Living Property*

*Joseph William Singer***

Because it is so clear[,] *it takes a long time to realize it.*[1]
- STARGATE SG-1: *Meridian*

We have seen . . . that the fundamental maxims, and rules of the law, which regard the rights of persons, and the rights of things . . . have been and are every day improving, and are now fraught with the accumulated wisdom of [the] ages . . .[2]
- WILLIAM BLACKSTONE

We must all here be independent and supreme lords of our own land.[3]
- George Fenwick

ABSTRACT

The Supreme Court has increasingly defined property rights that are per se exempt from regulation in the absence of compensation, most recently in *Cedar Point Nursery v. Hassid* (2021) and *Tyler v. Hennepin County* (2023). The Court claims that it can identify property rights that are categorically protected from regulation by reference to history, tradition, and precedent. Yet this approach is oddly ahistorical; it is inconsistent

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1. STARGATE SG-1*: Meridian* (Showtime television broadcast May 10, 2002) (unofficial transcript available at http://www.stargate-sg1-solutions.com/wiki/5.21_%22Meridian%22_Transcript [https://perma.cc/5USZ-N9K2]).

2. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 33, at 435 (1769).

3. Speaking ironically, because his tenants refused to pay quit-rents that he sought to impose in the colony of Connecticut. Beverley W. Bond, Jr., *The Quit-Rent System in the American Colonies,* 17 AM. HIST. REV. 496, 499 (1912).

with the fact that property law changed dramatically over U.S. history, as well as varying tremendously among the states. It is also inconsistent with the historical context of the Founding era. At that time, both courts and legislatures thought that property law must change over time in light of "reason and common sense." That meant rejecting remnants of feudal property rights like quit-rents and quarter-sale rights, along with primogeniture, presumptions in favor of life estates, and conveyances that did not comply with recording statutes. It also meant the invention of a new estate in land that applied only to Native nations, a novel development designed to smooth the way to dispossession of Native lands.

In reality, American history and tradition evinces a living property system that evolves over time as social conditions and needs change, as conceptions of public policy evolve, and as our notions of fairness and justice develop to promote both equality and liberty norms central to constitutional rights. Regulatory takings law would be better if the courts focused, not just on "traditional" or "established" property rights, but on the reasons for regulation and whether the obligations imposed by the regulation are unfair to impose on owners without compensation. That requires attention, not just to abstract conceptions of property that are defined in an ahistorical manner, but to the ways property law changes over time and the reasons why such changes are or are not justified in the absence of compensation. Because conceptions of fairness change over time, so must both the law of property, whether common law or statutory law. Because we have a living system, constitutional law cannot justify limits on regulation without attention to the norms and values that animate the property system as it changes over time.

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I. PROPERTY HAS A HISTORY

Property law changes over time. It is not static; nor would we want it to be. And if property law changes, it follows logically that property rights change as well. Property rights recognized in one era are abolished or limited in another era.[4] Property rights that are recognized as valid in one era are deemed to violate public policy in another era.[5] Property rights are even redistributed from owners to non-owners when that is required by prudence or justice—and sometimes even when it is unjust, as in the dispossession of Native nations.[6] Property does not have a single "historical" or "traditional" form. Rather, the *history* of property evinces a *tradition* of evolution and modernization over time.[7]

4. *See* STUART BANNER, AMERICAN PROPERTY: A HISTORY OF HOW, WHY, AND WHAT WE OWN 4–22 (2011); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 6 (3d ed. 2007) ("[L]egislators and courts frequently compelled existing property arrangements to give way to new economic ventures and changed circumstances.").

5. *See* ELY, *supra* note 4, at 9 ("[T]he history of property rights has not proceeded in a neat and orderly manner. Rather, the story is one of contradiction and ambiguity . . . .").

6. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §§2.02-2.07 (Nell Jessup Newton & Kevin K. Washburn eds., 2024) (recounting the history of dispossession of Native nations).

7. *See generally* GREGORY S. ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776–1970 (1997); DAVID A. THOMAS, 2 HISTORY OF AMERICAN LAND LAW: LAND LAW IN THE AMERICAN STATES 1161–1338 (2013); Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860*, 40 U. CHI. L. REV. 248 (1973); *see also* Mary A. Greene, *The Evolution of the American Fee Simple,* 31 AM. L. REV. 227 (1897); *see* Linn v. Minor, 4 Nev. 462, 466 (1869) ("But I wish not to be understood to press too

Our tradition of changing property law is not a deviation from original principles or practices at the Founding. No, the very opposite is true. Our Founding practice was to *redesign property*—to modify it, adjust it, reorient it, remake it.[8] First and foremost, when we broke with England, the states incorporated most of English common law but *rejected* English property law practices considered to be relics of "feudalism."[9] In the first decades of United States history, courts and legislatures were figuring out which property rights should be repudiated as vestiges of feudalism.[10] A

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strongly the doctrine of *stare decisis* when I recollect that there are more than a thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions, and such cases ought to be examined without fear, and reversed without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error.") (quoting 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 436 (3d ed., 1836); *cf.* Christopher Serkin, *What Property Does,* 75 VAND. L. REV. 891 (2022) (arguing that property law allows, but moderates, the pace of change).

8. *See* BANNER, *supra* note 4, at 22 (" . . . Americans in the early nineteenth century, especially lawyers, expected property to change over time. Old forms of property would cease to exist, new forms would be created, particular rules would come and go—all in response to changing material and intellectual conditions. . . . Property was a human institution that could be expected to change along with the changing human environment. Americans had already seen it happen in their own lives."); *cf.* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND LEGAL INSTITUTIONS IN EARLY AMERICA 13 (2021) (arguing that founding-era law, in an effort to reject aristocracy, had substantially dismantled primogeniture and the fee tail by the 1730s); William Weston Fisher III, The Law of the Land: An Intellectual History of American Property Doctrine, 1776–1880 (1991) (Ph.D. dissertation, Harvard University (ProQuest)) (describing American innovations on, and changes to, English property law between the Revolution and the end of the Reconstruction Era).

9. *See* N.J. CONST. art. XXII, § 22 (1776) ("That the Common Law of England, as well as so much of the Statute-Law, as have been heretofore practised in this Colony, shall still remain in Force, until they shall be altered by a future Law of the Legislature; such Parts only excepted as are repugnant to the Rights [and] Privileges contained in this Charter. . . ."); 1 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 7.02 (Thomas ed.); William R. Vance, *The Quest for Tenure in the United States,* 33 YALE L.J. 248, 249 (1924) ("[S]ome of our states quickly took advantage of their newly acquired independence to abolish all feudal tenures by legislative fiat, declaring that thenceforth all lands should be allodial."). Commenting on Chancellor James Kent's *Commentaries on American Law,* John Langbein noted that "Kent subscribed to the standard caveat that American courts should not apply English law in circumstances in which American conditions rendered it inappropriate. For Kent and persons of his persuasion, however, the presumption lay strongly with the inherited English law." John H. Langbein, *Chancellor Kent and the History of Legal Literature,* 93 COLUM. L. REV. 547, 568 (1993); Lyle v. Richards, 9 Serg. & Rawle 322, 333 (Pa. 1823) ("When our ancestors claimed the benefit of the common law, they took it as it was, except such parts as were manifestly unsuitable to their condition.").

10. *See, e.g.*, Townsend v. Hubbard & Orcutt, 4 Hill 351, 364–65 (N.Y. 1842) ("Thank heaven, we have here no titled nobility with their heraldic insignia and bearings which render necessary the use of seals. We have no statutes of entailment and primogeniture, locking up all the landed interests of the country, century after century, in a few privileged families, while the great mass remain dependent vassals. We need no system of enactments, and black-lettered law, throwing guards around real estate in order to prevent its alienation, and creating a monied aristocracy to lord it over the people. Ours is a different plan—a different policy. By the Declaration of Independence, we swept away those guards; and, by the adoption of our Constitution and our whole system of subsequent enactments and

search of all court cases from 1776 to 1860 yields 672 cases with the word "feudal" in them.[11] Some of them wrestle with the question of whether to reject a property right or obligation because it unduly inhibits the transfer of land or impedes the owner's free use of the land.[12] Others seek to interpret English common law in light of doctrines and statutes that overthrew feudal property rights.[13] "[R]eason and common sense" were to prevail over ancient or feudal doctrines, as a Connecticut trial judge insisted in 1790.[14] So too were "principles of justice" and "the policy of an infant Government," in the words of the North Carolina Supreme Court in 1791.[15] As a lawyer in a 1793 case before the Maryland Court of Appeals argued, "[i]t is high time that doctrines no longer applicable to things as they are, and therefore false, should give place to others more consonant to circumstances, and more conformable with truth . . . ."[16] Promoting the autonomy of owners requires dispossessing third parties of their rights to interfere with the owner's prerogatives with regard to the land, even if those third–party rights originate in deeds that created them. A nation of owners cannot tolerate absentee "lords" claiming part of the profits of the land, inhibiting transfer, impeding development, hoarding resources, and limiting liberty.[17] But in doing so, the courts saw themselves as adopting a property law system that would evolve over time, rather than embracing a new version of a static relic.

The new nation reformed property law in a second, more painful, way. It was eager both to embrace natural rights—including the sacred right of property—and to take property away from Indigenous nations to

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adjudications, our country and her institutions have been placed upon a different basis—a basis more consonant with the liberty, equality and rights of man."); Trammell v. Harrell, 4 Ark. 602, 604 (1842) ("The doctrine of entails and primogeniture, and the *jus accrescendi*, and the abolition of all patents of nobility, were the feudal badges which the American governments intended to sweep away, and thus break down all hereditary family succession by unfettering property and distributing it equally and justly among all the members of society.").

11. CASELISTENER, "feudal", 672 results (July 7, 2025), https://www.courtlistener.com/?q=feudal&type=o&order_by=dateFiled%20asc&stat_Precedential=on&filed_after=01%2F01%2F1776&filed_before=01%2F01%2F1860 [https://perma.cc/Q3BG-B5R9].

12. *See, e.g.*, De Peyster v. Michael, 6 N.Y. 467, 489 (1852) (invalidating a quarter sale provision in a "lease in fee").

13. Thompson v. the Catharina, 23 F. Cas. 1028, 1030 n.8 (D. Pa. 1795) (No. 13,949) ("The feudal parts of this law, and such as are inconsistent with the principles of our government are not, nor can they be, in force. Those who are best acquainted with its wise and just principles, as they relate to contracts, and the property, as well as the personal rights of individuals, admire the common law as the venerable and solid bulwark of both liberty and property.").

14. Martin v. Sterling, 1 Root 210, 211 (Conn. Super. Ct. 1790).

15. Strudwick v. Shaw, 2 N.C. (1 Hayw.) 5, 11 (1791).

16. Martindale's Lessee v. Troop, 3 H. & McH. 244, 284 (Md. 1793).

17. *See generally* J.M. Balkin, *The Constitution of Status,* 106 YALE L.J. 2313 (1997) (arguing that the Constitution requires promoting a democratic culture that treats each person with equal dignity and rejects status hierarchies).

promote expansion and settlement by non-Native Americans. How to dispossess Indigenous nations while purporting to embrace natural rights to property was a tricky business. It required dexterity, ingenuity, and not a small amount of gaslighting to champion property rights for some, while denying those same rights to others.[18] Embracing a republican form of government based on natural rights, the United States needed to give reasons to justify seizures of tribal land for the purpose of colonial settlement. To do that, the courts redefined property rights to rationalize centralizing control over tribal property in the federal government and denying core property rights to tribes.

At the very moment courts and legislatures were abolishing feudal rights to ensure autonomy to "owners," they were denying those very same property protections to Native nations. Indeed, they treated the United States itself as the ultimate lord of tribal lands, contradicting the effort to abandon the notion that all lands are owned by the Crown and that landowners are mere tenants in a hierarchical relationship with their lord.[19]

Creating this discriminatory property system required inventing a new estate in land applicable *only* to Native nations. The resulting "Indian title" is a property right unique to the United States, crafted over the first fifty years of U.S. history through federal statutes, treaty practices, and early Supreme Court opinions. It was an invention designed to protect tribal title while justifying dispossession of Native nations and "settlement" (or invasion) by non-Native Americans.

Third, the states created recording systems that changed rules about transfer of real property in ways that both protected and undermined preexisting property rights. Before those registries, the rule was "first in time, first in right."[20] If someone sells their property to A and then to B, A wins in a contest between A and B. You cannot convey something you no longer own. The registry of deeds system changed that; B would prevail against A if A did not record A's deed and B bought without notice of the earlier sale. That system *divested A of title* in violation of common law principles.[21] England had no land registries of the type used in the states, but

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18. Championing liberty for oneself while embracing slavery is another tricky normative project that tied the nation in knots for decades.

19. *See* An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, § 4, 1 Stat. 137, 138 (stating that no transfer of title to tribal lands made by Native Americans is valid without the consent of the United States); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that title to Indian laws is split between the United States and Indian nations); Joseph William Singer, *Indian Title: Unraveling the Racial Context of Property Rights, or How to Stop Engaging in Conquest,* 10 ALB. GOV'T L. REV. 1 (2017).

20. For various justifications of this principle, see Lawrence Berger, *An Analysis of the Doctrine That* "*First in Time is First in Right*," 64 NEB. L. REV. 349 (1985).

21. For a modern example of owners losing title because they failed to record their deed, see Mathes v. 99 Hermitage, LLC, 696 S.W.3d 524 (Tenn. 2024).

Scotland did, and the Americans learned from, and adopted, the Scottish system.[22] And while the land registries began in the colonial era (Massachusetts had one as early as 1649),[23] their continuation after Independence was a choice—a choice to repudiate the parts of English property law that were inconsistent with regulations designed to protect owners from hidden encumbrances on their freedom to use their own property and to transfer it to others. Registries imposed new duties and vulnerabilities on owners, requiring them to record their deeds on pain of loss occasioned by an unscrupulous grantor.

Nor did property law reform stop at the Founding. Changes in property law and property rights continued through the nineteenth and twentieth centuries and right up to today. Property owners have a bundle of rights, and whichever right you focus on, we can see a history of change. That is true of the right to exclude, the privilege to use, immunity from deprivation, and the power to transfer. Major changes occurred in trespass law, nuisance law, adverse possession, the estates system, leaseholds, inheritance, marital property, and real estate transactions. *In each and every area* of property law, we see significant changes over the last 250 years of United States history. Whether we look to history, tradition, precedent, original practice, or intent of the Framers, we find, not a fixed and unchanging property system, but an *evolving one.*

Nor is anything different if we focus on the moment the Fourteenth Amendment was adopted in 1868. That was just three years after the adoption of the Thirteenth Amendment—a constitutional change that abolished millions of dollars of property rights in human beings and which did so *without compensation.* Why no compensation? Because it was now the view (embodied in law) that it violates public policy as well as fundamental human rights to treat people like things. Nor was property law settled from 1868 on. Instead, we had public accommodation laws passed in Southern states, followed by repeal ten years later, followed by Jim Crow laws that made it illegal to grant entrance to persons of the wrong race in

22. *See General Register of Sasines*, REGISTERS OF SCOTLAND (last updated Oct. 29, 2024) https://www.ros.gov.uk/our-registers/general-register-of-sasines (on file with Seattle University Law Review) (self-describing as "the oldest national public land register in the world, dating back to 1617"); *see also* KENNETH G. C. REID & GEORGE L. GRETTON, LAND REGISTRATION (2017); George L. Gretton & Kenneth G. C. Reid, *From Registration of Deeds to Registration of Title: A History of Land Registration in Scotland* (University of Edinburgh School of Law Research Paper Series, No. 2015/29, 2015), https://ssrn.com/abstract=2655598 [https://dx.doi.org/10.2139/ssrn.2655598].

