an injunction could entirely waste Lydia’s existing capital investments—or alternatively, permit Bart to extract a large fee to buy out his rights—courts will sometimes award Bart only the remedy of money damages.

29In a number of states, the adverse possessor must have a “claim of right,” which effectively precludes erosion of an owner’s rights in favor of the willful trespasser; in an interesting study, Richard Helmholz found that even where “claim of right” is not formally required, courts seldom find for the willful trespasser, suggesting a widely-shared intuition against purposeful market bypass. See R.H. Helmholz, Adverse Possession and Subjective Intent, 61 WASH. U. L.Q. 331, 332 (1983) (discussing implication or intent and judge-held ethical values on adverse possession determinations).


Damage remedies—or so-called “liability rules”—have been much discussed in the last generation as an alternative to the “property rules” that protect property rights by all-or-nothing injunctive relief. Indeed, damage remedies have received excellent press in law-and-economic circles, in part because they suppress unneighborly behavior on Bart’s part—that is, the so-called “rent-seeking” in which an owner hold outs for no reason except to make claims on another. Under a liability rule, the property owner gets some remedial recompense, but not the full payoff that he might have extracted if he could completely veto use by another.

But this of course means that property remedied by liability rules is not the same as property remedied by property rules—in effect, liability remedies make Bart’s property subject to a kind of option, as law-and-economics scholars have pointed out. No doubt this is the reason why liability rules in practice are hemmed in by a variety of good-faith requirements and institutional constraints: liability rules can effectively undercut an owner’s “right to exclude,” a right, by the way, that has been described as the most fundamen-
tal of all property rights in some of the recent "takings" cases. In that sense, liability rules—like the operations of the recording acts or adverse possession—are legally-sanctioned rights disruptions.

For another example of these Type I, legally sanctioned rights-disruptions, one could cite limitations on the use of deed restrictions. Undoubtedly, the most famous deed restrictions in American law are the racially restrictive covenants that were overturned in 1948 in Shelley v. Kramer. But there are vast numbers of other more innocuous deed restrictions in neighborhoods all over the country, and they are routinely upheld in the courts. Probably the most common are those requiring that all the properties in a neighborhood be used only for single family dwellings. But suppose that our man Bart negotiates and pays for some special deed restrictions on a neighbor's property—e.g. that the neighbors stage a Maypole dance every Mayday for the viewing pleasure of Bart and subsequent owners of Bart's house. Courts may enforce the deal as a personal contract between Bart and his neighbors who signed it, but they are very unlikely to enforce Bart's demand against a later purchaser of the neighbor's house, simply because such an arrangement is too odd and unexpected to future purchasers, and does little to enhance land values. On occasion, a court may decline to enforce a deed restriction if surrounding circumstances have changed sufficiently to render the restrictions pointless—for example, if Bart insists on a single-family residence restriction after the surroundings have been taken over as a rail yard. As with other rights-eroding doctrines, extinguishment through "changed conditions" is quite constrained. Still, in all these instances Bart's property interest vanishes without compensation—and with surprisingly little controversy.


37 334 U.S. 1, 20 (1948) (holding that state grant of judicial enforcement of restrictive agreements violated equal protection mandates).


40 Id. at 395 (describing prerequisites for termination due to changed conditions as "stringent").

Why does the law allow these inroads into people's property interests? As I said earlier, a very important underlying reason stems from property's alienability. Property rights (generally unlike contractual rights) may last a long time and may pass through many hands, including the hands of strangers to the original property-creating transactions. Indeed, property rights in land could, in theory, persist indefinitely (as long as the land lasts). Hence, a given piece of land might be subject to many claims, both simultaneously and successively. To assure relatively easy transfers of property among the many potential claimants, courts and legislatures have devised a variety of quite subtle housekeeping rules to keep property claims relatively simple, to discourage claims that are so obscure or idiosyncratic that no one expects or values them, to repress obstructionist or rent-seeking behavior by holders of formal but useless claims, and to get rid of unused or obsolete claims altogether. 42 The benefit of these legal razor blades is that they keep property rights relatively legible, and thus more easily alienable and tradeable. But the cost is that true owners may lose rights—rights that they have paid for—over against others whose formal claims are weak or nonexistent.

Hence, the governmental management of everyday transactions about property, while centrally concerned with the vindication of formal property rights, is not just about that. Courts and legislatures are also concerned to keep the entire system of rights simple, manageable, and legible to outsiders and newcomers—a pattern that is undoubtedly especially important in a nation of immigrants like our own. 43 To further those concerns of simplicity and manageability, courts and legislatures adopt background housekeeping rules; but these background rules themselves sometimes result in the forfeiture or expropriation of formal individual rights. Generally, such forfeitures are neither systematic nor partisan, and they are unlikely to have larger redistributive impacts. Rather, the simplifying devices add up to a kind of impartial set

42 See Rose, supra note 27, 212–18 (explaining potential government roles in property relations); see also Epstein, supra note 41, at 1353–55 (1982) (noting that multiple interests in land make notice-giving devices particularly important, even to point of trumping formal canons of ownership). For an important new article on simplifying rules in property, see Thomas W. Merrill and Henry E. Smith, Optimal Standardization in the Law of Property: The Numerus Clausus Principle 100 YALE L. J. 1 (2000).

43 See JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998) 35–36 (linking relatively simple land tenure system to extension of state power). But see id. at 30–31 (noting usefulness of uniform measurement systems to long-range commerce among strangers). See also id. at 49, 56 (relating simplified land map in North America to arrival of new immigrants).
of norms that make property more useable and transferable for everyone, even at the cost of occasional losses to those who fail to take heed.

I stress these minor and little-discussed "housekeeping" divestments because they suggest that the property owner is not simply the holder of rights in absolute dominion, to the exclusion of all the universe, as some famous lines of Blackstone's suggest—lines, I should say, that are frequently quoted out of context, and without regard for Blackstone's own severe qualifications. Property rights are rather subject to some system-management rules, rules that require the property owner to take some responsibilities and bear some risks attributable to the smooth functioning of the larger property regime. A smoothly functioning property regime makes everyone better off, even if, on occasion, the operations of its management rules result in the forfeiture of individual formal rights.

To be sure, one way to look at these housekeeping constraints is to say that they do not really take away anyone's property, but are rather conditions and duties built into property itself. But this, if anything, makes the point even more sharply—that property includes an implicit set of conditions about expropriation. A regime of property rights—especially commercially available property rights like most of our own—has its own central imperatives of transparency and simplicity so that users can trade safely. In turn, those imperatives result not only in the protection of rights, but also in their qualification and adjustment, even though this includes some measure of expropriation.

I should pause here to mention what may seem an obvious parenthetical point: it is not at all a trivial matter that these housekeeping rules attract little attention and remain reasonably stable in the United States, as they also do in many other countries. On the contrary, it is a very considerable achievement to have reached a state of relative calm and quiet about such matters, where it is simply assumed that we can enjoy a large measure of property protection, modified almost invisibly by the adjustments necessary for simplicity, legibility, and the avoidance of obsolescence. An obvious comparison could be made with the condition of Russia in its post-Soviet days: much economic

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44See Carol M. Rose, Canons of Property Talk, or, Blackstone's Anxiety, 108 YALE L.J. 601, 601–02, 604–05 (1998) (noting that many property scholars quote Blackstone's lines without noting qualifying language that immediately follows).