23. MIDDLESEX SOUTH REGISTRY OF DEEDS, https://massrods.com/middlesexsouth/ [https://perma.cc/L5TL-QX62]; *Navigating the Past and Present: Exploring the Middlesex Registry of Deeds*, PROBATE (Apr. 3, 2015), https://probate.laws.com/tenancy/registry-of-deeds/middlesex-registry-of-deeds [https://perma.cc/E6UD-6NVY] ("The first Registry of Deeds office in Middlesex County was opened in Cambridge in 1649 . . . .").

public accommodations.[24] Changes in the law governing racial relations were, for the most part, changes in property law. And those changes were reversed again when we came to the civil rights era of the 1960s. Those changes in the right to exclude were fully enforceable—while they lasted. None were deemed unconstitutional takings of property.

These facts are well-known. Recent Supreme Court decisions involving property rights and regulatory takings, however, show no understanding of our evolving property system. Rather, the Court has increasingly understood property rights as fixed by "tradition" or "history and precedent," rather than evolving over time.[25] This newfangled objectification of property does not even recognize that we are a federal system with property law varying significantly among the several states. In recent years, the Supreme Court has increasingly defined regulations of particular property rights to be categorical or "per se" takings of property without regard to the governmental interests in regulating those property interests, even when the regulations protect the public as well as other property owners. These rulings rest on the incorrect assumption that we have a fixed, objective, "traditional" or "historical" set of practices with regard to property rights that can be discerned from precedent.[26] They also embody a perversely ahistoric approach to defining historic property rights. The Supreme Court has frozen property rights based on history, tradition, and precedent while ignoring all three.

We do not have a property law tradition that identifies fixed, unchanging property rights. The opposite is true. We have a *living property* system.[27] At every point in United States history, whether at the time of the Founding, the Civil War amendments, the Jim Crow era, the Lochner era, the Progressive Era, the New Deal, the Civil Rights era, the subprime crisis, or the recent pandemic, our property history and tradition is one of change. Historical practice is highly relevant to understanding property law, but arbitrarily identifying a property right as a fixed part of tradition

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24. *See infra* Part IV.B.2.

25. Tyler v. Hennepin Cnty., 598 U.S. 631, 639 (2023) ("History and precedent say otherwise."); *id.* at 638 ("[W]e also look to 'traditional property law principles,' plus historical practice and this Court's precedents."); Cedar Point Nursery v. Hassid, 594 U.S. 139, 162 (2021) (Kavanaugh, J., concurring) ("I join the Court's opinion, which carefully adheres to . . . history[ ] and precedent.").

26. *See generally Tyler v. Hennepin Cnty*., 598 U.S. 631; *Cedar Point*, 594 U.S. 139.

27. The evocation of "living constitutionalism" is deliberate. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010); David S. Schwartz, *Is the Constitution of 1787 a White Supremacist Document? Against Essentialism in Constitutional Interpretation,* 33 WM. & MARY BILL RTS. J. 63 (2024); Cass R. Sunstein, *Is Living Constitutionalism Dead? The Enigma of* Bolling v. Sharpe (Harvard Public Law Working Paper No. 22-30, 2022), https://ssrn.com/abstract=4192758 [https://dx.doi.org/10.2139/ssrn.4192758]; *cf.* STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM 136 (2024) (arguing that originalism "does not take into account the ways in which our values as a society evolve over time as we learn from the mistakes of our past.").

that can never be changed is, in fact, inconsistent with the history of property, property rights, and property law. Our historical property tradition is not only one of change, but of experimentation and innovation among the states; property is not uniform in our federal system. On every major point, we see variation among the states, both now and in the past. Evolving and diverse property practices are a fixture of our federal system, and it occurs because individual states adjust or change their property law rules as cases come before them that demand new thinking, and as statutes are passed to improve the property system and to promote the general welfare. Property law evolves, and so do property rights.

Importantly, even if you are an originalist, it would be impossible to look to magic historical moments, like 1791 or 1868, to determine what the word "property" means in the Fifth and Fourteenth Amendments. That is because what property meant at those precise moments was that property law must be modernized to be consistent with liberty and equality norms as well as "reason" and "common sense." The commitment at those moments, evident in 250 years of property law evolution, was that property is a social and economic institution that must evolve to promote both individual rights and public policy.

Our legal and customary practices—and our Constitution—embrace living property. Oblivious to this fact, the Supreme Court has expanded the set of property rights it deems to be "essential" and *per se* immune from regulation without compensation under the Takings Clause.[28] The Court has done so without regard for the public interests those regulatory laws serve, the social consequences of hamstringing legislatures keen on solving social problems, or the futile effort to stop courts from either distinguishing cases or overruling precedents now seen as unfair, unworkable, or inefficient.

The turn to history, tradition, and precedent in the field of constitutional property law is particularly problematic today because of the problems we face. First is climate change. If property rights established in an earlier time are rigidly protected, this may fatally inhibit our ability as a society to reduce climate-killing land uses or to protect owners whose homes are now unsafe.[29]

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28. *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) (characterizing the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property").

29. *See* Emily Sweeney, *Assessed at Nearly $2 million, Nantucket Waterfront Home Sells for Just $200,000. 'Inevitably, the Ocean Will Win,"* BOSTON GLOBE (July 11, 2024), https://www.bostonglobe.com/2024/07/11/metro/nantucket-waterfront-home-sold-erosion/ [https://perma.cc/N8WE-JRRL]; *see also* Jack Whiteley, *Property's Climate* (unpublished manuscript) (on file with author) (showing how property law promoted climate-harming activities and how it could be changed to protect the environment).

Second, the pandemic taught us—or reminded us—that temporary moratoria on evictions or foreclosures may sometimes be necessary to prevent widespread deaths from contagious disease.[30]

Third, the subprime crisis taught us that innovative property rights in the form of securitized, subprime mortgages had devastating negative externalities. They had the minor side effect of wrecking the world economy. They required massive government intervention to shore up the financial infrastructure and to manage massive displacement of property owners in the face of securitization methods that ignored established criteria for loan origination and traditional procedures for clarifying property rights, thereby inhibiting foreclosure and renegotiation.[31]

A fourth issue is affordable housing. While recent changes in zoning laws have begun to erode single-family zoning, legislatures have resisted abolishing covenants that similarly limit land to single-family structures. If covenants are deemed "property" rights protected by the Takings Clause, and if abolishing them without compensation is deemed unconstitutional, we may face a politically insurmountable barrier to solving the affordable housing crisis.[32] Enforcing single-family covenants would protect existing property owners at the expense of preventing millions of others from acquiring and enjoying homes of their own, along with access to employment and wealth. We would be protecting the property rights of some by preventing others from acquiring property rights of their own. That is the way feudalism worked, and our nation has consistently rejected property laws that concentrate ownership in the few and deny it to the many.[33]

Part II below explains the Supreme Court's recent turn to "tradition" or "history and precedent" to define the property rights that cannot be regulated or abolished without compensation under the Takings Clause. The

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30. *See, e.g.*, Gallo v. District of Columbia, 659 F.Supp. 3d 21, 24–25 (D.D.C. 2023) (eviction moratorium during pandemic not a physical or regulatory taking of property even though tenant was not paying rent); Baptiste v. Kennealy, 490 F.Supp. 3d 353, 387–90 (D. Mass. 2020) (eviction and foreclosure moratoria during pandemic not a taking); *see also* The Coronavirus Aid, Relief, and Economic Security Act §§ 4022–4024, Pub. L. No. 116-136, 134 Stat. 281, 490–92 (2020) (foreclosure moratorium and temporary moratorium on eviction filings).

31. *See* JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS (2015).

32. Inclusionary housing ordinances may also be vulnerable to invalidation under the Takings Clause after *Sheetz v. Cnty. of El Dorado,* 601 U.S. 267, 276–79 (2024) (holding that the "nexus" and "rough proportionality" requirements of the *Nollan* and *Dolan* cases apply to "legislatively prescribed monetary fees").

33. That is not to say we do not have a concentration problem now; indeed, the concentration of wealth in a few billionaires is flatly inconsistent with core norms of the American property system. Freezing the current distribution of wealth by preventing public policies that might redistribute wealth from our current "lords" to the rest of us would violate, rather than protect, the norms underlying our anti-feudal system.

Court has done this first by focusing on identifying "core" or "established" property rights; second, by using the "vested rights" doctrine to invalidate retroactive changes in property law; and third, by conceptualizing the "background principles" that limit property rights to be fixed and unchanging rather than evolving.

Part III below focuses on how property law was changing at the time of the Founding. Importantly, at the time the Bill of Rights was adopted in 1791, courts and legislatures were laser-focused on both adopting and rejecting English property law. They were intent on accepting the parts of English common law that were consistent with an emerging democratic conception of property, and they were equally intent on rejecting and abolishing property rights that were thought to have their origins in the feudal system, or which operated to inhibit robust property rights consistent with the abolition of titles of nobility.

In addition, a hugely important issue that judges do not like to think about or remember is the invention of "Indian title"—a new estate in land that justified and empowered the practice of seizing tribal lands, often without voluntary consent and for a pittance. By holding that the federal government was the "absolute ultimate title" holder of all tribal land—with the title of Native nations subordinate to that "ultimate" title[34]—the Supreme Court applied the feudal theory of land to Native nations that it rejected in the case of non-Native lands. While that doctrine partially protected tribes from invasion by settlers without the consent of the United States, it also provided an ideological bulwark to the practice of seizing tribal lands through the treaty process by giving the United States government the power to divest tribes of their lands—a power that the United States used over the course of the nineteenth century to take all but two percent of tribal lands for its own use.

States also adopted land recording systems that altered the priority rules that apply to conflicting titles, protecting some owners while divesting others of their property rights.[35] Those statutes operated to strip owners of title if they did not follow the rules, effectively taking their titles without compensation. Those regulations were intended to shore up property rights by making title secure, but they did so by changing common law rules in ways that denied title to those who did not comply with the new regulations. The Founding moment demonstrated not a commitment to static, unchanging property rights, but a spirit of innovation, with evolving property rights consistent with both public policy and individual rights.

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34. *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 592 (1823).

35. *See* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power*, 133 YALE L.J. 1487 (2024).

Part IV gives examples of the historical evolution of property rights over the course of U.S. history by using the basic Hohfeldian categories as a frame of reference. Part IV also describes multiple reforms in every area of property law that occurred over the last two and a half centuries. Each of the basic property rights, including the right to exclude, the privilege to use, immunity from deprivation, and the power to transfer, underwent significant changes over the last 250 years—changes that were never viewed as unconstitutional takings of property despite the fact that they altered core property rights.

Part V concludes with the thought that we would be better off with a more candid jurisprudence that recognizes rather than flees from reality and facts. We would be better off identifying the norms that justify property rights and property systems and the conflicts among them. We would be better off if the Court understood that property is a system as well as an individual right and that property rights must be shaped by their consequences for non-owners. We would be better off if the Supreme Court talked openly about *values* and gave *reasons* for its rulings, rather than appealing to a "history" or a "tradition" or even "precedent" that is inconsistent with our actual historical tradition and precedential practices. We would be better off if the Supreme Court understood that both property law[36] and regulatory takings law are founded on "fairness and justice,"[37] and when our views about what is fair change, so must property law. We would be better off if the Court understood that we have a living property tradition.[38]

A final thought: this is a long article, longer than most law reviews want to publish these days. But it is long for a reason. The cases and doctrines described here are the evidence for the proposition that we have a living property system. My saying so, on its own, is just a matter of opinion—unless I can back up my assertion with facts. The Supreme Court's cavalier attitude to property law, and its assumption that property rights can be defined in an ahistoric manner and justified by reference to "history" cannot be contested without demonstrating that it is false. Platitudes cannot combat platitudes. The only thing that can is evidence to the contrary, and that is provided by the statutes and common law rulings

36. *See* State v. Shack, 277 A.2d 369, 372 (N.J. 1971) ("Property rights serve human values. They are recognized to that end, and are limited by it.").

37. *See* Agins v. City of Tiburon, 447 U.S. 255, 263 (1980) (a taking will be found only when a regulation denies "justice and fairness" to the owner); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole" (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

38. *Cf.* STEPHEN BREYER, READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM (2024).

described below. If the Supreme Court means what it says in *Cedar Point*, then many of the changes in property law outlined in this article may be unconstitutional. Does the Court really mean to reverse all these changes in property law that have occurred since 1791? And if not, what justifies its ruling in *Cedar Point*? Perhaps the decision could be justified by other reasons, but if the only reason that supports it is reference to a history that does not exist, then the decision is unreasoned, and an unreasoned decision does not meet the minimum standards for the rule of law. And it certainly is not consistent with a well-functioning, fair, and just property system.

II. HOW THE SUPREME COURT EMBRACES—AND IGNORES— "HISTORY," "TRADITION," AND "PRECEDENT"

A. The Historical Rise, Fall, and Rise of Per Se Takings

In the beginning, the Fifth Amendment's Takings Clause was understood to apply to the federal government, but not to the states.[39] It was also generally understood to apply to outright seizures of property, but not to regulations of use.[40] When the Fourteenth Amendment was adopted, it copied the Due Process Clause from the Fifth Amendment, added an Equal Protection Clause, and omitted the Takings Clause.[41] It was not until 1897 that the Fourteenth Amendment was interpreted to prohibit takings of property by states without just compensation,[42] and that was after several Supreme Court cases had explicitly denied that the Fourteenth Amendment included an implicit takings clause.[43] It was not until 1922 that the

39. Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 243 (1833).

40. Cedar Point Nursery v. Hassid, 594 U.S. 139, 148 (2021) ("Before the 20th century, the Takings Clause was understood to be limited to physical appropriations of property."); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process,* 95 COLUM. L. REV. 782, 782 (1995).

41. *See* Aviam Soifer, *Text-Mess: There is No Textual Basis for Application of the Takings Clause to the States,* 28 UNIV. HAW. L. REV. 373 (2006). *See also* Davidson v. City of New Orleans, 96 U.S. 97, 105 (1877) ("If private property be taken for public uses without just compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing [the due process clause], was left out, and this [due process clause] was taken.").

42. Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897). While the Supreme Court based its 1897 ruling on the Due Process Clause of the Fourteenth Amendment, finding a taking of property without compensation to violate "due process of law," it later characterized its ruling as incorporating the Fifth Amendment's Takings Clause into the Fourteenth Amendment. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle*," 90 MINN. L. REV. 826 (2006) (comparing Chicago, 166 U.S. (1897) with Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

43. *Compare Chicago*, 166 U.S. (1897) (taking of property without just compensation is an unconstitutional deprivation of property without due process of law under the Fourteenth Amendment), *with* Davidson v. City of New Orleans, 96 U.S. 97, 104–05 (1877) (holding that there is no takings

Supreme Court held that the Takings Clause sometimes applied to land use regulations as well as outright expropriation of property, at least when regulations "go too far."[44] And it was not until 1978 that the Supreme Court announced a general test to determine when a regulation crosses the line into being an unconstitutional taking.[45] That "ad hoc test" announced in *Penn Central Transportation Co. v. City of New York* required consideration of the character of the government action, the extent of diminution of value, and interference with distinct (later "reasonable") investment-backed expectations.[46] And what must courts do with those factors? We are to consider them to determine whether "fairness and justice" demand compensation to the owner.[47] The rule of law that determines when a regulation is an unconstitutional "taking" is whether "fairness and justice"[48] require that "the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[49]

This brief history shows that we started with a set of fairly clear and rigid rules. The Takings Clause applies to the United States but not the states, and it prohibits expropriation of property but not regulation of it. We departed from that clear set of rules in 1922 when the Supreme Court decided that a regulation of land use can be a "taking" of property if the regulation "goes too far" in reducing the land's value, unless the regulation can be justified as promoting an average reciprocity of advantage or because the regulation prohibits a "noxious use."[50] That vague standard was elaborated and developed in 1978 with the *Penn Central* test, which identifies three factors to consider to help us determine whether "justice and fairness require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons."[51] This is a story of a clear rule morphing into the vaguest of flexible standards—standards that require both normative judgment and consideration of facts and social context. We are to focus on the legitimacy and relevance of government interests in regulation, along with

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clause in the Fourteenth Amendment), *and* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176–77 (1872) ("[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States.").

44. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

45. *Penn Cent. Transp. Co.*, 438 U.S. 104 (1978).

46. *Id.* at 123–24.

47. *Id.*

48. Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

49. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

50. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415, 417 (1922).

51. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) (citation modified).

the justified expectations of property owners in light of the effects of the exercise of their property rights on others and the general public, and, ultimately, whether the regulatory obligation on them can be justified as fair.

Of course, reliance on a standard does not mean that lawyers could not give advice to clients or that the regulatory takings doctrine was so vague as to make application of law unpredictable. Rather, the contrary was true. Almost all property regulations were clearly *not* takings under the *Penn Central* test. Standards morph into rules through precedent and analysis of social context.[52] There was, after *Penn Central,* a strong presumption *against* finding a regulation to be a taking. Yet for that very reason, there was an impetus to identify regulations that effect *per se* takings regardless of the government interest justifying the regulation.

The move back to rigid rules started with *Heart of Atlanta Motel, Inc. v. United States*[53] and *PruneYard Shopping Center v. Robins.*[54] The 1964 decision in *Heart of Atlanta Motel* dismissed the argument that the recently enacted federal public accommodation statute effected a taking of property when it denied owners the right to exclude Black customers from public accommodations. That law not only required hotels and restaurants to admit customers against the wishes of the owner, but it required them to provide services to strangers, including allowing people to stay in hotel rooms overnight. Despite this significant limitation on the right to exclude, the Supreme Court considered the motel's argument to be so frivolous that it dismissed the takings claim in one sentence: "Neither do we find any merit in the claim that the Act is a taking of property without just compensation."[55]

In *Heart of Atlanta Motel,* the Court noted that the "cases are to the contrary," citing precedents that held that the Takings Clause only applies to "direct appropriation" of property rather than "consequential injuries resulting from the exercise of lawful power"[56] as well as cases holding that regulations designed to serve legitimate government interests are not takings.[57] This approach was rule-like since regulations had a very strong

52. *See generally* Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369 (2013).

53. 379 U.S. 241 (1964).

54. 447 U.S. 74 (1980).

55. *Heart of Atlanta*, 379 U.S. at 261; *accord* Western Turf Ass'n v. Greenberg, 204 U.S. 359 (1907) (upholding state statute granting public access to places of entertainment because it does not "violate[] any right of property secured by the Constitution").

56. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551 (1870).

57. Omnia Com. Co. v. United States, 261 U.S. 502, 509 (1923) ("An appropriate exercise by a State of its police power is consistent with the Fourteenth Amendment, although it results in serious depreciation of property values; and the United States may, consistently with the Fifth Amendment, impose for a permitted purpose, restrictions upon property which produce like results."); United States

presumption of validity. If a taking occurs only when property is expropriated or when a regulation has no relation to a legitimate government interest, then virtually no regulations will count as unconstitutional takings.

This dismissive treatment of the takings claim in *Heart of Atlanta Motel* suggested that there was no reason to engage in a careful balancing of private and public interests. The federal public accommodation law served legitimate government interests, left owners with reasonable uses of their property, and did not come close to being the equivalent of an appropriation or expropriation of the owner's property rights. This was, in the words of Nestor Davidson and Timothy Mulvaney, a *per se non-taking*.[58] Antidiscrimination laws are not unconstitutional takings of property *even if they force owners to allow strangers to enter their property and demand service or even to stay there.* The public interest in the regulation outweighs the private property interest, and the regulation simply requires the owner to use the property as intended, but in a nondiscriminatory manner.

PruneYard similarly upheld a law mandating access to property of another and denied it was a taking; but this time, the Court chose a standard to justify its ruling. The Supreme Court held that a state constitutional ruling that enabled non-owners to enter shopping centers to hand out leaflets was not a taking because the law did not cause any interference with the "value or use" of the property.[59] Despite its interference with the owner's right to manage the use of their land and to exclude strangers, the prohibition on exclusion was not a "taking" of "property" because the owner retained all other use rights and there was no showing that the economic or practical value of the property was diminished in any way.

PruneYard applied the *Penn Central* multifactor test by focusing on the economic impact of the regulation and its interference with reasonable investment-backed expectations. At the same time, the character of the government action (a limitation on the right to exclude non-owners) was deemed *irrelevant* since the *value* of the property remained the same and there was no interference in the primary *use* of the property, given the power of the owner to impose reasonable time, place, and manner restrictions on leafletting. In effect, the Supreme Court required the owner

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v. Cent. Eureka Mining Co., 337 U.S. 155, 169 (1958) (holding that a mining regulation was not a taking of property because it was a mere temporary restriction that "was incidental to the Government's lawful regulation of matters reasonably deemed essential to the war effort").

58. Nestor M. Davidson & Timothy M. Mulvaney, Per Se *Non-Takings* (2024) (unpublished manuscript) (on file with author).

59. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) ("There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center.").

to give a good reason to be free from the intrusion. The interest in not having the activity take place on the owner's land was not enough to constitute a taking of property when there was no evidence that the owner's ability to operate the shopping center profitably was affected in any way.

Yet in a curious development, Justice Marshall concurred in *PruneYard* with a prescient warning. He argued that it might very well be a taking if the state were to "abolish 'core' common-law rights, including rights against trespass, at least without a compelling showing of necessity."[60] Marshall suggested that some "core" property rights could be immune from regulation without compensation *even if the government had a good reason for the regulation.* That was not the case in *PruneYard,* Justice Marshall explained, because the property was "already open to the general public" and there was "no showing of interference with appellants' normal business operations" or "invasion of any personal sanctuary."[61] This "core property rights" doctrine came to fruition two years later in a case that rejected the *Penn Central* multifactor test by defining the character of government action as a *per se* taking without regard to the effect on the owner's use or value and without regard to the public interests served by the regulation. That brings us to the *Loretto* case.

Justice Marshall wrote the opinion for the Supreme Court in the 1982 case of *Loretto v. Teleprompter Manhattan CATV Corp.*[62] The case held that a city ordinance requiring residential landlords to permit cable television companies to install boxes and lines on their buildings to empower tenants to access cable services was a "per se taking."[63] "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[64] This rule applied even though there was no evidence that the regulation had *any effect at all* on the fair market value of the property. On remand, the court awarded a nominal $1 for the taking since, if anything, the intrusion *increased* the market value of the property.[65] For our purposes here, *Loretto*

60. *Id.* at 93–94 (Marshall, J., concurring).

61. *Id.*

62. 458 U.S. 419 (1982).

63. *Id.* at 442 (Blackmun, J., dissenting) ("In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule: 'a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.'"). This "per se taking" language from the dissenting opinion has been used by later analysts to characterize the *Loretto* holding. *See* Cedar Point Nursery v. Hassid, 594 U.S. 139, 148 (2021) ("[W]e assess [physical takings] using a simple, *per se* rule: The government must pay for what it takes.").

64. *Loretto*, 458 U.S. at 426.

65. *A $1 Cable Fee for TV Hookup Upheld by State,* N.Y. TIMES (May 9, 1983), at B3, https://timesmachine.nytimes.com/timesmachine/1983/05/09/issue.html (on file with the Seattle

operationalized the suggestion by Justice Marshall in *PruneYard* that some property rights should be seen as core common law rights that cannot be taken without compensation, regardless of how important the public interest in the regulation is, and regardless of how little it interferes with the use or value of the property to the owner.

That per se taking approach was extended in *Lucas v. South Carolina Coastal Council*,[66] when the Supreme Court held that a regulation constitutes a taking when it results in a "total deprivation of beneficial use" that leaves land "without economically beneficial or productive options for its use."[67] This "total taking" rule has been interpreted to mean what it says: a one hundred percent deprivation of fair market value—in other words, the land must be "valueless."[68] Of course, this rigid rule was immediately modified by a standard that allowed total deprivation of value if the regulation reflected limitations on ownership built into the common law or historical definition of the property rights in question such as restrictions on nuisances. No taking exists if the "prohibited purposes [were] *always* unlawful"[69] or if the restriction reflected "background principles of the State's law of property and nuisance already place [sic] upon land ownership."[70]

As of 1992, then, it appeared that the Supreme Court was determined to begin using rigid rules to delineate when regulation of property constitutes an unconstitutional taking. But that did not happen; instead, Justice O'Connor stepped in and convinced a majority of Justices that rigid rules were generally not the best way to determine whether a regulation amounts to an expropriation under the Takings Clause. In a pair of rulings, the Supreme Court refused to find safe harbors either for owners or for states.

University Law Review) ($1 fee reasonable because cable TV access increases the value of residential rental property); *see* Loretto v. Group W. Cable, 522 N.Y.S.2d 543 (N.Y. App. Div. 1987) (upholding city agency determination of reasonable compensation); *cf.* Brown v. Legal Found. of Wash., 538 U.S. 216 (2003) (holding that no compensation due for an unconstitutional taking when there was no loss to the owner).

66. 505 U.S. 1003 (1992).

67. *Id.* at 1017.

68. *Id.* at 1033 (Kennedy, J., concurring). Of course, this is an overstatement. Beachfront property has value even if one cannot build a structure on it, given the interest in accessing the water to swim and to sit and play on the beach. Indeed, many people pay to join beach clubs to have access to the beach. That suggests that the fair market value would not be zero even if no construction was allowed; nor is the property devoid of "beneficial use." The finding of "no value" was uncontested by the lawyer for the state commission and was an unfortunate concession, given the way it was used in the opinion to characterize the facts in a manner inconsistent with reality. There is no doubt the prohibition on development had a huge impact on the property's market value but to characterize it as "total" is an exaggeration.

69. *Id.* at 1030.

70. *Id.* at 1029.

The Court held in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* that owners are not automatically entitled to compensation when a regulation denies all economically viable use in a temporary, rather than a permanent, manner.[71] And it held in *Palazzolo v. Rhode Island* that states are not *per s*e exempt from takings claims just because an owner acquired title after the regulatory law was in effect.[72] Justice Scalia's impatience with these rulings was palpable,[73] but they reflected a consensus that sought to rein in rigid rules that either prohibit government regulation without regard to the reasons for the regulation or the interests it serves, and to rein in safe harbors for states that wrongly immunize them from liability without consideration of whether the impact on the private property owner caused by the regulation is fair to impose on the owner for the good of the community.

Tahoe-Sierra and *Palazzolo* seemed to signal a return to general standards in takings law. That direction was confirmed in 2005 when the *Lingle* decision held that the *Penn Central ad hoc* test was the core of regulatory takings law and that *per se* takings were limited to the permanent physical occupation rule in *Loretto* and the total taking rule in *Lucas.*[74] However, the search for rigid rules and clear definitions of "property" never really went away. Even though the Supreme Court tried to simplify the law and minimize the force of the *per se* takings approach in *Loretto* and *Lucas,* it was not a very good expert on its own case law.

In addition to the physical occupation and total taking rules, the Supreme Court had previously identified some "core" or "established" private property rights that could not be "taken" by regulation even if the regulation served important public interests and even if the economic value of the property as a whole remained intact. It turns out that *Loretto* and *Lucas* are not the only *per se* takings that have been recognized by the Supreme Court. These other cases are important precursors of the per se taking holdings of *Cedar Point Nursery v. Hassid* in 2021 and *Tyler v. Hennepin* in 2023.[75]

B. "Core" or "Established" Rights of Private Property

By reestablishing the *Penn Central* ad hoc "fairness and justice" test as the way to determine whether a regulation was a taking of property, the *Lingle* decision in 2005 sought to limit the number of per se takings to two:

71. 535 U.S. 302 (2002).

72. 533 U.S. 606 (2001).

73. Justice Scalia joined both Justice Rehnquist's and Justice Thomas's dissenting opinions in *Tahoe-Sierra* and wrote his own concurrence in *Palazzolo.*

74. Lingle v. Chevron, 544 U.S. 528 (2005).

75. Tyler v. Hennepin Cnty., 598 U.S. 631 (2023); Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).

the *Loretto* permanent physical invasion rule and the *Lucas* total taking rule. But the Court did not do a good job of canvassing its precedents; there were a significant number of per se takings cases that they forgot about. While it is true that these cases purported to apply the ad hoc test, they held that the "character of the government action" was so "extraordinary" that it amounted to a taking without regard to the diminution in value of the property or interference with investment-backed expectations.[76] These cases identified regulations that were thought, per se, to be unjust and unfair in the absence of compensation. According to the Supreme Court, the regulations in those cases imposed limitations on or abolition of "core" or "established" property rights. These cases fit in the per se property rights category because their holdings can be stated as rigid rules: explaining the result does not require an assessment of multiple factors. That makes them per se takings cases even if the Court did not remember about them when it wrote its decision in *Lingle*.

The notion that some rights are core property rights originated, as we saw, in Justice Marshall's concurrence in *PruneYard*. The notion that "established private property rights" cannot be taken without compensation was announced in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* in 2010.[77] While refusing to find a taking in *Stop the Beach,* a majority of Justices asserted that it either violated the Takings Clause or the Due Process Clause for the state to deprive an owner of an "established right of private property."[78] "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."[79]

However, there are per se takings precedents that the *Lingle* Court forgot about. Oddly, the first one was the first case ever to hold that a regulation of use can amount to an unconstitutional taking. The *Pennsylvania Coal* case rested partly on the proposition that Pennsylvania had recognized a unique estate in land called the "support estate."[80] That estate either gives the surface owner of land a right to continued support of the

76. *See* Babbitt v. Youpee, 519 U.S. 234 (1997).

77. 560 U.S. 702 (2010).

78. *Id.* at 715; *id.* at 737 (Kennedy, J., concurring). Oddly, the Justices seem to forget that *there is no takings clause in the Fourteenth Amendment*. That means that a majority of Justices agreed that it could be a violation of the Fourteenth Amendment to deprive an owner of an "established right of private property" even if that deprivation was accomplished by court order or a common law rule rather than legislation. They only disagreed about whether the proper remedy was just compensation or an injunction stopping the regulation from taking effect.

79. *Id.* at 715; *cf. id.* at 737 (Kennedy, J., concurring) (quoting Lingle v. Chevron, 544 U.S. 528, 542 (2005)) (arguing that a deprivation of "established property rights" might be deemed "arbitrary or irrational" under the Due Process clause).

80. Pa. Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).

surface or gives the owner of mineral rights beneath the land the right to act in ways that undermine subjacent support for the surface. The support estate cannot belong to a third party but must belong either to the owner of the mineral rights or to the owner of the surface land. Because state law recognized the support estate as a separate estate in land, the Supreme Court ruled that it could not be taken without compensation.

Justice Holmes explained that the state statute required a significant amount of coal to be left in place so as not to undermine the surface. The obligation to preserve the surface applied even if the mineral estate owner had purchased the right to undermine the surface by acquiring the support estate from the surface owner. Depriving the mineral estate owner of the support estate that it had purchased was a taking because the statute "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate."[81] The ruling suggested that core property rights, like recognized estates in land, cannot be abolished without compensation even if there is a strong reason for doing so—in this case, to ensure that the land surface of the state of Pennsylvania is not destroyed. One might think that preserving the existence of land that can be used, lived on, and developed would be a pretty strong public interest, and actions that decrease the useable land surface of a state might be considered public nuisances. One might also think that prohibition of one use should be considered in light of all the other uses that remain. After all, Justice Brandeis dissented on the ground that separating the fee simple into mineral and surface estates should not change the fact that what matters is the impact on the "value of the whole property."[82] But none of that mattered. What mattered was that the statute took an estate in land that the mineral estate owner had purchased from the surface estate owner.