45See Robert C. Ellickson, Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights, 64 WASH. U. L.Q. 723, 736–37 (1986) (noting efficiency reasons for sacrificing formal rights where transactions costs become high and arguing that "the deep structure of property law has traditionally been not libertarianism, but transaction-cost utilitarianism").
uncertainty there has arisen from the inability of legal and governmental institutions to provide stable and predictable background rules. This means that ordinary transactions have been in a state of constant turmoil; it means that people have to worry that their business deals won’t stick; it means that they cannot make credible legal commitments to other people, so that others will trust them in their business relationships.\(^{47}\) It means that people have only limited ways to publicize their property claims; and, in turn, lenders and purchasers cannot be certain that there are no prior claims on a property, or that they themselves can take priority over later claims—an uncertainty that can dry up investment.\(^{48}\) It means that some properties have been so loaded with overlapping claims that they cannot be used at all.\(^{49}\) It means that in many commercial transactions, creditors have to fall back on informal, even illegal, enforcement—which all too often means the Mafia, or criminal gangs, who extract a high price for their enforcement activities.\(^{50}\) The greatest fear should be that once these gangs get a foothold, and once they take over the enforcement tasks that the courts should be performing, the gangs will not let go.

But the point I wish to stress is that the very nature of a property regime demands that property be stable only relatively, not absolutely. In turn, this means that expropriation itself is a relative term. For that reason, it begs the question to condemn “takings” of property as such. The lesson of Type I divestments, those that occur in everyday property transactions, is that some expropriations are not only acceptable but necessary to the operations of a

\(^{47}\) See, e.g., Stephen Handelman, Comrade Criminal: Russia’s New Mafia 68–70 (1995) (describing difficulties of ordinary private business dealings, created by collaboration of criminal and bureaucratic elements); cf. Paul Collier and Jan Willem Gunning, Explaining African Economic Performance, 37 J. Econ. Lit. 64, 98–99 (1999) (noting that some African governments’ criminalization of market activities increased costs of contract enforcement because courts were unavailable, resulting in reduced credit and capital flight).

\(^{48}\) For Russia’s new land registration system and some of its problems, see Lev S. Batalov, The Russian Title Registration System for Realty and Its Effect on Foreign Investors, 73 Wash. L. Rev. 989, 1005–06, 1011–12, 1014–16 (1998) (noting continuation of unregistered claims, severe constraints on publicity of registered claims and resultant uncertainty for investors). For an interesting historical comparison, see Phillip T. Hoffman, Gilles Postel-Vinay, and Jean-Laurent Rosenthal, Information and Economic History: How the Credit Market in Old Regime Paris Forces Us to Rethink the Transition to Capitalism, 104 Am. Historical Rev. 69, 79–80 (1999) (observing that risks to creditors from lack of effective land registration forced lenders to turn to middlemen “notaries” for information about borrowers).


\(^{50}\) See Handelman, supra note 46, at 59–72 (describing entrepreneurs’ inability to do business without criminal assistance).
property regime itself. The real question is not expropriation *vel non*; it is what kinds of expropriations are appropriate to our constitutional system of property, which are not, and why.

II. TYPE II DISRUPTIONS: REGULATORY ADJUSTMENTS

A second category of property rights disruptions includes far more controversial matters. This category includes instances in which property is affected by regulatory changes—changes that in some measure alter the scope and content of property rights.

During the last few years in the United States, there has been a very heated debate over the implications of regulatory changes on property rights. This debate has followed the growth of environmental law, which some property rights groups contend deprives owners of their property, particularly property in land.\(^\text{51}\) Their view of environmental law is that this kind of legislation is an example of what can go wrong in democracies: democratic governments are all too prone to takeover by factions, who disrupt property rights for the sake of some purported public project.\(^\text{52}\) While this argument is basically libertarian, based on a natural rights view of property, the utilitarian argument lurks nearby. This is perhaps most visible in the best-known exposition of the property rights position, Richard Epstein's *Takings*, which explicitly mixes libertarian and utilitarian rationales.\(^\text{53}\) Under the utilitarian view, of course, if property owners are not secure in their expectations, they will invest less effort, and the result will be some degree of social impoverish-


ment. Given such concerns not only for liberty but for general social wealth, it is important to ask more closely why property, and especially landed property, is subject to changes in regulation.

When people have property rights in land, they also have access to other resources that they in fact share with other people. That is, if you have land, you also have access to air, water, and wildlife resources, which normally cross the property boundaries of a number of owners. Whenever a landowner uses any of these common-pool resources, the effects are not confined to that landowner’s property. If Bart burns trash in the back yard, the smoke is likely to travel through the air and across his property lines to Lydia’s house and beyond. When he pipes wastewater to a river or allows construction runoff to flow into the stream, that material flows on to someone else downstream. When he logs trees that birds use for nests, he may contribute to an explosion of insects somewhere else in a place where the birds normally eat the insects.

Such incidental uses of attached common resources are what the economists call externalities, or spillover effects, or sometimes, as the economist Gary Libecap has noted, common pool losses—that is, actions from which one person reaps the benefits, while feeling none or only a small portion of the costs. Spillover or common pool effects do not matter very much when there are few people and their uses are not intensive. Air currents disperse small amounts of most pollutants harmlessly. Flowing water does the same to organic wastes. If only a few nesting sites are lost for a particular bird population, no one will notice so long as lots of nesting trees remain standing elsewhere. Under such circumstances, it is not worth the effort to constrain people’s uses of their property, or to redefine their rights more circumspectly; the spillover effects simply do not matter enough.

But such spillovers matter very much indeed when there are many more such users of common resources, or more intense uses, so that the common resources become congested. One coal fire means nothing for London’s air. A few million coal fires can mean a killer smog—that is, the smog literally kills a number of people in the short run, and contributes to long-range higher mortality in many others. One coal-burning utility produces sulphur dioxide that may disperse harmlessly; but with one hundred coal-burning utilities,

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56 See WILLIAM WISE, KILLER SMOG: THE WORLD’S WORST AIR POLLUTION DISASTER passim (1968) (describing deadly London smog of 1952, due especially to household soft coal furnaces).
sulphur dioxide may come down as acid rain and can kill fish and trees hundreds of miles away.\textsuperscript{57} The first auto in Los Angeles is unlikely to have created discernible health problems due to air pollution, but when autos are multiplied by millions, their exhausts contribute to deadly respiratory problems and heart disease.\textsuperscript{58} Such damages explain why certain coal fires were banned in London as far back as the early 14th century,\textsuperscript{59} why the Clean Air Act has pushed utilities to cut their sulphur-burning coal,\textsuperscript{60} and why California's pollution control plan requires Los Angeles to reduce very substantially the pollution levels from autos.\textsuperscript{61}

Notice here that the changing regulation of externalities serves exactly the same purpose that the utilitarian story gives for property itself: encouraging the efficient, careful, and socially wealth-maximizing use of resources. Changes in regulatory regimes do not occur smoothly, however. Just as it is characteristic of environmental problems that they are scarcely problems at all when the first spillovers occur—that is, with the first coal fire or the first auto—so is it characteristic that we do not even notice the problems until spillover effects


\textsuperscript{58}See JAMES E. KRIER \& EDMUND URSN, POLLUTION AND POLICY: A CASE ESSAY ON CALIFORNIA AND FEDERAL EXPERIENCE WITH MOTOR VEHICLE AIR POLLUTION 1940-1975 18-20, 80 (1977) (explaining sources and effects of air pollution).

\textsuperscript{59}See 1 J. U. NEF, THE RISE OF THE BRITISH COAL INDUSTRY 157 (1966) (describing ban on coal to limeburners in Southwark area in 1307). According to Nef, coal-burning and coal fumes became more much more intense as forest supplies of wood dwindled in the sixteenth century. \textit{See id.} at 12-13. In 1578, Queen Elizabeth apparently avoided London because of the "noisome smells" of coal, and a variety of other coal-burning uses were prosecuted in the seventeenth century, though the smog-producing fires continued to distress Londoners. \textit{See id.} at 156-58; \textit{see also} William H. TeBrake, \textit{Air Pollution and Fuel Crises in Preindustrial London}, 16 TEC. \& CULTURE 337, passim (1975) (describing history of coal pollution, particularly as result of medieval and early modern destruction of woodlands); Wise, \textit{supra} note 55, at 17-31 (describing early history of London's smog and early efforts to control coal-burning).


have become quite intense. Unfortunately, by that time, property owners have often settled into thinking that their property rights include the externality-causing activities. Take our friend Bart. Suppose Bart buys some waterfront property: he may look around at the neighbors and observe that they filled in their wetland areas years ago, and he may then claim that he should be able to develop in just the same way that they did—even though additional fill now will result in flooding downstream. Or perhaps Bart thinks he should be able to build a jetty out in the sea to preserve a little bit of beach for himself, just the way the neighbors did, even though this activity reduces the total amount of sand for everyone and slightly devalues all the beachfront properties. Or he may think that he should be able to burn trash in the back yard, particularly if he has built a cinder-block incinerator for the purpose. After all, his neighbors have done this for years. From Bart’s point of view, regulatory constraints on the scope of his expected property are expropriation, pure and simple.

But as we learn from Type I disruptions, expropriation is not such a simple matter. In the Type I scenario, some expropriation is built into property regimes as a housekeeping matter, for the sake of the transparency and publicity of property rights. The Type II disruptions also cut back on property rights, for a different reason, but one that is also part and parcel of property as a resource management tool: property rights have to be redefined in order to manage increasing congestion and common pool losses.

The underlying problem raising Type II disruptions is that of transitions. Earlier definitions of property rights may treat air, water, and wildlife as free goods, but in practice little harm is done, since thin uses of those resources may cause only negligible damage to air, water and wildlife—the first building in the floodplain causes little harm, and the first coal-burning electrical plant scarcely affects the wider air mantle. But later, additional floodplain buildings may cause flooding downstream, while additional electrical plants create a smoke that kills trees 500 miles away. Notice that both types of events damage the property of other people. More careful regulation redefines property rights, not only to protect health and safety, but also precisely in order to protect property itself. The problem is that by the time we get around to regulating floodplain building or coal fires, the new regulation upsets people’s expectations about the ways they can use their property.

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62 See, e.g., Wise, supra note 55, at 37–38, 48–49 (describing failure of 19th century air pollution control in London due to lack of precise knowledge of damage from pollution) and (same for Belgian killer fog in 1930); Krier & Ursin, supra note 57, at 48–54 (describing Los Angeles’ slow response to auto pollution and tendency to blame air quality problems on small and localized targets like synthetic rubber plant).
Taken together, these considerations create what I call the Utilitarian Dilemma, a dilemma that underlies many of the claims that property has been unconstitutionally taken. The dilemma is that the essential goal of securing property expectations clashes with the equally essential goal of managing congested resources. Notice that as with the Type I disruptions, Type II problems pit the stability of property owners expectations against the imperatives of the property regime's own logic. Just as existing formal rights may be disrupted by property's essential housekeeping, so may those rights require redefinition when property regimes have to manage finite and increasingly congested resources.

Unlike Type I disruptions, however, Type II disruptions are not so randomly distributed, and this leads to several conundrums. Procedurally, legislatures are the bodies effectively redefining rights, but as a number of commentators have argued, legislatures may be tempted to single out more vulnerable individuals to bear the onus of uncompensated change. This pattern may lead not only to inegalitarian decisions but to unwise ones, insofar as legislatures may be cavalier about expenses that only appear on someone else's budget (the "fiscal illusion" problem). On the other hand, if all changes were uniformly compensated, property owners might be encouraged to take unwise or strategic decisions of their own, safe in the knowledge that they will be compensated (the "moral hazard" problem).

There is another problem, too. Completely uniform redefinitions might conceivably "zip back" property rights across the board, as Robert Nozick put it, putting all owners on the same footing with respect to their property uses. But if they did so, regulations would tend to fall very hard on existing uses, with two unfortunate effects. First are the economic consequences: this kind of regulatory change could be particularly expensive, either wasting already-
committed resources or necessitating costly tear-downs or retrofit.\(^{67}\) Second, and in part for that reason, “zipping back” the rights of pre-existing investments could seem particularly unfair and demoralizing.\(^{68}\) But on the other hand, exemptions for existing uses have fairness and efficiency problems of their own: on the fairness front, they can raise charges of favoritism; and on the efficiency front, they can encourage premature development.\(^{69}\)

Hence, while Type I rights-disruptions simply sacrifice formal property claims randomly to the imperatives of the property regime, Type II disruptions are not so random; they are rather shot through with countervailing considerations, with respect both to fairness and efficiency. That is the general context in which the “takings” question arises, and with all these cross-currents, perhaps it should be no surprise that, as many commentators have noticed, takings decisions in the courts have a rather chaotic quality, using that term in the now-fashionable sense of chaos theory.\(^{70}\) Perhaps because of this chaotic context, the historic takings pattern in the courts, including the Supreme Court, has been to compromise. Moreover, like other phenomena studied by chaos theory, the takings compromise has some ascertainable and regularly re-appearing components.

What are these recurring components of takings compromises? Generally, the courts have looked for solutions that allow necessary regulation to go forward, in order to redefine the scope of property rights in the face of increasing congestion; but they have also tried to salvage the expectations of property owners who are particularly caught short. In the mid 1970’s, the Supreme Court used a phrase that is now quoted a great deal: an owner cannot succeed in a takings claim unless she can show that a regulatory change


\(^{68}\)According to some cognitive psychologists, people are apt to feel the loss of an existing “endowment” especially strongly. *See*, e.g., Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277, passim (1989) (describing experiments in which subjects’ preferences were affected by possession).

\(^{69}\)See Dana, *supra* note 66, at 684–93 (describing developers’ incentives to develop where developed land is not retroactively regulated).

disrupts her "investment-backed expectations." What the courts seek is a signal that a particular property owner really has been especially damaged by a new regulation, and, in particular, that the owner has sunk capital on the basis of a previous regulatory regime.

Somewhat akin to compensation based on "investment-backed expectations" are the collection of exceptions that courts and legislatures have worked out for special hardship cases. State courts in particular have developed doctrines of "vested rights," generally applied when some combination of owner investment and official approval are deemed sufficient to shield a property owner from later uncompensated regulatory rollback of already-initiated development. Courts have also insisted that regulations include what have come to be called "variances"—exceptions to general regulations that are made for special hardship cases, at least where the exception poses no great threat to the essential regulatory scheme. In modern environmental law, the regulators rather than the courts have sometimes worked out similar kinds of exceptions. For example, the Clean Water Act forbids owners from filling in wetlands areas without a federal permit, but enforcement agencies makes routine exceptions for owners of small plots. This is a compromise that takes into account that smallholders may be hurt proportionally more grievously by limitations on fill, that their fill activities may be only minimally disruptive, and that the administrative costs of enforcement may be especially high for them.