We must recognize, of course, that *Pennsylvania Coal* is widely cited for the proposition that regulations are not takings if they have an "average reciprocity of advantage,"[83] or if they protect people from harm, and that they are only "takings" if they "go too far."[84] However, the Supreme Court did not think the state statute was justified as a safety measure since plenty of notice could be given to the surface owner to depart the property if excavation made occupation of the surface unsafe. Nor was there an average reciprocity of advantage when the owner bought the surface rights but failed to protect themselves by also purchasing the support estate—an

81. *Id.*

82. *Id.* at 419 (Brandeis, J., dissenting). *See id.* ("For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property . . . .").

83. *Id.* at 415.

84. *Id.* at 415 (a regulation will be a taking if it "goes too far"); *see id.* at 413 (the regulation would have been fine had it prohibited a "public nuisance").

estate required by state law to belong to the surface owner if they wanted protection from a loss of subjacent support through mining by the owner of the mineral estate. While *Pennsylvania Coal* found a taking of the support estate, it did pay attention to whether the state had legitimate government interests in enforcing the regulation and whether any harm to the owner was compensated by a right to prevent similarly harmful acts by other owners. Finding no legitimate government interests supporting the regulation, *Pennsylvania Coal* held that it was a per se taking to deprive an owner of an established or recognized estate in land. So, while *Pennsylvania Coal* identified a core property right by recognizing "estates in land", it also required consideration of the public interest served by the regulation and whether the harm to the owner's interests "goes too far."

Later core property rights cases would not be so sensitive to the reasons for regulation or even whether the regulation "went too far" in limiting the owner's rights. In 1960, for example, the Supreme Court held in *Armstrong v. United States*[85] that a lien on property was a core property right that could not be taken without compensation, regardless of the public interests served by the legislation. *Armstrong* involved boats forfeited to the United States when the owner breached a contract with the United States. Because workers had furnished materials to build the boats before contractual forfeiture to the United States, they had materialmen's liens on the property under Maine statutory law. Because the United States had sovereign immunity, they could not enforce those liens once the boats became the property of the United States. The Supreme Court explained that this did not change the fact that "the liens were valid [under state law] and had compensable value."[86] The Supreme Court held that "there was a taking of these liens for which just compensation is due under the Fifth Amendment."[87]

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something that the Government could do because its property was not subject to suit, but which no private purchaser could have done. Since this acquisition was for a public use, however accomplished, whether with an intent

85. 364 U.S. 40 (1960).
86. *Id.* at 46.
87. *Id.* at 48.

> and purpose of extinguishing the liens or not, the Government's action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment. Neither the boats' immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.[88]

While the *Armstrong* case is generally cited for the proposition that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,"[89] it should also be remembered for the proposition that when the law eliminates a lien on property without compensation, that is a per se unconstitutional taking, regardless of the public interest served by the regulation that invalidates the lien. That is the very definition of a per se or categorical taking.

A similar result was obtained in three cases involving government appropriation of interest earned on principal. The 1980 case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith*[90] held that interest earned on a court fund paid by a litigant belonged to that litigant (or the prevailing parties in the litigation) rather than the court itself. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property."[91] The general rule is that "interest . . . follows the principal" and belongs to whoever owns the principal.[92]

By contrast, the state statute in *Webb's Fabulous Pharmacies* had the "practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry."[93] The statute could not be justified as a management fee to defray the costs of the court's work overseeing the fund while in the hands of the court because a separate fee was paid for that purpose.[94] And the mere fact that the funds were held by the court did not transmute them into public funds owned by the state. Rather, the funds were owned either by the parties who deposited the funds

88. *Id.* at 48–49.

89. *Id.* at 49.

90. 449 U.S. 155 (1980).

91. *Id.* at 164.

92. *Id.* at 162 ("The usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal.").

93. *Id.* at 164.

94. *Id.* at 162.

or by the parties to whom they were to be paid at the conclusion of the litigation.

As in *Armstrong,* the Supreme Court in *Webb's Fabulous Pharmacies* considered whether there was any legitimate government interest in seizing the interest without compensation, but found that "[n]o police power justification" was offered and none could be discerned.[95] While not quite a ruling that government seizure of interest is a per se taking without regard to government interests in the regulation, *Webb's Fabulous Pharmacies* does hold that the owner of the principal owns the interest and that appropriating the interest without compensation is akin to an eminent domain proceeding that fails to provide just compensation. In other words, a taking of interest appears to be a per se taking regardless of the government's reasons for the seizure.

The holding in *Webb's Fabulous Pharmacies* was extended in two later cases that held that interest on lawyers' trust accounts (IOLTA) was private property belonging to the client and not the government. *Phillips v. Washington Legal Foundation*[96] held that it was a taking of property to devote the interest earned on client fund accounts held by lawyers in trust for those clients to pay for legal services for low-income individuals. The regulation in that case promoted a legitimate government interest, indeed an important one. Nonetheless, the Court transmuted the *Webb's Fabulous Pharmacies* rule to a rigid conclusion that the interest belongs to the owner of the principal regardless of the public interest in devoting the interest to public purposes.

In an odd coda, however, the Supreme Court held in *Brown v. Legal Foundation of Washington*[97] that no compensation was due to the owners of those interest payments because the client funds would not have earned any interest at all unless they had been pooled together. And they were pooled together only because the government program mandated that client funds be deposited in a collective account. That collective account earned interest, but if the funds had been held by lawyers individually, the fees paid to banks would exceed the interest earned since the funds were in the accounts for only short periods of time. Since the clients would have earned no interest at all if the IOLTA program had not been established, there was no loss that needed to be compensated. What mattered was not what the public gained but what the client lost. Nevertheless, the Court did not repudiate its finding that the interest follows the principal regardless of the public interest rationales advanced by the Government in devoting

95. *Id.* at 163.
96. 524 U.S. 156 (1998).
97. 538 U.S. 216 (2003).

the interest to public purposes. Seizure of the interest was seen as a per se taking even though no compensation was due.[98]

Finally, and importantly, in stating in *Lingle* that only two per se takings exist, the Supreme Court failed to remember its rulings in four cases involving the property rights of Native nations and tribal members. On one side of the ledger, the Supreme Court held in two separate cases that some government regulations of tribal property are "per se non-takings,"[99] even though compensation would be required in comparable situations if the property were owned by non-Native Americans. In 1903, the Court held in *Lone Wolf v. Hitchcock*[100] that no compensation is due when the United States takes a tribe's property and redistributes it to tribal members. According to the Court, that is "a mere change in the form of investment of . . . the property,"[101] an odd ruling to make if one considers what would happen if the City of Cambridge required Harvard University to allot its property into bits and transfer title to various buildings or rooms to faculty or students. There is no question that this would be a taking of Harvard University's property. Yet tribes are denied the same protection under the pretense that the United States has a trust interest in tribal land that somehow justifies stripping the tribe of its title and doing so without compensation because the government thinks this is good for the tribes and their members. The *Lone Wolf* case finds this expropriation of tribal land to be a per se non-taking[102] even though the exact opposite would be true if the tribe were Microsoft or Harvard University.

The Supreme Court further held that tribal property established and protected under both tribal and federal law is not "property" under the Fifth Amendment's Takings Clause if it has not been recognized by Congress through a statute or by the President and the Senate by a treaty.[103] *Tee-Hit-Ton Indians v. United States*[104] found expropriation of land held in original Indian title or aboriginal title both is—and is not—"property." It is property for the purpose of federal common law and federal trespass statutes. It is property under tribal law. But somehow it is not property within the meaning of the Fifth Amendment's requirement that property

98. This reasoning is, in my view, flawed. The Constitution does *not* prohibit taking property for public purposes; all it requires is compensation. If no compensation is due, then there is no constitutional violation. The same could be said of *Loretto* where the "taking" actually increased the fair market value of the property. One could make the same argument about *Horne* since the raisin seizures there were intended to increase the value of the farmers' crops. Horne v. Dep't of Agric., 576 U.S. 351 (2015).

99. *See generally* Davidson & Mulvaney, *supra* note 58.

100. 187 U.S. 553 (1903).

101. *Id.* at 568.

102. *See* Davidson & Mulvaney, *supra* note 58.

103. Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

104. *Id.*

not be taken without just compensation. The reasoning in the case is peculiar, offensive, and (perhaps unconsciously) racist.[105] For our purposes here, *Tee-Hit-Ton* and *Lone Wolf* established rigid rules of law that *deny* compensation for actual expropriation of property that would be constitutionally required if the owners were non-Native. Here we have core property rights that are deemed, without regard to justice and fairness, to be outside constitutional protection.[106]

Lone Wolf and *Tee-Hit-Ton* are preludes to two cases which held that taking away the right to pass on property after one's death is a per se taking without regard to the reasons for the public regulation or the problems the property rights pose. Those cases involved federal statutes that attempted to deal with the fact that allotment of tribal lands authorized by *Lone Wolf* led to inheritance of lands by multiple descendants who could not use partition or sale to consolidate their interests given the federal restraint on alienation of allotment property. That led to management of the property by the Bureau of Indian Affairs and the fact that the cost of management would often exceed the value of the property. Yet Congress's attempts to solve that problem by consolidating property rights by escheat to the tribe were struck down as a violation of the property rights of the allottees.

In both *Hodel v. Irving*[107] and *Babbitt v. Youpee,*[108] the Supreme Court found that the "character of the Government regulation [was] extraordinary"[109] because the statutes severely limited the right to pass on property after death. Taking of that core property right required compensation even though the statutes in both cases were enacted to handle the terrible consequences of the *Lone Wolf* decision with its expropriation of tribal lands, their allotment to tribal members, and the ensuing fractionation problem that made the lands unmanageable and unproductive.

Perhaps because the Court considers "Indian cases" to be *sui generis* and not relevant to "ordinary" law, it somehow forgot about *Hodel* and *Babbitt* in stating in *Lingle* that only two per se takings remained. While it is true that *Hodel* and *Babbitt* purport to apply the *Penn Central* ad hoc test, they do not focus on anything at all but the "character of the government action," and they issue rulings that are rigid and conclusory by

105. For critiques of the reasoning in *Tee-Hit-Ton,* see Joseph William Singer, *Erasing Indian Country: The Story of* Tee-Hit-Ton Indians v. United States, *in* INDIAN LAW STORIES 229–60 (Carole Goldberg, Kevin K. Washburn & Philip P. Frickey eds., 2011); Joseph William Singer, *Double Bind: Indian Nations v. The Supreme Court,* 119 HARV. L. REV. F. 1 (2005).

106. *Tee-Hit-Ton* continues to be cited favorably by the Supreme Court. *See, e.g.*, Idaho v. United States, 533 U.S. 262, 277 (2001).

107. 481 U.S. 704 (1987).

108. 519 U.S. 234 (1997).

109. *Hodel*, 481 U.S. at 716 (1987); *see also Babbitt,* 519 U.S. at 244 (noting that *Hodel* "rested primarily on the extraordinary character of the governmental regulation") (alteration in original).

defining the "right to pass on property at death" to be a core property right that cannot be taken without compensation regardless of the context, the reasons for the restriction, or the history of the property. That is extraordinary since the problem of fractionated property that the regulations in *Hodel* and *Babbitt* were trying to correct was caused by the Supreme Court itself when it ruled in *Lone Wolf* that allotment of tribal land to tribal members was not a taking of the tribe's property. *Hodel* and *Babbitt* declared the right to pass on property at death as a core property right that cannot be taken without compensation, and those cases did not limit their holdings to tribal property. In effect, they hold that states cannot convert a fee simple to a life estate. Only a habit of marginalizing cases involving federal Indian law can explain the Court's amnesia about *Babbitt* and *Hodel.*

By the time we get to 2005 when *Lingle* holds that there are only two per se takings (*Loretto* and *Lucas*), the Supreme Court has somehow forgotten that it has identified other rights to be core property rights that cannot be taken without compensation, regardless of the reasons for the regulation. Those core property rights include (i) the Pennsylvania support estate, (ii) liens on property, (iii) interest earned on principal, and (iv) the right to pass on property after death. And those core rights were later joined by still more per se takings in the following years, including (v) appropriation of personal property in *Horne v. Department of Agriculture*[110] (2015), (vi) forced union access rights in *Cedar Point Nursery v. Hassid*[111] (2021), and (vii) home equity in the context of tax foreclosures in *Tyler v. Hennepin County*[112] (2023). Those more recent cases are the focus of the next section.

C. "Traditional" Property Rights Based in "History & Precedent"

That brings us to the present. *Horne v. Department of Agriculture*[113] held in 2015 that it was a per se taking for the federal government to appropriate raisins from a farmer, even though the purpose of that appropriation was to shore up the price of raisins to ensure that farmers could make a profit from their agricultural businesses. The seizure was a per se taking even though it arguably increased the market value of both the farmer's real and personal property. *Cedar Point Nursery v. Hassid*[114] held in 2021 that a state law allowing union organizers to enter farms to communicate with workers when they were not working was a per se taking of the owner's right to exclude even though the entries were not a permanent

110. 576 U.S. 351 (2015).
111. 594 U.S. 139 (2021).
112. 598 U.S. 631 (2023).
113. 576 U.S. 350 (2015).
114. 594 U.S. 139 (2021).

occupation, as in *Loretto,* and even though the entries did not interfere with use or value as required by *PruneYard,* and even though the mandated entries likely had zero effect on the fair market value of the land. *Tyler v. Hennepin County* held in 2023 that owners have a categorical right to the equity in their property when it is taken through tax foreclosure even though they could have avoided foreclosure by paying their taxes.[115]

These recent cases attempt to ground constitutional property rights in history, tradition, or precedent,[116] and they do so in a manner that purports to find an answer from an historical practice without regard to variations in property law among the states, the ways property law was changing at every period of U.S. history, the public interests served by the regulation, or even the effects on the owner. A similar move is evident in Justice Scalia's rigid interpretation of "background principles" that would justify regulations of property that leave it with no beneficial value.[117] This method of defining constitutional property rights is divorced from analysis of whether the property right in question poses a danger to the public, to other owners, or to non-owners who are affected by the exercise of those property rights. It echoes and extends to a new area of constitutional rights the Supreme Court's move to "history and tradition" in the *Dobbs*[118] decision and the Second Amendment cases, *Heller,*[119] *Bruen,*[120] and *Rahimi.*[121] Let us look at them a little more closely.

Horne v. Department of Agriculture[122] invalidated a federal program designed to enable farmers to stay in business by "help[ing] maintain

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115. 598 U.S. 631 (2023).

116. *See id.* at 639 ("History and precedent say otherwise."); *id.* at 638 ("we also look to 'traditional property law principles,' plus historical practice and this Court's precedents." (quoting Phillips v. Wash. Legal Found., 524 U.S. 156, 165–68 (1998))); *Cedar Point*, 594 U.S. at 162 (Kavanaugh, J., concurring) (citing adherence to "history[ ] and precedent" as reason for concurrence).

117. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1031 (1992) (holding that state must identify "background principles of nuisance and property law that prohibit the uses [claimant] now intends" to demonstrate no taking).

118. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (holding that any right protected under the Due Process Clause must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty" (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

119. District of Columbia v. Heller, 554 U.S. 570, 595 (2008) ("There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to bear arms"); *id.* at 638 (Stevens, J., dissenting) (adopting the majority's approach of centering argument around "the interpretation most faithful to the history of [the] adoption" of the Second Amendment).

120. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 20, 22 (2022) (recounting how the Court "looked to history" from both preratification and postratification to interpret the Second Amendment and "assessed the lawfulness of [the] handgun ban by scrutinizing whether it comported with history and tradition").