Finally, a common though not universal pattern in property re-definition is "grandfathering": that is, pre-existing uses may be wholly or partially exempted from regulations even though they are not in conformity with new regulations. This is particularly the case where pre-existing nonconforming uses normally are either likely to die out over time—as with older automobiles

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72 See, e.g., Clackamas County v. Holmes, 508 P.2d 190, 192–93 (Or. 1973) (describing tests of vested rights to continue development).
74 See 33 U.S.C. § 1344(c)7,F (1994).
that are not required to install catalytic converters—or where some regulatory moratorium is built in to deal with them, as in the so-called amortization schemes in land use controls. Grandfathering has many problems from the perspective of efficiency, most notably that the practice of regulating new uses, while leaving old ones alone, may discourage innovation or encourage premature development. Deployed judiciously, however, limited concessions to pre-existing uses have some arguments in their favor: first, they implicitly recognize the special expense of retrofit; and second, more subtly, grandfathering calibrates ownership rights according to the increasing marginal cost of new development or new uses where resource congestion is rising. And finally, grandfathering reflects a widespread rejection of retroactive regulation; indeed, grandfathering is akin to takings compensation, in that it makes allowances for property owners’ demonstrated expectations and commitments—expectations and commitments that were formed at a time when regulatory change was not yet on the horizon.

From these doctrines and devices, one can see the elements of a traditional and persistent compromise. The logic of managing congestion may include an element of divestment, in the sense that regulation redefines property rights; on the whole, our legal institutions have required that property owners adjust their own expectations to incorporate the regulatory change that is a part of the logic of managing scarce resources. But somewhat like doctrines of estoppel, compensation or grandfathering softens the expropriative elements of regulatory change where an owner would suffer special injury, where existing investments were made when the marginal costs of common pool losses were low, or where existing investments might go entirely to waste without offsetting social gains.

Those elements of adjustment comprise the historic pattern of takings compromises. Compensation and exemptions have been imperfect and messy as a matter of doctrine, as compromises often are; but they aim at balancing security of property over against the need to readjust the content of those rights in the face of common pool losses. The Supreme Court has been taking a much more active role in these cases in recent years, but on the whole those decisions

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76 See, e.g., Louisiana Envtl. Action Network v. United States Envtl. Protection Agency, 172 F.3d 65, 67 (D.C. Cir. 1999) (describing EPA variance regulation that recognizes stringent regulation of new waste disposal could give incentive to leave old wastes in place); Peter Huber, The Old-New Division in Risk Regulation, 69 VA. L. REV. 1025, 1025–28, 1066, 1073 (1983) (arguing that while regulating new risks more stringently than old is politically feasible, pattern may discourage innovation and overall risk reduction); Dana, supra note 66, at 682–86 (describing how norm against retroactive legislation encourages premature development).
do not deviate far from this pattern, despite their sometimes troublesome verbiage.  

The main points that I want to make about this category of property divestments—that is, the divestments of regulatory transitions—are the following: First, like Type I housekeeping adjustments, Type II regulatory adjustments are a part of the logic of a property regime. Just as a property regime must include mechanisms that keep property relations relatively simple and legible, so does it need regulatory mechanisms that readjust property rights in the face of changing resource congestion. As different parts of the logic of property regimes, both kinds of mechanisms necessarily modify existing rights. But second, Type II divestments diverge from Type I. They are less likely to be random than Type I divestments, and this feature raises questions both of fairness and efficiency, questions that are only seldom asked with respect to Type I. Seen in the big picture, Type II problems begin in the context of needed response to long-range changes in resource congestion, but seen in the smaller picture, the burdens of regulatory change may well not be evenly or randomly distributed. And because of this distributional lumpiness, and the partisanship and self-interest it elicits, all kinds of things may go wrong: fiscal illusion and majority misrule on the side of government; moral hazard and destructive evasions on the side of landowners.

Those potentially damaging factors call for second-guessing and compromise solutions to Type II issues, and our takings jurisprudence is one of the several locations in which we take those second guesses and work out the contours of the compromises. It is not the only location by any means—legislatures are engaged in similar compromises—but the courts are an important site at which the discussion of compromise enters our legal under-

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77For an interesting discussion of the divergence between the Supreme Court's rhetoric (the "Apparent Model") and its actual decisions in the property area (the "Operative Model"), see Laura S. Underkuffler-Freund, Takings and the Nature of Property, 9 CAN. J.L. & JURIS. 161, passim (1996). Underkuffler-Freund's article focuses on Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992), which held that a regulation was a "taking" if it removed all beneficial economic use of the property. See id. at 174–75, 194–202. The actual impact of the Lucas case is somewhat uncertain because of its idiosyncratic posture; the appeal did not contest a lower court finding that the regulation did remove all beneficial economic use, a context that distinguishes almost all other cases in which owners claim that regulation effectively "takes" their property. Nevertheless, the rhetoric of Lucas—what Underkuffler-Freund calls the "apparent model"—suggests a quite untraditional rigidity about property. See id. at 190. For example, the case suggests that regulation may not exceed common law nuisance or ignore historic regulatory responses to changes in collective needs. See id. at 190; see also Louise A. Halper, Why the Nuisance Knot Can't Undo the Takings Muddle, 28 IND. L. REV. 329, 336–39 (1995) (arguing Lucas ignores traditional nuisance doctrine's recognition of legislative role).
standing of property. But in general, the compromising approach to Type II
divestments underscores the point that while Type II regulatory disruptions are
akin to Type I housekeeping losses, they are also different.

This brings me to the last of my expropriations types, Type III. These are
revolutionary expropriations. As with the discussion of Type I expropriations,
I return here to an exposition of contrasts, that is, to reflect on another type of
expropriation that illuminates Type II by putting it in relief. But here the
contrast goes to the far end of the spectrum from Type I's everyday
divestments, those that go unnoticed because they are so routine. Instead, with
Type III, I turn to expropriations that are extraordinarily public and searingly
controversial, expropriations that in a sense draw the lines around a whole
community, and define who is in and who is out.

III. TYPE III: REVOLUTIONARY EXPROPRIATIONS

However much we Americans think of ourselves as property-conscious,
we have in fact had a number of extraordinary, even revolutionary, disruptions
of property rights. One of these came more or less simultaneously with the
American Revolution: when colonists loyal to Britain fled their homes, their
property was confiscated, and despite some diplomatic forays, the rather
meager compensation that the loyalists received came largely from Great
Britain rather than the new United States. 78 A second extraordinary property
disruption in fact predated those Revolutionary confiscations, but the pattern
only came into sharp focus somewhat later. That was the expropriation of land
from Native Americans.