121. United States v. Rahimi, 602 U.S. 680, 703 (2024) (upholding a regulation because it is "wholly consistent with the Nation's history and tradition of firearm regulation").

122. 576 U.S. 351 (2015).

stable markets for particular agricultural products"[123] despite fluctuations in weather, crop production, and costs of doing business. Part of that program limited the amount of raisins that could be brought to market in bumper crop years where market competition might force down the price so far that it would be less than the cost of production. To prevent that economic catastrophe for farmers, each year the United States determined an amount of raisins that farmers should reserve and hand over to the federal government. The government would either sell the raisins it confiscated in noncompetitive markets (where a profit would not be forthcoming), donate them, or dispose of them. If any profits were left after paying the government's expenses in administering the program, those profits would be turned over to the farmers. The whole program was put in place for the benefit of farmers and to ensure that their investment-backed expectations could be fulfilled despite "acts of God" beyond their control. It was designed to enable farmers to make more money over time than would be the case without the program and to ease year to year deviations in crop production and profitability. The program was also in place to ensure that agricultural products, i.e., food, would be available to consumers.

Laura and Marvin Horne did not see it that way. They wanted to sell all their raisins but could not do so because the Department of Agriculture confiscated some of them. They argued that this amounted to a taking of their property and that it was irrelevant that the seizure was part of an overall government program designed to help them make a profit and stay in business, and even though the seizure might increase the economic value of their investments in their farm. The Supreme Court agreed with the Hornes, holding that the seizure of their raisins was a per se taking of property and that any reasons the government might give for the taking were irrelevant. Instead, the government had a "categorical duty" to pay compensation when it "physically takes possession of an interest in property" regardless of the reasons for the appropriation or its economic effect on the owner.[124]

Chief Justice Roberts first explained that the Takings Clause applies to personal as well as to real property,[125] canvassing the history of the just compensation requirement from the time of the Magna Carta in the year 1215 to the colonial era in the United States.[126] He noted that "the Takings Clause was understood to provide protection only against a direct

123. *Id.* at 355.

124. *Id.* at 357 (quoting Arkansas Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012)).

125. *Id.* at 358.

126. *Id.* at 358–61.

appropriation of property"[127] until its 1922 decision in *Pennsylvania Coal* when the "regulatory takings" doctrine was born. Oddly, he focused on "history" in the 1200s and 1700s but ignored the fact that the Supreme Court itself refused to interpret the Fourteenth Amendment to include a takings clause until 1897. That historical period of roughly thirty years between the adoption of the Fourteenth Amendment and the conclusion that it prohibited uncompensated takings by states (1868 to 1897) was apparently irrelevant. Also irrelevant was the fact that the Supreme Court had initially held that the Fourteenth Amendment does not include a takings clause.[128] Also irrelevant was the 1978 decision in *Penn Central,* which held that the economic impact of the regulation and its interference with "distinct, investment-backed expectations" were just as important as the "character of the government action" in determining whether a regulation requires compensation.[129] While the character of the government action in *Horne* was an appropriation of physical control of some of the farmer's raisins, this was part of a regulatory program designed to keep farmers in business, to increase the economic value of their land and their businesses, and to protect their investment-backed expectations.

Instead, the *Horne* Court relied on its 1982 decision in *Loretto* to find that a "physical appropriation of property" gives rise to a "per se taking, without regard to other factors*"* or indeed to a determination that the taking is unfair or unjust.[130] The reserve requirement in the statute was "a clear physical taking"[131] requiring compensation even though the taking was done "to promote the purposes of the raisin marketing order" which are to ensure that raisin farmers make consistent profits that are as large as possible over time.[132] The Court thought it was irrelevant that it would not be an unconstitutional taking if the government had simply prohibited the farmers from marketing those raisins without compensation; nothing mattered other than the physical appropriation of the raisins by the government: "A physical taking of raisins and a regulatory limit on production may have the same economic impact on a grower. The Constitution, however, is concerned with means as well as ends."[133]

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127. *Id.* at 360.

128. *See generally* Davidson v. City of New Orleans, 96 U.S. 97, 104–05 (1877) (holding that there is no takings clause in the Fourteenth Amendment); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176–77 (1872) ("[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States.").

129. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

130. Horne v. Dep't of Agric., 576 U.S. 351, 360 (2015) (italics added).

131. *Id.* at 361.

132. *Id.*

133. *Id* at 362.

The Supreme Court then held that it did not matter that the governmental program increased the farmers' profits. Just compensation should be determined, not by asking whether the appropriation caused any economic loss to the farmer, but by the fair market value of the raisins that were appropriated, i.e., "the market value of the property at the time of the taking."[134] This ruling is inconsistent with the holding of *Brown* that denied compensation for interest earned on IOLTA funds on the ground that the interest would not have been earned at all absent the government program.[135] In this case, as well, it is arguable that the raisins that were appropriated would have had little or no market value but for the market stabilization program the government created.

Justice Breyer dissented in part in *Horne* because he thought it was relevant whether the seizure of the raisins had caused any harm to the farmers at all. As in the IOLTA cases, if the Hornes' profits had been lower if the federal program were not in existence at all, then any loss would not be attributable to the federal government. Indeed, the opposite would be true; the program would have been responsible for their ability to make their realized profit. If that were the case, then there was no harm to the farmers' property rights; indeed, there was a benefit rather than a harm. The government program was "intended, at least in part, to enhance the price that free-tonnage raisins will fetch on the open market."[136] According to Justice Breyer, if the "benefit" to the price of the raisins the farmers retained "equal[s] or exceed[s] the value of the raisins taken,"[137] then the government program causes an increase in the fair market value of the property that was destined for market, rather than a decrease. Under *Brown,* no compensation should be due.[138] Justice Sotomayor also dissented, arguing that when property is fungible and destined for market, "the income that the property may yield is the property owner's most central interest."[139] For that reason, and others, she argued that this case should not be deemed a per se taking.[140]

None of this was relevant to the majority. A government program that operated to ensure that farmers could maximize their profits was unconstitutional because it did not compensate farmers for profits they may

134. *Id.* at 368–69 (quoting United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984)).

135. Brown v. Legal Found. of Wash., 538 U.S. 216 (2003).

136. *Horne*, 576 U.S. at 372 (Breyer, J., concurring in part and dissenting in part).

137. *Id.* at 375 (Breyer, J., concurring in part and dissenting in part).

138. Justice Breyer cited *Brown* but also relied on a series of cases that hold that if part of an owner's property is taken and the resulting uses of the taken property enhance the value of the property that remains, just compensation for the appropriated property should take into account the gain as well as the loss. *See id.* at 372–73 (citing Bauman v. Ross, 167 U.S. 548 (1897)).

139. *Id.* at 381 (Sotomayor, J., dissenting).

140. *Id.* (finding that "the Order does not effect a *per se* taking").

well not have earned but for the government program. Chief Justice Roberts explained that the means matter as much as the ends, but his reasoning divorces the case from the question of whether the regulation denies the owner fairness or justice. Indeed, it makes unconstitutional a government program designed to enhance the fair market value of *both* the farmers' real estate and their personal property in the raisins they produced. And all this is because history tells us what it means to take property.[141]

Cedar Point Nursery extended the *Loretto* rule by finding a union access requirement to be a *per se* taking even though the law allowed access only when it would not disrupt work and even though it had zero effect on the fair market value of the real property. While Justice Kavanaugh's concurring opinion referred to "history[] and precedent,"[142] Chief Justice Roberts' majority decision held that *any* law that grants a "right to invade the [property of another] . . . constitutes a *per se* physical taking."[143] That rule, of course, is inconsistent with the holding of *PruneYard,* which the Court rescues only by creating an exception for property open to the public.[144]

Several observations are relevant. First, *Cedar Point* finds a taking even though many other laws that allow physical entry to property owned by another are clearly *not* takings requiring compensation. Those cases

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141. *See id.* at 360 (arguing that the physical taking rule in *Loretto* is "justified . . . by history" but also because a physical taking denies the owner a core property right by constituting the "most serious form of invasion of an owner's property interests," even though it increased the market value of the property and could have been accomplished by requiring landlords to bear the obligation and expense of installing cable boxes themselves).

142. Cedar Point Nursery v. Hassid, 594 U.S. 139, 162 (2021) (Kavanaugh, J., concurring).

143. *Id.*

144. *Id.* at 156–57. On *Cedar Point's* startling embrace of a categorical rule, see Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground,* 2021 SUP. CT. REV. 125 (2021). Scholarly criticisms of *Cedar Point* abound. *See, e.g.*, Bethany R. Berger, *Eliding Original Understanding in* Cedar Point Nursery v. Hassid, 33 YALE J.L. & HUMANS. 307 (2022); Bethany R. Berger, *Property and the Right to Enter,* 80 WASH. & LEE L. REV. 71 (2023); Nikolas Bowie, *Antidemocracy,* 135 HARV. L. REV. 160 (2021); Kathleen A. Brennan, Cedar Point Nursery*: Taking an Unprecedented Approach to the Right to Exclude,* 65 B.C. L. REV. 1029 (2024); John D. Echeverria, *What Is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731 (2020); Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1 (2022); Eric T. Freyfogle, *The Democratic Forebodings of the "Right to Exclude,"* 2025 UNIV. ILL. L. REV. 169; David Froomkin, *Taking Stock of Property Essentialism,* 67 ARIZ. L. REV. (forthcoming 2025), https://papers.ssrn.com/abstract=4708880 [https://dx.doi.org/10.2139/ssrn.4708880]; Timothy M. Harris, *Backwards Federalism: The Withering Importance of State Property Law in Modern Takings Jurisprudence,* 75 RUTGERS UNIV. L. REV. 571 (2023); Aziz Z. Huq, *Property Against Legality: Takings After* Cedar Point, 109 VA. L. REV. 233 (2023). For defenses of the holding in *Cedar Point,* see Mary Catherine Jenkins & Juliette Turner-Jones, *Original Understanding of "Background Principles" in* Cedar Point Nursery v. Hassid, 47 HARV. J. L. & PUB. POL'Y 507 (2024); Benjamin Alexander Mogren, *A New Takings Clause? The Implications of* Cedar Point Nursery v. Hassid *for Property Rights and Moratoria,* 31 WM. & MARY BILL RTS. J. 545, 566–73 (2022); Julia D. Mahoney, Cedar Point Nursery *and the End of the New Deal Settlement,* 11 BRIGHAM-KANNER PROP. RTS. CONF. J. 43 (2022).

include, for example, public accommodation laws (*Heart of Atlanta Motel*), fair housing laws,[145] employment discrimination laws, state constitutional free speech rights (*PruneYard*), and entries needed to protect the public from harm (*Bowditch v. City of Boston*).[146] *Cedar Point* itself identifies four exceptions to the supposedly per se rule it adopts. Interestingly, *Cedar Point* itself appears to fit in one of these exceptions that authorizes entries which are imposed in return for a license to operate.[147] Why isn't union organizer access a legitimate condition on the right to operate a farm? How is that different from health or safety inspections of restaurants or workplaces?

Second, *Cedar Point* celebrates the "traditional rule" that a "government[al] appropriat[ion of] a right to invade" always requires compensation[148] even though it *also* recognizes that "[b]efore the 20th century, the Takings Clause was understood to be limited to physical appropriations of property."[149] The Court fails to notice that the Fourteenth Amendment was not interpreted to include a just compensation requirement until 1897.[150] Ignoring all of history between 1776 and 1922 is, to say the least, a peculiar, selective, and unprincipled conception of "tradition."

Third, one must wonder how the just compensation principle applies in cases like *Cedar Point*.[151] If the invasion has no effect on the fair market value of the property, is any compensation due? As Justice Breyer explained in *Horne,* the answer is no if we apply the rule adopted in *Brown* but yes if we apply the rule adopted by the *Horne* majority. The constitutional remedy provided by the Takings Clause is compensation as measured by the reduction in the fair market value of the property that the

145. *See* Amy Liang, *Property Versus Antidiscrimination: Examining the Impacts of* Cedar Point Nursery v. Hassid *on the Fair Housing Act,* 89 UNIV. CHI. L. REV. 1793 (2022).

146. Bowditch v. City of Boston, 101 U.S. 16 (1879).

147. *See Cedar Point Nursery*, 594 U.S. at 161 ("When the government conditions the grant of a benefit such as a permit, license, or registration on allowing access . . . the nexus and rough proportionality requirements of the constitutional conditions framework should not be difficult to satisfy."). The Court identifies three exceptions, but it embraced a fourth when it distinguished *PruneYard* on the ground that the property there was open to the public. *Id*. at 156–57.

148. *Id.* at 156.

149. *Id.* at 148.

150. *Compare* Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226 (1897) (taking of property without just compensation is an unconstitutional deprivation of property without due process of law under the Fourteen Amendment), *with* Davidson v. City of New Orleans, 96 U.S. 97, 104–05 (1877) (holding that there is no takings clause in the Fourteenth Amendment), *and* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176–77 (1872) ("[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States.").

151. *See* Estlund, *supra* note 144, at 144–45; Fennell, *supra* note 144, at 54–60; Mark Kelman, *Staying in the Taking Lane: The Compensation Issue in* Cedar Point Nursery, 2022 CARDOZO L. REV. DE-NOVO 129 (2022).

regulation causes.[152] Labor organizing might reduce the profits of agricultural employers but that loss is not a compensable taking, under Supreme Court precedents, and the land value is not affected by union organizing activity that has no effect at all on the owner's land use.

Fourth, we learn that the per se takings inquiry is divorced from considerations of the reasons for regulations and the actual economic and business effects on the property owner, as well as the harms nonregulation poses to neighbors and the general public. The inquiry is also divorced from considerations of fairness and justice, i.e., whether the burden is one that is not fair to impose on the owner in the absence of compensation.[153] It is also irrelevant whether access is needed to promote just relations between workers and employers. Under such a rule, laws limiting the feudal rights of owners would be takings of property even though they ban undue control by lords over tenants.

Finally, we learn from *Cedar Point* that the Supreme Court feels free to identify certain core property rights as immune from regulation or limitation without compensation and to justify that obligation by reference to history, tradition, and precedent, while exercising a capacious amount of discretion in defining those rights and in grounding them in established law, and while giving a faint nod to the many cases where that rule does not apply at all. If we have a rule that finds limits on the right to exclude to be per se takings, its application is highly uncertain. The Supreme Court has undue confidence in its ability to define property rights based on history, tradition, and precedent, while not overruling cases it does not intend to overrule. The Supreme Court also has undue confidence in its view that limits on the right to exclude can never be justified without compensation even when they are intended to prevent harms to others, to structure market relationships to promote equal dignity, or to ensure that non-owners have the power to acquire property through market transactions.

The core property rights doctrine and its per se takings cousin emerged again in the 2023 case of *Tyler v. Hennepin County*.[154] When a county took property to pay off property taxes owed on the home, it kept the property according to state law in a manner that allowed the county to resell the property for its fair market value without handing over to the property owner the proceeds of that sale that were in excess of the unpaid taxes. The Supreme Court held that the purpose of the tax foreclosure was

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152. Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 474 (1973) (compensation must "put [the owner] in the same position monetarily as he would have occupied if his property had not been taken" and that requires compensation for the lost "market value" of the property as caused by the regulation).

153. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960); *accord* Agins v. Tiburon, 447 U.S. 255, 260 (1980).

154. 598 U.S. 631 (2023).

to pay off the unpaid taxes and that there was no reason for the state to authorize the government to keep the market value of the home in excess of that amount: "History and precedent say otherwise. The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to *confiscate more property than was due*."[155]

Under state law, the owner had no right to the equity left after payment of taxes. State statutes made the property vulnerable to foreclosure and to loss of the equity. Nonetheless, the Supreme Court held otherwise. It did not matter what state law was; *nor did it matter that most private foreclosures result precisely in that loss of equity.* Many private foreclosures are accomplished with only 20% or less of the fair market value of the property.[156] When that happens, and the lender buys the property at foreclosure, the lender gets the benefit of the equity built up in the house. Apparently, this is fine for banks but not for governments; the property rights homeowners have are greater when the state is involved. The Supreme Court justified its result based on "[h]istory and precedent."[157] But what history? What precedent?