A third extraordinary disruption was the emancipation of the slaves in the
aftermath of the Civil War in the 1860s. Unquestionably, the institution of
slavery depended on a prior expropriation—that is, of the slaves' bodies from
themselves—a fact that certainly acted as a justification for emancipation.
Nevertheless, once the institution of slavery was established, slaves represented
a substantial capital investment for their owners, who could and did argue that
uncompensated emancipation was an unconstitutional taking of their

property. In the later eighteenth and early nineteenth century, a number of states in the Northeast abolished slavery, but they did so with gradual schemes that in effect compensated slaveowners at least partially for their losses. But with the Civil War and the post-War amendments to the Constitution, slavery was simply abolished, and all capital investment in slaves wiped out.

It is in this sense that, as Joseph Singer rightly implies, claims of historic American property-consciousness need to be taken with a large grain of salt. Quite aside from the mild Type I expropriations that are built into the housekeeping management of property regimes, and quite aside from the normal if more controversial regulatory changes that lead to Type II redefinitions of existing property rights, on at least these three occasions (and actually several more) we Americans have drastically altered property relations.

It is interesting to observe that the courts have played only a relatively peripheral role in two out of three of these revolutionary expropriations, neither


80 See Zilversmit, supra note 78, at 199–200 (pointing out that owners in New York’s and New Jersey’s gradual emancipation lost no current slaves and received considerable value from retaining services of children born after emancipation).

81 Section four of the Fourteenth Amendment forbade the federal and state governments from compensating any claim deriving from the emancipation of any slave. See U.S. Const. amend. IV, §4.

82 See Joseph William Singer, Sovereignty and Property, 86 NW. U. L. Rev. 1, 5 (1991) (asserting that most American real property was forcibly transferred from Native Americans).

shaping nor reining in the incursions on property to any great degree, no doubt because the surrounding circumstances were so charged with political and militarily significance. State legislatures were the moving factor in the Revolutionary seizures from loyalists, and while some confiscations required a judicial finding of guilt, many did not even make that concession to judicial process, as legislatures simply named the attainted persons whose property was taken. 84 Similarly, courts were relatively passive with respect to the emancipation of slaves. 85 An exception was Massachusetts, where the state courts followed the lead of Lord Mansfield and opined that the state constitution would not recognize slave status. 86 But in other northern states, it was the legislatures that passed the emancipation statutes, and it was the legislatures as well that instituted a kind of piecemeal expropriation from slaveholders, forbidding their courts from participating in the recapture of runaway slaves—to the point that when Congress passed the Fugitive Slave Act of 1850, it created special commissioners to enforce it rather than relying on the state courts. 87 For its part, the federal judiciary dutifully upheld property claims in slaves and enforced the statutes that propped up those claims, much

84 See, e.g., Brown, supra note 77, at 537–40 (explaining that Massachusetts confiscation legislation named certain notable persons as traitors, but left confiscations from mere absentees to jury trial); Haskett, supra note 77, at 585–86 (explaining New Jersey confiscations were initiated through county commissions, then heard by courts); Lambert, supra note 77, at 82 (explaining that legislature declared certain persons guilty of treason and subject to confiscation). Interestingly enough, the courts had a more important role in later claims made by persons claiming property through the wives and widows of loyalists; these raised the question whether wives could act politically independently from their husbands. See Linda K. Kerber, The Paradox of Women’s Citizenship in the Early Republic: The Case of Martin vs. Massachusetts, 1805, 97 AM. HIST. REV. 349, 358–62, 368–72 (1992) (describing one such case).

85See ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 60–61, 79–82, 96–99 (1975) (reviewing genuine but very limited scope for emancipatory activity in antebellum courts, through interpretation of state constitutional clauses, manumission statutes, and comity rules); see also id. at 120–23 (describing judges’ own sense of limitation).

86 See ZILOVERSMIT, supra note 78, at 113–15; THOMAS D. MORRIS, FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780–1861, at 7, 13–14, 75 (1974) (describing Massachusetts cases denying legality of slavery in the state and Lord Mansfield’s opinion that slavery could not be supported by English law); Lord Mansfield’s opinion is contained in The Case of James Sommersett, a Negro, on a Habeas Corpus, 20 State Trials 1, 82 (1772), ruling that a slave brought into England had to be freed since slavery could only exist if supported by positive law, which was not the case in England. See MORRIS, supra, at 13.

87 See id. at 109–26 (describing “personal liberty laws”); see id. at 145–46 (describing Fugitives Law Act of 1830).
to the disgust of contemporary ethicists. And of course, the really wholesale expropriation from slaveholders—that is to say, emancipation—came with the Civil War and the post-Civil War amendments, rather than with judicial action.

The courts played a much more prominent part, however, in defining and delimiting the expropriations from Native Americans. The foundational judicial opinions are those of John Marshall in the early nineteenth century. The Marshall opinions, to which I will return shortly, sharply constrained native claims to property, and they are sometimes cited as examples of acute ethnocentrism. But they nevertheless resisted some elements of the wholesale expropriations from tribal peoples that were already well underway, and in recent years they have become the legal foundation for some important revivals of native claims. Still, at the time they were handed down, they proved ineffectual as a means to halt the massive expulsions of native peoples from their homelands.

The relatively peripheral role of the courts in two of the three of these upheavals—either in furthering them or restraining them—suggests how revolutionary these Type III divestments were, and how little they were integrated into the legal system, unlike Type I and Type II. It is worthwhile to pause here to ask as well, why did these major disruptions not also disrupt the whole institution of property? All of these property revolutions entailed

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90 At least in the case of the Tory confiscations, there was some contemporary concern about just such disruption. See Richard B. Morris, Class Struggle and the American Revolution, 19 WM. & MARY Q. 3, 6–7 (1962) (noting fears of American Whig leadership that demands for confiscations of Loyalist property might be part of more general “leveling” attack on property, though noting also that these fears did not materialize).
massive redistributions, just the sort of action, according to the great Utilitarian thinker Jeremy Bentham, that could make people distrust the ability of the law to safeguard their property. 91 The effect should have been what Bentham called "the deadening of industry": people would stop working and investing in what they owned, fearing that it might all be taken from them.92 Why did this not appear to happen? Why did not the very beneficiaries of these transfers fear that their own property might be grabbed by someone else? Why, in short, did these events not make all property seem insecure?

One answer is that these disruptions were worked on people who were perceived to be nonmembers of the community: outsiders, outcasts, and outlaws. During the Revolution, loyalists were perceived as betrayers to American aspirations, and hence fair game.93 As to the slaveowners, there is a telling difference between pre-Civil War emancipation efforts and those of the wartime and postwar eras. In the prewar period, when several northern states did abolish slave ownership by statute, it is significant that the most difficult obstacles concerned compensation.94 For example, even where emancipation was declared for newborns, the assumption was that the owners of the still-enslaved mothers would have to be compensated for supporting the mothers' children.95 The larger picture is clear: in the pre-war era, at least for the majority of lawmakers, if not for abolitionists, it was simply assumed that slaveowners' property could not be taken without compensation, however immoral the institution of slavery itself.96 But once the war started, slaveowning Southerners became rebels, persons who took up arms against the United States, and this changed everything. The Emancipation Proclamation