Chief Justice Roberts looked to English common law in the thirteenth century.

> The principle that a government may not take more from a taxpayer than she owes can trace its origins at least as far back as Runnymede in 1215, where King John swore in Magna Carta that when his sheriff or bailiff came to collect any debts owed him from a dead man, they could remove property "until the debt which is evident shall be fully paid to us; and the residue shall be left to the executors to fulfil the will of the deceased."[158]

He then cited a federal statute from 1798[159] and state practice at the time of the Fourteenth Amendment in 1868,[160] while noting that that practice was not uniform and that several states disagreed with the practice.[161]

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155. *Id.* at 639 (emphasis added).

156. *See, e.g.*, Thomas v. Joseph P. Casteel Trust, 496 P.3d 403 (Alaska 2021) (foreclosure sale valid at a price that was only seven percent (7%) of the fair market value); Phillips v. Blazier-Henry, 302 P.3d 349 (Idaho 2013) (property valued at $300,090 legitimately purchased at foreclosure sale for $1,000); *In re* Nelson, 495 N.W.2d 200 (Minn. 1993) (inadequacy of price not a sufficient basis to undo a foreclosure sale; property worth $43,500 bought at foreclosure for $1,266.44); *see* Restatement (Third) of Property (Mortgages) §8.3 cmt. b (A.L.I. 1997) (courts are generally warranted in invalidating foreclose sales when the property is sold for less than 20% of fair market value).

157. Tyler v. Hennepin Cnty., 598 U.S. 631, 639.

158. *Id.* at 639 (citing William Sharp McKechnie, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN, ch. 26, at 322 (rev. 2d ed. 1914).

159. *Id.* at 640.

160. *Id.* at 641.

161. *Id.* at 641–42.

Chief Justice Roberts also ignored the fact that inadequacy of price is generally not a basis for undoing a private foreclosure sale.[162]

Importantly, Chief Justice Roberts argued that the majority of states—thirty-six in all—adopted the view that the equity that exceeds the unpaid taxes belongs to the property owner.[163] Thirty-six is a large number, amounting to more than two-thirds of the states. Still, that leaves fourteen states that rejected the practice, not to mention the fact that standard foreclosures are usually upheld even if the owner is paid only 20% (or even less) of the fair market value of the property.[164] For example, in the recent 2021 case of *Thomas v. Joseph P. Casteel Trust,* the Supreme Court of Alaska upheld a foreclosure at 7% of fair market value.[165] The Supreme Court in *Tyler v. Hennepin County* focused on the fact that, under Minnesota law, owners have the right to the surplus on foreclosure in excess of the debt,[166] but failed to recognize that the foreclosure sale price may be so low as to result in no money going to the homeowner.[167]

Courts in Minnesota do not invalidate private foreclosures when the price is inadequate because borrowers have a statutory right of redemption after foreclosure, and they may be able to find another bank that will buy the property back at the low foreclosure price and create a new mortgage for the homeowner.[168] This assumes that such a redemption will occur and that the redeeming bank will be happy to loan money to someone who just lost their property through foreclosure. In any event, the Tyler ruling is inconsistent with Minnesota property law in the sense that property owners have no vested right to the equity in their homes given the legality of foreclosure at a fraction of market value.

No matter, the Supreme Court concluded. Instead, it held, "A taxpayer who loses her $40,000 house to the State to fulfill a $15,000 tax debt

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162. *See* Restatement (Third) of Property (Mortgages), *supra* note 156 ("[A] foreclosure proceeding that otherwise complies with state law may not be invalidated because of the sale price unless that price is *grossly inadequate*") (emphasis added).

163. Timothy M. Mulvaney, *A New Source of Background Principles* (2024) (unpublished manuscript) (on file with author).

164. *See* Restatement (Third) of Property (Mortgages) §8.3 cmt. b (A.L.I. 1997) (courts are generally warranted in invalidating foreclose sales when the property is sold for less than 20% of its fair market value).

165. 496 P.3d 403, 410 (Alaska 2021).

166. 598 U.S. at 645.

167. *See, e.g.*, *In re* Nelson, 495 N.W.2d 200 (Minn. 1993) (inadequacy of price not a sufficient basis to undo a foreclosure sale; property worth $43,500 bought at foreclosure for $1,266.44).

168. *See* U.S. Fed. Credit Union v. Avidigm Capital Group, Inc., 2008 WL 2796742, at *7 (Minn. Ct. App. 2008) ("[A] foreclosure sale free from fraud or irregularity will not be held invalid for inadequacy of the price, since the mortgagor has a period to redeem from foreclosure." (quoting G.G.C. Co. v. First Nat'l Bank of St. Paul, 287 N.W.2d 378, 383 (Minn. 1979))).

has made a far greater contribution to the public fisc than she owed. The taxpayer must render unto Caesar what is Caesar's, but no more."[169]

While I have no objection to this conclusion on fairness grounds, it is striking for the Court to come to this conclusion without any attention to the question of how far Minnesota law goes in protecting equity when an owner fails to pay debts related to the property.

Horne, Cedar Point, and *Tyler* all rely on "history," "tradition," or "precedent"—or some combination of them—to define core property rights that are immune from regulation or appropriation without compensation regardless of the effect on the property owner, the reasons for the government regulation, the fact that states disagree about the definition of property rights, or the fact that property rights change over time. While I am not making substantive objections to the results in these cases, I object to the refusal to consider the reasons for regulation, such as the ways it may help the owner, prevent the owner from harming others, or impose fair obligations on the owner. Instead, this new "history, tradition, and precedent" method of defining constitutional "property" rights pretends that it is possible to define property rights without regard to specific sources in state law, without regard to the particular moment in history when the right is being defined, and without regard to the American practice of modernizing property law and property rights over time to protect legitimate interests and to promote both fairness and justice and the public welfare. Most damning of all is the Supreme Court's refusal to consider whether owners have legitimate obligations under regulatory laws to protect the public, other owners, and non-owners they invite onto their land. Title to property comes with rights but it also comes with obligations, and neither fairness nor justice is denied if an owner is asked to fulfill legitimate obligations attendant to property ownership.

D. Vested Rights & Background Principles

The final set of issues we need to address is the Supreme Court's treatment of vested rights[170] and of "background principles of the State's law of property"[171] or "background restrictions on property rights."[172] These doctrines help define the scope of core property rights that cannot be "taken" without compensation. The vested rights doctrine is embedded in the common law in most states as well as in state zoning enabling acts. Changes in property law are often, but not always, made prospective rather

169. *Tyler*, 598 U.S. at 647.

170. *See* Kaiser Aetna v. United States, 444 U.S. 164, 169 (1979) (protecting an owner who "invested millions of dollars in improving on the assumption that it was a privately owned pond").

171. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

172. *Cedar Point,* 594 U.S. at 160.

than retroactive so as not to unfairly surprise owners who invested in reliance on laws that made those property rights lawful. For example, changes in the rule against perpetuities are often applicable only to deeds, wills, or trusts created after the change in the law so as not to upset the expectations of owners who created property interests in reliance on prior law.[173] Zoning laws generally do not apply retroactively to owners who have built structures that comply with existing use limitations under the prior nonconforming use doctrine and the vested rights doctrine.[174]

This principle was crucial to the holding of *Kaiser Aetna v. United States*,[175] which held that a private marina open only to fee-paying members whose owner invested in connecting a private lagoon to the Pacific Ocean could not be required to open the lagoon to the general public for free. The Supreme Court focused on the fact that the owner had "invested substantial amounts of money in making improvements"[176] and that the private marina was open to navigable waters only because of that investment. It would violate the owner's investment-backed expectations to allow a private marina to be used by the general public for free. Importantly, the Court also believed those expectations to be reasonable since imposition of a navigational servitude on what had been a private lagoon would "result in an actual physical invasion of the privately owned marina."[177]

It is essential to understand, however, that there are important exceptions to the practice of applying property law changes only prospectively. Property rights are abolished without compensation when they are deemed harmful to others or in violation of public policy. The Thirteenth Amendment abolished millions of dollars of property interests in formerly enslaved persons without compensation. Married Women's Property Acts in the mid-nineteenth century stripped husbands of their rights to control the property of their wives. Equitable distribution statutes in the 1960s and 1970s stripped husbands of their property rights and allowed those rights to be equitably distributed to their wives on divorce. The right to exclude someone from a public accommodation because of race was retroactively abolished with the 1964 Public Accommodations Law, and the right to

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173. *See, e.g.*, N.J. STAT. § 46:2F-11(a)(1) (West) (perpetuities statute only applies to future interests "created on or after the effective date of this act").

174. *See, e.g.*, Cumberland Farms, Inc. v. Town of Groton, 719 A.2d 465 (Conn. 1998); CONN. GEN. STAT. § 8-2 (prior nonconforming uses protected); *see generally* Stone v. City of Wilton, 331 N.W.2d 398 (Iowa 1983) (vested rights cannot be denied without compensation); TMS Enters. Ltd. v. Cleveland Bd. of Zoning Appeals, 2024 Ohio App.LEXIS 1776, at *19 (Ohio. Ct. App. 2024) ("[A] zoning regulation must . . . recognize and protect vested property rights that existed prior to the passage of the regulation.").

175. 444 U.S. 164 (1979).

176. *Id.* at 176.

177. *Id.* at 180.

refuse to rent to a Black family became illegal when the Fair Housing Act was passed in 1968.

While it is true that the City of Cambridge cannot rezone the land on which Harvard Law School sits and limit its use to single-family residential purposes (because Harvard University has vested rights in using the property for institutional purposes), the vested rights doctrine is not divorced from consideration of the reasons for the regulation. Many regulations have been imposed retroactively and have not been held to be takings of property when the statute in question prevents use of the property for purposes that harm other owners or the public at large. Examples abound.[178] *Bowditch v. City of Boston*[179] approved destroying a house to prevent the spread of a fire. *Mugler v. Kansas*[180] approved prohibition of alcohol production when it was deemed harmful to the public. *Miller v. Schoene*[181] approved destruction of cedar trees to protect the Virginia apple industry. An owner who purchases land with the intent to build factories, but who has not yet commenced construction there does not have to be compensated when it is rezoned for single family house uses.[182]

The vested rights cases teach us that, while it is appropriate to protect the justified expectations of those who invest in reliance on existing laws, it is *also* appropriate to empower legislatures to change property law retroactively to protect the public from harm, to resolve conflicts among property rights, and to ensure that property rights are not exercised in ways that deny equal access to the market or to the acquisition of property.

The "background principles" doctrine means that regulations that prevent an owner from doing something that the owner never had a right to do in the first place cannot be viewed as a taking of property rights. A law stopping an owner from committing a nuisance takes no property rights because owners never had the power to cause a nuisance. A law allowing police officers to chase a fleeing criminal onto someone's property does not take a property right since owners never had the right to deny access to law enforcement officials in exigent circumstances necessitating immediate entry to land. This "background limitations" doctrine was introduced as an exception to the "total taking" doctrine of *Lucas* and was incorporated as an exception to the *Cedar Point* "right to exclude" doctrine.[183]

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178. *See generally* Bowditch v. City of Boston, 101 U.S. 16 (1879); Mugler v. Kansas, 123 U.S. 623 (1887); Powell v. Pennsylvania, 127 U.S. 678 (1888); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928).

179. 101 U.S. 16 (1879).

180. 123 U.S. 623 (1887).

181. 276 U.S. 272 (1928).

182. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

183. *See* Lucas, 505 U.S. 1003, 1028–29 (1992); Cedar Point, 594 U.S. 139, 160 (2021).

The same problem arises with defining legitimate background principles that limit the powers of owners. Can background principles change over time? Do legislatures have the same power to change property law as judges do through common law holdings? How much time must pass after a statute has been passed before it becomes a background principle? How many states have to adopt a property law rule before it signals a fundamental change in property as defined in the Fifth or Fourteenth Amendments? If property is defined by reference to history, tradition, and precedent, can background principles ever change, or are they static and perpetual? How much "history" has to pass before a novel regulation of property becomes embedded in social life and the justified expectations of owners?

The vested rights doctrine prohibits governments from changing property law rules retroactively when someone has invested in development of real property in reliance on laws that authorized that development. Denying vested rights is a per se taking unless the owner's expectations are unreasonable either because background principles of property law would have made the use of the property illegal to begin with or because the government has sufficiently strong reasons to justify retroactive application of the prohibitory law. A city cannot force a university to tear down its buildings by rezoning its property for residential use because the university has vested rights, but it can do so if the university's use of the property is harmful to the public or to other property owners or if the use was not lawful to begin with under background principles of property law. While the vested rights doctrine applies in a relatively rigid manner in some fact settings, it nonetheless gives way if the government has sufficiently strong interests in preventing the land use despite the owner's investment-backed expectations. That suggests that a categorical rule cannot be fairly applied without reference to the reasons for government action and consideration of the ways property use affects the property and personal rights of others.

E. The Wrong Way to Use History, Tradition, & Precedent to Define Property Rights—and the Right Way

In recent decades, the Supreme Court has become increasingly attracted to the notion that we can define core property rights that cannot be regulated without compensation regardless of the reasons for the regulation, the public interests served by it, or even whether imposition of the regulatory obligations on the owner are unfair or unjust. The Court justifies this approach by relying on—and simultaneously ignoring—history, tradition, and precent.

The Supreme Court presents itself as caring a lot about history; indeed, history is supposed to be determinative in figuring out what property

rights are established by tradition and/or precedent. But in defining core property rights whose regulation is a categorical taking, the Supreme Court ignores (a) the *actual facts* embedded in history, (b) the *actual precedents* in the jurisdiction in question (as well as in other jurisdictions), and (c) the tradition of regulating property rights to protect both individual rights and the property rights of others. It also ignores our tradition of promoting the general welfare by denying recognition to property rights that violate public policy. The Court has justified adopting this essentialist attitude to property rights on the ground that it is possible to identify what "property" is without regard to the ways that states have changed property rights over time.

There are at least three major problems with this approach. First, property is subject to regulation by the police power. Defining property rights that are totally immune from regulation prevents the courts from even considering the reasons why the regulation was promulgated in the first place. It assumes that property rights are absolute and that legislatures are disabled from regulating them even when they are unjust or harmful to society. That is not the law in the United States; nor is it our historical tradition. In fact, at no point in history have property rights been absolute, even when William the Conqueror purported to own all of England.

Second, defining "core" or "essential" property rights in an ahistorical manner denies the fact that property law, and property rights, have changed dramatically over time—not just in England in the centuries after the Norman Conquest, but for the entirety of the history of the United States. In every area of property law, states (and the federal government as well) have altered property law by regulating it and even by outlawing particular property rights or bundles of property rights. In addition, the Supreme Court seems to have forgotten that we are a federal system, and that the property law of Texas is *not* the same as the property law of Montana.

Without normative analysis, one cannot pick the "magic moment" in history (or the exemplary state jurisdiction) when and where a property right was "fixed" by tradition or precedent. Yet the strategy of identifying core property rights is premised on the notion that we need not consult actual precedents or to acknowledge changes over time in history. If we focus on the fact that property law has changed over time, and that this occurred because rights deemed sensible and fair in one era came to be viewed as pernicious or unjust in another era, then it becomes impossible to find a regulation unconstitutional just because it limits or abolishes a property right. What we require, of both the common law of property and of the constitutional law of regulatory takings, is analysis, reason giving, interpretation of norms and public policy, as well as consideration of the

consequences of disabling legislatures from passing laws to limit the harmful externalities of property over time.

What if "precedent" reveals, not only differences among the property laws of the various states, but evolving conceptions of property rights and property law as norms and social conditions change?[184] What if our history, tradition, and precedent do *not* identify timeless property rights, but a property law system that evolves, that changes, that becomes something new, as lawmakers shape property rights to promote the general welfare, individual rights, and fairness and justice?

Third, even if we want to ignore all history but the "tradition" adopted at the Founding, we cannot escape normative judgment by essentializing property rights. That is because our founding moments (1791 with the Fifth Amendment and 1868 with the Fourteenth Amendment) were moments of intense change in property law. We can take a photograph of a river but that does not change the fact that the river flows and that, from moment to moment, we are not looking at the same water.

What if our founding tradition was that property law must be modernized to excise rights that are inconsistent with a democratic polity that rejects the idea that "lords" have a right to control us and our property? What if the moment when the Takings Clause was adopted was a moment when courts and legislatures were intent on modernizing property rights to excise the remnants of feudalism? What if history, tradition, and precedent developed an evolving, rather than a static, system of property law? What if our tradition is to abolish property rights that are incompatible with evolving norms of liberty, equality, and democracy? What if history gave us a living property system rather than a static one?

III. PROPERTY AT THE FOUNDING

A. Redefining Property to Excise "Feudal" Rights

1. The Incomplete Reception of English Law and the Quit-Rent Problem

Upon independence from Great Britain, the states accepted English common law—but not all of it.[185] The Crown had permitted feudal property rights that had long been abolished in Great Britain to spread in the colonies. Among those were "quit-rents" paid to the "lords" of the land.

184. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power.").

185. On the processes by which English common law was accepted—and the parts of it that were rejected—see THOMAS, *supra* note 7, at 799–1154 (detailing the history of how different states received English common law).

Opposition to those quit-rents was one of the reasons for colonial discontent with British rule. When the Constitution prohibited "Titles of Nobility," it not only broke with the notion that people could be divided into classes of nobility and commoners but with the idea that proprietors (or "lords") had rights to collect rents from their "tenants." Feudal obligations to absentee lords were viewed as inconsistent with freehold tenure.[186] Freeholders are lords of their own castles, and only freehold tenure was viewed as consistent with the belief that "all men are created equal."[187] For that reason, a New Jersey Chancery Court held in 1866 that a legislative attempt to impose perpetual rents on fee lands unrelated to the costs of services provided to those landowners was unconstitutional.[188]

Property law at the Founding was in flux. It was changing to eliminate the vestiges of feudal property law that would have prevented American owners from acting as free and independent citizens with autonomy over their own lives, homes, farms, and businesses.[189] Even though many of the vestiges of feudalism had long ceased in England, some of the core statutes that abolished or limited feudal rights were not in force in the colonies.[190] Feudal relations long banned in England flourished in the American colonies.[191] One of the goals of the American Revolution was to finally get rid of those remnants of feudalism.[192]

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186. *See* Balkin, *supra* note 17, at 2350 (arguing that the goal of the Constitution's prohibition on "titles of nobility" was to "stamp out . . . pernicious system[s] of social hierarchy" based on "rank and political, cultural and economic privilege").

187. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

188. *See generally* Coster v. Tide Water Co., 18 N.J Eq. 54 (N.J. Ch. 1866).

189. THOMAS, *supra* note 7, at 1165 ("Changes in laws governing private lands were . . . underway by the time the federal Constitution was adopted, most changes apparently driven by desires to increase the marketability of land interests. By the end of the 18th century, state legislatures had removed almost all vestiges of primogeniture and feudal tenures, even though those were only nominally present in most states' jurisprudence by the end of the 18th century. The demise of the fee tail soon followed. The legislatures changed the English legal preference for joint tenancy as the form of concurrent ownership to an American preference for tenancy in common. State courts more strictly interpreted and enforced rules against perpetuities; they struck down restraints against alienation if those restraints were unreasonable."). *See generally* Eric T. Freyfogle, *Property Law in a Time of Transformation: The Record of the United States,* 131 S. AFR. L.J. 883, 895–918 (2014).

190. As the New York Court of Appeals held in 1853, the "statute quia emptores was never adopted or recognized by the colonists as forming a part of the law of the colony." People v. Van Rensselaer, 9 N.Y. 291, 305 (1853); *see also* Thomas H. Burrell, *A Story of Privileges and Immunities: From Medieval Concept to the Colonies and United States Constitution,* 34 CAMPBELL L. REV. 7, 85–86 (2011) ("A number of colonial charters to proprietors suspended the application of *Quia Emptores Terrarum,* and these proprietors were allowed to subinfeudate.").

191. Vance, *supra* note 9, at 256–57 (noting that subinfeudation was authorized in the American colonies despite its longstanding prohibition in England).

192. Of course, the institution of slavery was inconsistent with the push for freehold tenure and freeing people from the arbitrary control of others. It represented an older class and caste-based system more consistent with the feudal past that white Americans were seeking to put behind them. And, as I show below, the antifeudal policy did not extend to Native nations.

The Crown expressly granted some of the colonial proprietors the right to collect quit-rents. These were relics of feudalism that conditioned ownership on perpetual rent owed to the lord. And the Crown even exempted many colonies from the 1290 statute *Quia Emptores,* thereby allowing subinfeudation in the colonies that had long been outlawed in England.[193] These remnants of feudal property rights were anathema to the new nation because feudal property was inconsistent with natural rights and the norms of a republic.[194] Indeed, the "attempt to impose quit-rents upon estates [in Massachusetts] which had for so many years paid no such charge, was cited by the men of Boston as one of the grievances justifying the revolution against [British governor] Andros."[195]

William Vance explains:

> The Puritans of New England, who had come to the New World for the very purpose of escaping the restrictions of the Old, quickly perceived what was the real meaning of quit rents reserved; that by submitting to quit rents and the power of the overlord to collect them by distress they subjected themselves to the will of another and sacrificed the independence which they had sought to win at so heavy a cost.[196]

The Supreme Court recognized that the states repudiated the parts of English common law that were inconsistent with republican values and the

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193. Beverley W. Bond, Jr., *The Quit-Rent System in the American Colonies,* 17 AM. HIST. REV. 496, 497 (1912), https://www.jstor.org/stable/1834386; Burrell, *supra* note 190, at 85–86. New England was an exception where quit-rents never took hold. Bond, *supra* note 193, at 498–500. *But see* Van Rensselaer v. Hays, 19 N.Y. 68, 74 (1859) ("I am of opinion that the law forbidding the creating of new tenants by means of subinfeudation was always the law of the Colony.").

194. BEVERLEY W. BOND, JR., THE QUIT-RENT SYSTEM IN THE AMERICAN COLONIES 41 (1919) ("[T]he chief reason for this hostile attitude [to quit-rents] was dislike of a feudal control of the land by an external power rather than the mere monetary loss involved.").

195. Bond, *supra* note 193, at 500; *see also* BOND, *supra* note 194, at 33 ("In England landholders at first gladly accepted the quit-rent as a commutation of irksome services and payments in kind and gradually became accustomed to it through long usage. But in the colonies the quit-rent had no significance as a welcome release from undefined obligations and was usually construed as an arbitrary charge upon the land. Sacrifices borne and expenses incurred by the founder of a colony were soon forgotten, especially where the quit-rent was paid to an absentee proprietary, and the people opposed the payment of it as an obligation for which they got nothing in return."); *id.* at 35 (in New England, "the inhabitants bitterly opposed such a charge as the quit-rent, deeming it a sign of vassalage and an arbitrary limitation of their rights as lords of their own land."). *See* Charles, M. Andrews, Introduction *in* BOND, *supra* note 194, at 11 (noting that the quit-rent system was a "contributory cause . . . to the discontent which brought on the Revolution."); Vance, *supra* note 9, at 257–58 (noting the widespread resistance of colonists to paying quit-rents).

196. Vance, *supra* note 9, at 258; *id.* at 259 ("[T]he colonists bitterly resented the reservation by the sovereign or other overlord of powers that gave him personal control over their lands."); *id.* at 260 ("[W]hen the newly independent states found themselves in 1776 masters of their own destiny, we should expect action to carry out the popular desire to be rid of the claims of overlords which they regarded as incompatible with the sovereignty of an independent state and dangerous to their personal liberty and the security of their land titles." (footnote omitted)).

independence of owners. In its 1804 decision in *M'Ilvaine v. Coxe's Lessee,*[197] the Supreme Court commented on the recently-adopted New Jersey Constitution:

> The adoption of the common law was to secure the liberty and property of the citizens of *New Jersey* . . . . It was not meant to adopt those parts which were inconvenient, or inconsistent with our situation-such as that the king can do no wrong-*personal and perpetual allegiance, &*c. Besides, the constitution of *New Jersey* expressly excepts *such parts* as are inconsistent with the *rights* and privileges, contained in that charter.[198]

Of course, the common law as developed by U.S. courts did not provide equal liberties to all. It did not provide equal rights to married women, Indian nations, or enslaved persons. But it did reform our property systems over time in ways that promoted independence of owners, development of land, investment in agriculture and manufacturing, a real estate market, and increasingly equal access to the opportunity to become an owner.

Importantly, both courts and legislatures shaped property law to promote liberty as they understood it. By abolishing "titles of nobility,"[199] the new nation created a new ideal of a society of equals without lords or commoners. The feudal requirement that tenants owe "homage," "fealty," and service to a "lord" was seen as "a negation of liberty. It implied subordination. It meant that one man was inferior to another."[200] Evolving the

197. 6 U.S. (2 Cranch) 280 (1805).

198. *Id.* at 289.

199. U.S. CONST. art I, §9, cl. 8 ("No Title of Nobility shall be granted by the United States."); *id.* art I, §10, cl. 1 ("No State shall . . . grant any Title of Nobility."); *See* Balkin, *supra* note 17, at 2349–52 (explaining the significance of the titles of nobility clauses in the Constitution); Sarah E. Crooke, *Titles of Nobility, Emoluments, and Presidential Privileges: Applying* Flast *to Unconstitutional Grants,* 13 LIBERTY UNIV. L. REV. 499, 499 (2019) ("The Framers had experienced the dangers of aristocracy and nobility under British rule and saw them as destroyers of equality."); Richard Delgado, *Inequality from the Top: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice,* 32 UCLA L. REV. 100, 110 (1984) ("The antinobility clauses were part of an American reaction to feudalism"); Carlton F. W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions,* 84 WASH. UNIV. L. REV. 1375, 1408 (2006) ("[T]he Nobility Clauses were widely understood at America's founding as vital components of America's commitment to the core principle of equality."); THE FEDERALIST NO. 39, at 81 (James Madison) (Michael A. Genovese ed., 2009) ("Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility, both under the federal and the State governments; and in its express guaranty of the republican form to each of the latter."); Joseph William Singer, *Titles of Nobility: Poverty, Immigration, and Property in a Free and Democratic Society,* 1 J.L. PROP. & SOC'Y 1, 2 (2014) ("The American tradition emphasizes the equal status of all persons."); THE FEDERALIST NO. 84, at 81 (Alexander Hamilton) ("[T]he prohibition of titles of nobility . . . may truly be denominated the cornerstone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.").

200. Emmanuel Okon, *Land Law as an Instrument of Social Change,* 17 Zam. L.J. 46, 49 (1985).

property system to recognize antifeudal values meant that ambiguities in property law would be resolved with that policy goal in mind, and any remaining remnants of feudal doctrine inconsistent with liberty would be repudiated.[201]

I come from Monmouth County in the state of New Jersey and the county seat is named Freehold. The name commemorates the struggle of "freeholders" against those who claimed title to land based on deeds given to the two lords of the colony of New Jersey by King Charles II in the 1660s.[202] Historian Brendan McConville explored in detail the long running fight between the "proprietors" (those who derived their titles from the two lords) and the "freeholders" (those who claimed ownership based on possession and grants from both the Duke of York and the local Leni Lenape Nation).[203] The lords and their successors (the proprietors) claimed rights to feudal rents from the settlers in Monmouth County and Elizabethtown (now Elizabeth), while the freeholders objected to lords being placed over them *after* they acquired title to their lands from Richard Nicolls, the first governor of New Jersey empowered by the Crown to grant land titles to settlers there. Many freeholders refused to pay quit-rents on the ground that their titles were complete, in fee, and free of any obligations to anyone else.[204] Imposing lords and quit-rents on them after they acquired title to

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201. *Cf.* Watson v. Mercer, 33 U.S. (8 Peters) 88, 104 (1834) ("Absolute rights to property, are placed under the safeguard of the constitution, as completely and effectually as life and liberty, and with equal justice; as life and liberty would be dreary things to man, if he could not be secure in the enjoyment of his property, acquired by his honest industry, to make life comfortable, and liberty worth preserving.")

202. *See generally* Maxine Lurie, *"The Case of the Founding of Monmouth County*,*"* 126:1 N.J. HIST. 84, https://njh.libraries.rutgers.edu/index.php/njh/article/view/1105/2553 [https://perma.cc/3QY9-JGM2].

203. *See generally* BRENDAN MCCONVILLE, THESE DARING DISTURBERS OF THE PUBLIC PEACE: THE STRUGGLE FOR PROPERTY AND POWER IN EARLY NEW JERSEY (1999); *see also* Bond*, supra* note 193, at 506 (tenants in East Jersey claimed "that the title to their lands rested upon Indian grants which had been confirmed by the governor of New York, [and therefore] refused to recognize the right of the proprietors to reserve a quit-rent upon their holdings. The Monmouth patents were speedily brought under proprietary control, but the more determined associates of Elizabethtown would neither pay rents nor sue out new patents." (footnote omitted)). *See also* Graham v. Edison, 173 A.2d 403, 405-11 (N.J. 1961) (recounting the history of colonial New Jersey).

204. JOSEPH R. KLETT, USING THE RECORDS OF THE EAST AND WEST JERSEY PROPRIETORS 16 (rev. vol. 2014):

"Quit-Rent – A rent paid by the tenant of a freehold (i.e., on purchased property) to the grantor by which the tenant goes "quit and free," that is, discharged from any other rent. In proprietary New Jersey, this was at first one half-penny per acre annually, or in some cases one penny per acre for town lands. East Jersey quit-rents were later 6 pence per 100 acres. While quit-rents were required throughout East Jersey, they were never systematically or effectively collected. It is estimated that in 1696, quit-rents were paid by only about 40-50% of the landowners required to pay, yielding only £200 for all of East Jersey."

their lands amounted to expropriation of their property rights as they understood them. And when cases went to court, juries often sided with tenants rather than with the proprietors.[205] When the proprietors "made a vigorous attempt to enforce their rights . . . the popular wrath broke forth. The rioters were imprisoned, but the people quickly released them."[206] Eventually, the tenants prevailed over the proprietors and the quit-rent system in New Jersey withered away.[207]

Quit-rents were remnants of feudalism[208] and were seen by citizens of the new nation as inconsistent with the values of a republic where the people are the sovereign. Beverley W. Bond, Jr., an historian who studied the history of quit-rents in the colonies, commented: "Such an antiquated system of land-tenure was bound to fail when it came in contact with the independent spirit of the New World."[209] The struggle against quit-rents in New Jersey is fascinating, and it involved a low-level civil war in the state that culminated only with Independence when the freeholders triumphed and the property rights of the proprietors were (mostly) abolished.[210] After Independence, the New Jersey legislature required all future grants of land to be "allodial," meaning non-feudal, although the statute did not abrogate previously existing quit-rents.[211] That prospective application of the change in property law seemed to preserve quit-rents but, in truth, it did nothing of the kind. They were reviled, and landowners simply refused to pay them. Any quit-rents that remained in old deeds after the Revolution were simply ignored.[212]

Struggles against quit-rents occurred in many colonies, including Maryland, New York, Pennsylvania, Virginia, North Carolina, South

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https://www.nj.gov/state/archives/pdf/proprietors.pdf. *See also* Gary S. Horowitz, New Jersey Land Riots, 1745–1755 (1966) (PhD. dissertation, The Ohio State University), https://etd.ohiolink.edu/acprod/odb_etd/ws/send_file/send?accession=osu1486636887818283&disposition=inline (detailing the contentious relations between proprietors and freeholders in New Jersey in the 18th century).