91 See BENTHAM, supra note 3, at 141-46.
92 Id. at 142-44. Bentham specifically remarked that whatever evils might attend the distributions of property under serfdom or slavery, those distributions could not be overturned without threatening the security of all property. See id. at 146-47.
93 See, e.g., Brown, supra note 77, at 549-50 (quoting October 1778 letter of Samuel Adams to James Warren, which describes loyalists as "traitors . . . doing their utmost to enslave and ruin us, shall these wretches have their estates reserved for them and restored . . .?").
94 See ZILVERSMIT, supra note 78, at 175-84 (discussing New York's concerns over compensation in 1790's debate); Claudia Dale Goldin, The Economics of Emancipation, 33 J. ECON. Hist. 66, 72-79 (1973) (describing costs of various emancipation options).
95 See ZILVERSMIT, supra note 78, at 121-22, 182-84, 192-93 (describing various northern states' provisions for owners to retain services of children of slaves born after emancipation date).
96 See Goldin, supra note 93, at 73 (asserting that majority of population in 1860 thought emancipation required compensation); Martin Duberman, The Northern Response to Slavery, in THE ANTISLAVERY VANGUARD: NEW ESSAYS ON ABOLITIONISTS 395, 397-99 (Martin Duberman ed., 1965) (noting gradualism of most Northerners' antislavery views and nervousness about direct abolition as attack on private property).
itself formally applied only to rebellious areas, while exempting states held by the Union,97 and indeed, slaveholders in Union-held Kentucky still regarded the Proclamation as unconstitutional.98 Thus until the outbreak of war and beyond, emancipation continually raised property questions, in spite of the very powerful Abolitionist arguments about the immorality of slavery. Emancipatory expropriation only became thinkable when war turned the matter into a question of We versus They.

Hence in both cases, the Revolutionary confiscations and the slave emancipations, radical expropriation gave rise to no demoralization among us, because these appropriations only affected them. They were not members of our moral and political community, and disruption of what they thought their property was thus a matter of relative indifference. Disruption of such outsiders' property seemed to carry very little threat to the property of insiders.

Much the same attitude appears to have played out in the massive expropriations from the American Indian tribes, but I wish to devote more attention to these expropriations because of their more ambiguous legal character. The official legal position of the United States disavowed expropriation, to the point that in 1947, Felix Cohen, by no means a naif with respect to the history and condition of American native peoples, could proclaim that the United States was unique among nations in that it had acquired almost all its public domain (excepting Alaska) by purchase from indigenous peoples.99

Nevertheless, there was another way in which native expropriation could be denied: there was no expropriation, some argued, because the native tribes never had property at all. This theme ran back to the beginning of European settlement, in spite of the fact that in the early days of settlement, when

97See ERIC Foner, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1867, at 7 (1989) (noting exemption for Union territories, though also noting practical effect of freeing many slaves there as well).

98See id. at 37 (noting that Kentucky, though Unionist, resisted emancipation and opposed the Thirteenth Amendment); VICTOR B. HOWARD, BLACK LIBERATION IN KENTUCKY: EMANCIPATION AND FREEDOM, 1862-1884, at 35–37 (1983) (Kentucky unionists considered Proclamation unconstitutional); E. MERTON COULTER, THE CIVIL WAR AND READJUSTMENT IN KENTUCKY 163–64, 258–61 (1926) (same); HOWARD, supra at 87–90 (same). As late as 1862, Lincoln offered compensation to slaveowners if Kentucky would free the slaves. See COULTER, supra, at 158. He made a similar offer to Maryland. See Charles L. Wagandt, Redemption or Reaction?—Maryland in the Post-Civil War Years, in RADICALISM, RACISM, AND PARTY REALIGNMENT: THE BORDER STATES DURING RECONSTRUCTION 146, 149 (Richard O. Curry ed., 1969).

Europeans were relatively weak and few in number, they themselves regularly purchased land rights from native tribes; and indeed they continued to make private land purchases from native peoples even after the Revolution, in spite of a 1790 federal statute making it illegal to do so. Whatever those extensive purchases might have signified to the settler purchasers, their argument against native property was that, with the minor exception of women's crop areas, the Native Americans were too nomadic to hold property and too unwilling to make the permanent improvements that would clarify their claims and give them moral weight. It is now known that in fact, native practices did considerably modify the landscape, particularly through the use of fire, which cleared browse areas for grazing animals; the early European settlers themselves were aware of this, and hence the claims about the nomadic and unimproving character of native economies clearly protested too much. Nevertheless, European theorists amplified the arguments against the supposedly nomadic indigenous people's property. Such arguments undoubtedly came to seem more plausible to settlers as European diseases

100See John Frederick Martin, Profits in the Wilderness: Entrepreneurship and the Founding of New England Towns in the Seventeenth-Century 10-18 (1991) (describing how New England frontier settlements used services of professional settlement entrepreneurs, who were accustomed to dealing with Native Americans both in land purchases and in warfare).

101See Indian Trade and Non-Intercourse Act, ch. 33, 1 Stat. 137 (1790) (obsolete). According to the subsequent Act of 1793, no purchase or grant of land from any Indians or tribes would be valid unless made under treaty. See Chapter 191 Stat. 329 (1793). The federal government here followed the British example in the Proclamation of 1763, forbidding all parties from engaging in land purchases from the Indians except under governmental auspices.


104See S. James Anaya, Indigenous Peoples in International Law 13, 16 (1996) (describing eighteenth-century international law theorist Emmerich de Vattel's extension of Locke's theory and taking view that cultivation gave greater right to land than hunting or gathering); Robert A. Williams, Jr., The American Indian in Western Legal Thought: The Discourses of Conquest 2446-49 (1990) (describing how Locke's arguments about Indians' lack of productivity and impact on colonists in eighteenth century) [hereinafter "American Indians"].
disrupted native populations and social structures;\textsuperscript{105} as Anglo-Americans, once freed from the checks of native tribes' alliances with European rivals, moved more aggressively westward;\textsuperscript{106} and as tribal groups retreated into areas occupied by other tribal peoples, where their economies in fact did probably become more nomadic and less settled.\textsuperscript{107} All these factors helped to confirm Anglo-American views that whatever claims native peoples had, they were based on practices too ephemeral and too unsettled to count as property.

Arguments about the status of Indian land claims made an appearance in the United States' courts very early in the new republic's history in, among others, the famous case of \textit{Fletcher v. Peck}.\textsuperscript{108} The litany against native property appeared most particularly when the status of direct land purchases from Native Americans came before the United States Supreme Court in \textit{Johnson v. Mc'Intosh},\textsuperscript{109} the first of Marshall's trilogy on Native American claims. This case concerned the legal status of a large amount of land in what was then considered the West, now the upper Midwest. The plaintiffs claimed ownership through a direct purchase from representatives of several Indian tribes.\textsuperscript{110} The defendants' conflicting claim, ostensibly to the very same land, derived from a title that came later in time, but that originated directly from the United States, after the tribes had ceded the land to the United States without any reservation or title.\textsuperscript{111}


\textsuperscript{108}10 U.S. (6 Cranch) 87 (1810). \textit{Fletcher} upheld western Georgian land sales that had been induced by bribing legislators, but there was a subtheme on Native American claims: one party argued that Georgia had not been seized in fee of lands subject to "Indian title," but this claim was put to one side with the assertion that whatever the property interests of native tribes, those interests were not incompatible with the state's seizin. \textit{Id.} at 142–43. \textit{See also} Nell Jessup Newton, \textit{At the Whim of the Sovereign: Aboriginal Title Reconsidered}, 31 HASTINGS L.J. 1215, 1220–21 (1980) (discussing question of aboriginal title in \textit{Fletcher}.)

\textsuperscript{109}21 U.S. (8 Wheat.) 543 (1823).

\textsuperscript{110}See \textit{id.} at 571–72.

\textsuperscript{111}See \textit{id.} at 593–94.
The defendants attacked the legality of the plaintiffs' direct private purchase from native peoples, and in making that attack they questioned whether the native peoples even had any property that they could have conveyed to the plaintiffs.\textsuperscript{112} This portion of the defendants' argument reflected centuries of denial of indigenous people's property. The Indians could not have conveyed good title to land, said the Johnson defendants, because they never owned it. First, Native Americans did not own property under the laws of the United States, because the law of nations, to which the United States adhered, had never accorded these peoples any permanent right in the soil.\textsuperscript{113} Second, Native Americans could not own land because their own law did not recognize property: "the Indians never had any idea of individual property in lands."\textsuperscript{114}

But the third and most pointed argument was that the Native Americans did not own this land according to what was called the law of nature.\textsuperscript{115} Why not? Because the Indians simply wandered over the land and hunted, and they did so nonexclusively.\textsuperscript{116} These activities, according to the defendants, gave no more claim to property than fishing in the sea.\textsuperscript{117} They did not make permanent changes in the land; they did not build fences, they did not do anything to exclude others; and hence "the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators."\textsuperscript{118} You cannot own something, on this argument, unless you show your claim to the world; and you cannot do that unless you have some settled agriculture or settled markers, and if your claims are nonexclusive and unintensive, it is unjust to keep out those who would make more intensive and productive use of the land.\textsuperscript{119}

Putting to one side the factual problems with this description of Native American land uses,\textsuperscript{120} this argument is especially striking in the way that it incorporates we/they thinking into property terms, or what in anthropological

\textsuperscript{112}See id. at 567. No native peoples were party to Johnson, and under principles of res judicata, the decision was not directly binding on tribal peoples. See Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv. L. Rev. 381, 389–90 (1993).

\textsuperscript{113}Johnson, 21 U.S. at 567–68.

\textsuperscript{114}Id. at 568.

\textsuperscript{115}See id. at 569.

\textsuperscript{116}See id. at 569–70.

\textsuperscript{117}See id.

\textsuperscript{118}Id. at 570.

\textsuperscript{119}See id. at 568–70.

\textsuperscript{120}See LINDA S. PARKER, NATIVE AMERICAN ESTATE: THE STRUGGLE OVER INDIAN AND HAWAIIAN LANDS 19–23 (1989) (describing productive activities and land tenure systems of Native Americans in East, Midwest and Southwest areas).
discussions is sometimes referred to as “othering.” Their uses of resources are not property. Nomadic uses cannot constitute property, because they leave no mark of exclusive claims. What is more, their uses are unproductive and wasteful; they were merely hunting, doing pitifully little with the land. But our land uses are agricultural, or timbering, or mining, and our uses would bring great wealth from the earth. We deserve this land, they do not. This is of course an argument that would never recognize anything like property rights in the Indian tribes, or in any other nomadic peoples.

In response to this, Justice Marshall did uphold the claims of the defendants in Johnson, but he referred only obliquely to their argument from the fundamental nature of property (and the supposed unnaturalness of Indian property), and turned instead to arguments from international law. By the consensus of European nations, he asserted, “discovery” gave superior title to the discovering nation; vis-a-vis one another, all would recognize the exclusive right of a discoverer nation to deal with the native peoples of the lands they respectively “discovered.” England was the “discoverer” of the relevant part of North America, and the United States was its successor; this meant that the United States alone was entitled to deal with native peoples’ claims. And since the United States, like all its predecessors in this “pre-emptive right,” had not authorized any entity but itself to extinguish native claims, the plaintiffs’ purported purchase from the Indian tribes was a nullity in the law of the United States.

Marshall’s “discovery” doctrine became well-known in the law of indigenous peoples the world over, and it has been much derided as

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122 Bentham might have added that the native claimants’ undefined boundaries and lack of secure exclusive dominion invited warfare. See Bentham, supra note 3, at 145–46 (contrasting Native American and settler societies, describing former not only as poor but as violent and warlike, and attributing peace and prosperity of latter to security of property).
123 See Carol M. Rose, Possession as the Origin of Property, 52 U. Chi. L. Rev. 73, 87 (1985) (describing hostility of common law criteria to nomadic property claims).
124 See Johnson, 21 U.S. at 588–89.
125 Id. at 573–74.
126 See id. at 584–89.
127 Id. at 588–89.
diminishing the rights of native peoples. When tribal peoples themselves appeared as parties before the Supreme Court, in *Cherokee Nation v. Georgia*, they quite resoundingly denounced the discovery doctrine. But no native peoples were parties either to the *Johnson* case or to any agreement among Europeans with respect to the fruits of “discovery”; and nothing in Marshall’s opinion held native peoples directly subject to an agreement in which they had played no role. Instead, the diminution of their rights was indirect, constricting the range of persons and nations with whom they might deal. As Marshall articulated it, the discovery doctrine was the foundation of a cartel agreement, though which the European nations divided the Americas into what might now be called “exclusive territories.” In setting out “discovery” as a part of the law of the United States, Marshall implied that Native Americans would have at most an incomplete property under that law, since tribal peoples were effectively blocked from alienating their rights to any party except the United States itself, or a party authorized by the United States. If native peoples’ rights were “necessarily diminished,” as Marshall put it, it

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129 See, e.g., Frickey, *supra* note 111, at 389 (arguing that Marshall opinion detracted from native property claims); Raymond Cross, *Sovereign Bargains, Indian Takings, and the Preservation of Indian Country in the Twenty-First Century*, 40 ARIZ. L. REV. 425, 450–52 (1998) (same); Robert A. Williams, Jr., *supra* note 88, at 163–64 (1995) (same). My own view is that many critical readings of *Johnson* are misleading insofar as they understate the point that the “discovery” doctrine—because it derived from an agreement among European nations—could at most govern the relationships of the parties so agreeing, a point that Marshall repeated in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 544, 584 (1832). See Joseph William Singer, *Well-Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 490–93 (1994) (arguing that *Johnson* was aimed chiefly at settling relations among European nations) [hereinafter “Land Claims”]. Thus the third-party impact of this agreement on tribal nations was indirect, consisting of a limitation of parties with whom they could bargain. See Singer, *supra*; see also notes 123–26 and accompanying text.

130 30 U.S. (5 Pet.) 1, 4 (1831).

131 See id. at 4 (stating Indian nation had never assented to doctrine of discovery as affecting their rights, and denying its validity in positive or natural law).

132 *Johnson*, 21 U.S. at 573–74. This construction of the discovery doctrine—as an agreement among the European nations alone—was repeated in Marshall’s opinion in *Worcester*, 31 U.S. at 543–44. The cartel and exclusive territory aspects of *Johnson*’s doctrine of discovery are emphasized in ERIC KADES, THE DARK SIDE OF EFFICIENCY: *Johnson v. Mc’Intosh AND THE EXPROPRIATION OF INDIAN LANDS* 148 U. PENN. L. REV. 1065, 1110 (2000) (describing discovery doctrine as creating “monopsony” powers). See also Anderson & McChesney, *supra* note 106, at 56 (same). The important new article of Adelman and Aron, *supra* note 105, at 816, suggests that Indian territorial claims in fact had been treated much more respectfully when there was greater competition among the settler countries to form alliances with tribal groups.
was because the discovery doctrine so sharply narrowed the set of parties with whom they might trade.\textsuperscript{133}

But Marshall declined the invitation of the Johnson defendants to say that Native Americans had no claims of entitlement whatsoever, and instead held that the native tribes had a right of “occupancy,” which only the United States, of course, could extinguish.\textsuperscript{134} Although these occupancy rights were left undefined, Marshall’s strong implication was that the United States had to take some positive action, either through agreement or through justified war, before Indian rights could be divested.\textsuperscript{135}

In Marshall’s defense, the position of Johnson was something of a middle ground. If Marshall had said that Native Americans had complete property rights, including a right of alienation, they would almost certainly have been subject to enormous pressure to sell by an ever-increasing numbers of settlers, who were more than willing to use force and fraud to arrange the transfer of land from tribal peoples to themselves.\textsuperscript{136} On the other hand, if the defendants’ arguments had been accepted, Indian claims would indeed have been nothing at all. That was in fact the position that was taken by the courts in Australia until late in the twentieth century. According to nineteenth century Australian law, Australia was supposedly simply empty land, “terra nullius,” where the aboriginal population was legally invisible;\textsuperscript{137} it is only within the last decade that the Australian courts have revisited and rejected this position.\textsuperscript{138}

Marshall did seem to think it futile for a court to try to halt the tide of settlers pouring across the country, to the great detriment of the Native Americans,\textsuperscript{139} but his opinion placed a legal buffer—the government of the

\textsuperscript{133}Johnson, 21 U.S. at 574.

\textsuperscript{134}Id.

\textsuperscript{135}See Newton, supra note 107, at 1220–26 (arguing that Marshall Court opinions required deference by settling sovereign to aboriginal title).

\textsuperscript{136}See Anderson & McChesney, supra note 106, at 64 (noting settlers’ use of violence and fraud in defiance of treaties); see also American Indians, supra note 103, at 298 (describing how argument in favor of native property rights came from land speculators who had purchased directly from natives). Newton, supra note 107, at 1223, also notes that an absolute native property right would have the effect of disrupting numerous existing titles. No doubt the latter could have lead to further violence among the settlers themselves.


\textsuperscript{139}See Frickey, supra note 111, at 388–90 (arguing that Marshall’s opinion, while raising a normative theme, instead stressed the theme of judicial subordination to a colonizing sovereign).
United States—between Native Americans and the new settlers, ineffective though that buffer may seem in retrospect. Johnson, as well as Marshall's later opinion on Georgia's Cherokee removal statute, Worcester, clearly failed to prevent the forcible displacement of native peoples throughout the nineteenth century and beyond, much of it by the very federal government that Johnson supposedly interposed as an implicit protector. Many years later, even the legal basis of that protection was threatened in a mid-twentieth century case that has been sharply criticized for misreading Johnson, Tee-Hit-Ton Indians v. United States;\textsuperscript{140} in this case the Supreme Court ruled that the United States needed not pay compensation for actions inconsistent with certain as-yet-unextinguished native claims.\textsuperscript{141}

On the other hand, Johnson itself has become something of a time capsule in modern native claims issues. In an early salvo, the Penobscots and Passamaquodies used Johnson's logic to sue the United States for failing to protect them from the late eighteenth century onward from direct land purchases by the state of Maine, as well as by several private parties; the case was settled with a land transfer and cash payment.\textsuperscript{142} Even earlier, in the later 1960s, when significant amounts of oil were discovered on the Alaskan North Slope, the interested parties realized that little development could proceed until the incoherent but as-yet-intact Alaska native occupancy rights were extinguished.\textsuperscript{143} Although the United States claimed no legal necessity to compensate these indigenous peoples' claims, after lengthy negotiations Congress in

\textsuperscript{140}348 U.S. 272 (1955).
\textsuperscript{141}See id., at 288–89 (concerning logging permits in a National Forest in Alaska, and holding that United States did not have to pay " takings" compensation when it acted inconsistently with unextinguished native occupancy rights). For criticism, see Newton, supra note 107, at 1220, 1246, 1252–53 (criticizing case as inconsistent with historic law); Land Claims, supra note 128, at 495–520 (same); John P. Lowndes, When History Outweighs Law: Extinction of Abenaki Aboriginal Title, 42 Buff. L. Rev. 77, 95–98 (1994) (same; also arguing that Tee-Hit-Ton has in fact been reconsidered in more recent cases, particularly Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 669–70 (1974)). See also Mabo, 175 C.L.R. at 90 (Dean & Gaudron, J.J.) (criticizing Tee-Hit-Ton's position as against the "weight of authority" as well as contrary to "considerations of justice").
fact accorded Alaska tribal groups a major cash and land settlement in the Alaska Native Claims Settlement Act of 1971.\textsuperscript{144}

None of this is to say that native peoples’ property claims have been even remotely adequately addressed in the United States. But by recognizing even an incoherent “occupancy” right, the \textit{Johnson} case did at least establish the principle—however weakly executed in practice and however threatened in modern judicial misreadings—that Native Americans are not some kind of outlaw or enemy group, whose property claims count for nothing. Whatever their scope, their claims too are a subject for consideration and negotiation rather than simple confiscation.\textsuperscript{145}

IV. CONCLUSION

It is time to return to the framing question: what do Type I and Type III expropriations tell us about the contentious Type II takings issues? Type I disruptions show how certain kinds of expropriation are necessarily built into a property regime; they make the regime itself function. Type III disruptions are at the other extreme: they are expropriations that occur not from the logic of a property regime, but rather because some people, rightly or wrongly, are not deemed to be participants in the property regime at all. At that extreme, denial of property is denial of membership in a community; it is a part of a radical othering.

The subject of my special concern, the Type II disruptions that raise takings claims, partakes of the first but gives rise to the specter of the third. Type II disruptions arise from the property adjustments that must be built into a property regime, in order to cope with changes in congested resources; but nevertheless, these adjustments can raise the prospect that some persons are treated as strangers to the community. This may be one reason why takings claims arouse such heated emotions on the part of owners; it is not simply that owners perceive the loss of a valuable asset, but also that they sense that others are saying, in effect, we can take your things and we don’t care, because you are not one of us.


\textsuperscript{145}See Land Claims, supra note 128, at 531 (arguing that recognition of native claims can be basis for negotiation and settlement).
The understanding of takings issues as compromise, on the other hand, can deflake these fears on the part of property owners, while reminding legislatures that no members of the community can be treated as nullities, even in the process of making necessary adjustments. This is why I stress that our takings jurisprudence can and should be seen as a series of compromise devices, taking seriously the exigencies of the property regime taken as a whole, but also taking seriously the claims of particular owners as participants in that common regime.

Some expectations of owners cannot be satisfied without making a property regime fall apart from its own rigidity. But the object of Type II property disruption is transitional; Type II regulations are not aimed at punishing enemies or declaring war on outsiders, but rather at making adjustments necessary to further the common wealth of the community. Our takings jurisprudence has to be seen in that light, where compensation is neither automatic nor automatically denied, but rather one element in a quest for compromise solutions.

I have stressed in my own writings in the past that a property regime itself is a kind of common property among the participants in it. However messy and theoretically unsatisfying compromise and negotiation may be, they are the signals of a common cause among all the participants in a larger enterprise.