205. Bond, *supra* note 193, at 504.

206. *Id.* at 507.

207. *Id.*

208. *Id.* at 496 (noting that the "quit-rent was a survival of feudalism"); *see also* Freyfogle, *Property Law in a Time of Transformation*, *supra* note 189, at 898 (quit-rents and other "vestiges of feudalism were swept away [at the time of the Revolution] almost as quickly as legislators could act, and without meaningful resistance or payment").

209. Bond, note 193, at 516.

210. MCCONVILLE, *supra* note 203.

211. Vance, *supra* note 9, at 249–50.

212. BOND, *supra* note 194, at 88 (noting the "early abandonment of the quit-rent system in West Jersey"); *id.* at 107 ("The outbreak of the Revolution put an end to all hope of enforcing the quit-rents in East Jersey, although, as the proprietary rights to vacant lands remained undisturbed, theoretically all feudal charges upon settled lands continued also. Indeed, by the terms of the original patents, quit-rents are still legally due on many tracts of land in East Jersey. This failure formally to abolish the quit-rents in the Jerseys shows that for all practical purposes these feudal dues had entirely disappeared long before the close of the colonial period.").

Carolina, and Vermont.[213] Several of these states formally abolished quit-rents upon Independence.[214] In 1780, for example, the Maryland General Assembly passed a statute discharging all citizens of Maryland from quit-rents owed to Lord Baltimore given that it was "highly improper for, and derogatory to, the citizens of this sovereign and independent state, to pay quit rent . . . to the subject of a foreign prince."[215] In other states, quit-rents were 'allowed simply to lapse with all other vestiges of royal control."[216]

2. How American Property Law Evolved to Reject "Feudal" Encumbrances

In the early years of the Republic, courts grappled with the question of how to interpret property rights and whether to abolish, not only quit-rents, but other property rights that were viewed as remnants of feudalism and inconsistent with "allodial" property. One such remnant of feudalism was the "quarter-rent" requirement that made owners hand over one-fourth of the sale price to the heirs of the original landowner every time the land was sold. This obligation resembled feudal incidents that had long been abolished in Great Britain, but which had been allowed to spread in the

213. *See* Bond, *supra* note 193, at 498–99 (opposition to quit-rents in New Hampshire occasioned "[s]uch bitter opposition . . . that little was accomplished" in trying to get owners to pay them).

214. For example, Maryland abolished quit-rents in 1780. *See* BOND, *supra* note 194*,* at 214; *see also id.* at 81–82 ("After the outbreak of the Revolution a clause in the North Carolina Declaration of Rights, which was incorporated in the state constitution, asserted that the property in the soil belonged to the people. This declaration was followed by the prohibition of perpetuities and the dismissal of all suits for quit-rents and arrears 'said to be due' from lands held of the king."); 64 PA. STAT. § 5 (1779) ("All and every the quit-rents, which at any time or times heretofore have been reserved in and by any warrant, patent or other conveyance of lands or other hereditaments, from, by or under the said proprietaries, their officers, or others by them commissioned and appointed, and all and every the dues and arrearages of quit-rents, and arrearages of purchase moneys for lands, not within the tenths or manors aforesaid, or which at any time or times heretofore have been deemed or taken to be due and in arrear, other than the quit or other rents reserved within the proprietary tenths or manors before mentioned, shall from henceforth cease and determine; and the same lands and other hereditaments shall be held free and discharged therefrom, and from the payment thereof, forever.").

215. 1780 MD. LAWS ch. 18. The same legislative session confiscated all property of British subjects in the state of Maryland. 1780 MD. LAWS ch. 45. *See also* Garrett Power, *Calvert versus Carroll: The Quit-Rent Controversy Between Maryland's Founding Families* (2005), https://digital-commons.law.umaryland.edu/cgi/viewcontent.cgi?article=1044&context=fac_pubs (on file with the Seattle University Law Review).

216. BOND, *supra* note 194, at 459 ("It is at any rate significant that with the outbreak of the Revolution, all the latent antagonism toward the quit-rents that existed in both crown and proprietary colonies was converted into open hostility. Coincident with the overthrow of royal authority was the collapse of the quit-rents, the outward sign of an absentee ownership of the soil. Only in New York were they retained as a nominal charge due the state. In South Carolina, Delaware and the Jerseys they were allowed simply to lapse with all other vestiges of royal control. In the remaining continental colonies which declared for independence and in which quit-rents had been established, the inhabitants repudiated these feudal dues in no uncertain terms. The different measures that were passed prove conclusively that the quit-rent, as a feudal charge and the source of a permanent royal revenue, was deemed incompatible with the land tenure of an independent people.").

colonies.[217] Whether the obligation could survive in a republican society of free and equal persons was an open question.

New York faced a struggle over quit-rents, but it did not result in as clean a victory on Independence for the freeholders as had occurred Maryland or even New Jersey.[218] The struggle in New York between "proprietors" and "tenants" continued for the first half of the nineteenth century.[219] The contest over the quarter-rent provision was part of this struggle. The New York Court of Appeals abolished quarter-rents in 1852 in the case of *De Peyster v. Michael.*[220] The duty to pay one-quarter of the sale price to the heirs of the original owner was seen as a vestige of feudalism that was incompatible with the rights of owners in a republic. It was also seen as a violation of public policy.[221]

The lawyers in *De Peyster* noted that the newly independent state of New York passed a statute in 1779 called the *Statute of Tenures* that

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217. *See* De Peyster v. Michael, 6 N.Y. 467 (1852) (invalidating at quarter-sale covenant as an outdated relic of feudalism).

218. *See generally* CHARLES W. MCCURDY, THE ANTI-RENT ERA IN NEW YORK LAW AND POLITICS, 1839–1865 (2001); REEVE HUSTON, LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK (2000); Eric Kades, *The End of the Hudson Valley's Peculiar Institution: The Anti-Rent Movement's Politics, Social Relations, and Economics,* 27 L. & SOC. INQUIRY 941 (2002).

219. Even the New York Constitution of 1846, which clearly abolished all feudal tenures, appeared to preserve any existing quit-rents. N.Y. CONST. art. I, § 12 (1846), https://history.nycourts.gov/wp-content/uploads/2019/01/Publications_1846-NY-Constitution-compressed.pdf ("All feudal tenures of every description, with all their incidents, are declared to be abolished, saving, however, all rents and services certain, which at any time heretofore have been lawfully created or reserved."). On the other hand, enforcement of the quit-rents was quite weak after the Revolution. BOND, *supra* note 194, at 283–84 ("The general indifference with which the quit-rents were regarded in New York was reflected in the failure of the assembly to abolish these feudal dues after independence was declared. The right to collect the quit-rents was vested in the Commonwealth of New York as the successor to the crown. But there is little evidence of any actual steps to enforce them." (footnote omitted)); *accord,* BANNER, *supra* note 4, at 6 ("By the mid-nineteenth century, the old system [of quit-rents] survived only on the great manors of New York's Hudson River valley, where the resentment of the thousands of people still subject to archaic tenure obligations fueled decades of conflict and sporadic violence.").

220. 6 N.Y. 467 (1852); *cf.* Livingston v. Stickles, 8 Paige Ch. 398, 405 (N.Y. Ch. 1840) (refusing to recognize an equitable remedy for breach of a lease condition to pay one-tenth of the sale price upon transfer of the lease by the tenant on the ground that "these agreements in the nature of fines upon alienations, are inconsistent with the spirit of our free institutions, and injurious to the community").

221. De Peyster, 6 N.Y. 467, 493–94 (1852) ("[A] fee simple estate and a restraint upon its alienation cannot in their nature co-exist . . . [this principle] rests . . . on grounds of great public utility and convenience; in facilitating the exchange of property; in simplifying its ownership, and in freeing it from embarrassments, which are injurious not only to its possessor, but to the public at large."). *De Peyster* effectively overruled cases to the contrary like *Jackson v. Schutz*, 18 Johns. 174 (N.Y. Sup. Ct. 1820) which had upheld such rent charges payable upon alienation.

purported to abolish all feudal tenures.[222] The land in *De Peyster* was held in the form of an odd estate in land called a "lease in fee." This property interest was close to a fee simple but nevertheless required periodic rent payments to the "lessor"—a third party who derived their rights from the original owner of the land. The "lease" (or deed) in *De Peyster* contained the quarter-sale covenant which purported to be binding on current and future buyers of the land forever. That provision required one-fourth of all proceeds from sale of the land to be handed over to the successors of the original owner of the land.

The "lease in fee" in *De Peyster* originated in 1785 in a lease/conveyance from James Van Rensselaer, and the parties in the case derived their interests from Van Rensselaer and from his first tenant. That means that the document creating the quarter-sale right originated during the brief Articles of Confederation era *after* Independence but *before* adoption of the Constitution. The New York Court of Appeals, unlike the New Jersey courts, had upheld the validity of the "lease in fee" as an estate in land even though its rental obligations limited the alienability of the land and even though the rent obligations were inconsistent with freehold tenure.[223] The New York Court of Appeals noted that restraints on alienation are void with respect to fee interests but valid with respect to life estates and leases, and it classified the "lease in fee" as a "lease" rather than as a "sale."[224] If the periodic rent payments were valid, was the quarter sale provision valid as well? *De Peyster* answered that question in the negative. Payments on sale of the land resembled feudal incidents even more so than quit-rents did, and such obligations could not survive in a republic.

The New York Court of Appeals reasoned that if the quarter sale obligation were valid, then so would a duty to pay half or even ninety percent of the sale price.[225] "It would be a bold assertion to say that the adoption of such a principle would not operate as a fatal restraint upon alienation."[226] This conclusion followed from the "principle of natural right, the rule of the common law, and the reasons of public policy, which forbid

222. De Peyster, 6 N.Y. at 502–03. A similar law was passed in Virginia. *See* Tomlinson v. Dillard, 7 Va. (3 Call) 105, 109 (1801) (describing a Virginia descent statute that "was part of a system commenced with a view of conforming our laws to the genius of our government, and abolishing the feudal and monarchical principles derived to us, therein, from the parent government of *Britain").*

223. *De Peyster,* 6 N.Y. at 490 ("These conditions in leases for years and for lives have been repeatedly upheld in this state as valid, although in restraint of alienation."). *See also* Tyler v. Heidorn, 46 Barb. 439, 440–41 (N.Y. Gen. Term 1866) ("The rents and services reserved and stipulated by the manor leases in fee executed by Stephen Van Rensselaer are not inconsistent with the abolition of feudal tenures, or with the independent and allodial tenure under the state itself which the 'Act concerning tenures,' passed in 1787, (1 *R. L.* 70, §§ 1 and 6,) effected.")

224. *De Peyster,* 6 N.Y. at 491–93.

225. *Id.* at 494.

226. *Id.*

restraints upon the disposition of one's own property . . . "[227] No precedent supported such an obligation when attached to a fee simple estate, and many held that it was invalid.[228] But how did those precedents apply to a "lease in fee"?

The court noted that a lease in fee was "an estate of inheritance."[229] The owner could leave the land to his heirs. That meant that the original grantor had conveyed a fee interest in the land.[230] A restraint on alienation cannot attach to a fee interest in land; it is "repugnant to the [fee] estate"[231] and void.[232] The court explained:

> Restraints upon alienation of lands held in fee simple, *were of feudal origin*. A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs the tenure became extinct and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seignory without the consent of the tenant. *This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence.*[233]

So, the court invalidated a material term of the "lease" on the ground that it was not a lease at all but a fee interest, and it did so because the term inhibited the alienability of land and the independence of the owner.

It was relevant that feudal tenures had been substantially limited or abolished in England and that English statutes prohibiting feudal regimes did not apply to the colonies in America.[234] In one sense, the New York court was deferring to English law rather than defying it. The court further held that the 1779 New York Statute of Tenures abolished feudal property rights and that it "took effect retrospectively."[235] Although the effect of the statute "may not have been . . . understood at the time by the landholders, or the scriveners who drew their leases," it nevertheless made void any quarter-sale provision in a property interest that was the equivalent of a fee interest.[236]

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227. *Id.*
228. *Id.* at 495–97.
229. *Id.* at 506.
230. *Id.* at 508 ("The lessor . . . parted with the fee of the land . . . .").
231. *Id.* at 497.
232. *Id.*
233. *Id.* at 497–98 (emphasis added).
234. *Id.* at 502–03.
235. *Id.* at 503.
236. *Id.* at 505.

The high court in New York abolished a property right retroactively because it had harmful social costs (inhibiting alienability and use of the land) and because it was inconsistent with norms of autonomy ("independence") in a polity of free and equal persons. This was the case even though the property interest had been in effect before the Constitution was adopted and had existed for almost seven decades before the *De Peyster* decision excised it from the title to the property.[237]

Nor was *De Peyster* the only case that carefully reviewed deeds and leases to determine which provisions were consistent with freehold (allodial) or republican property and which were relics of feudal services. A search of the word "feudal" in court cases between 1776 and 1860 yields 672 cases, many of which consider whether a property right protected under feudal property law could survive in a republic committed to liberty, equality, and natural rights.[238] Other cases interpret and resolve ambiguities in the received common law by refusing to recognize rights based in feudal doctrines that interfered with the alienability of land and the autonomy of current owners.[239]

The earliest case I found mentioning and rejecting "feudal rights" is a 1786 trial court case from Pennsylvania called *Lessee of Allston v. Saunders*.[240] The trial court refused to allow a longtime possessor to gain property by adverse possession against the state because of the "established maxim" of *nullum tempus occurrit regi* which meant that "no length of time could run against the right of the king, when he had dominion over this country. And when this State had separated itself from that dominion, the right of the crown devolved upon the State, in its corporate capacity."[241]

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237. *Id.* at 502 ("It is well known that a number of colonial grants were made, (and the patent to Killian Van Rensselaer is said to be among the number,) by which manors were created within the province; and the patentees were authorized to grant lands within those manors to be holden of them and their heirs as immediate lords, to whom, by the feudal tenures thus created, fealty was due, and who were entitled to the reversions or escheats, in the same manner as the mesne lords in England were, before the statute of *quia emptores*. These manorial tenures could not have been created if that statute had extended to the province.")

238. Court Listener, FREE.LAW (search for "feudal"), https://www.courtlistener.com/?q=feudal&type=o&order_by=dateFiled%20asc&stat_Precedential=on&filed_after=01%2F01%2F1776&filed_before=01%2F01%2F1860 [https://perma.cc/5DZ4-EP5Z] (last visited Sep. 28, 2025).

239. Thompson v. The Catharina, 23 F. Cas. 1028, 1030 n.8 (D. Pa. 1795) (No. 13,949) ("The feudal parts of this law, and such as are inconsistent with the principles of our government are not, nor can they be, in force. Those who are best acquainted with its wise and just principles, as they relate to contracts, and the property, as well as the personal rights of individuals, admire the common law as the venerable and solid bulwark of both liberty and property.").

240. Lessee of Allston v. Saunders, 1 S.C.L. (1 Bay) 26 (S.C. Ct. Com. Pl. & Gen. Sess. 1786).

241. *Id.* at 25.

But when a new trial was ordered, the court changed its mind and did so because of the great change wrought by repudiating monarchy and its attendant feudal principles. The adverse possession statute had no exception for occupation of land owned by the state,[242] and the *nullum tempus* principle that time does not run against the king "was never contended for, but by kings only; and like most of the royal prerogatives, was a mere usurpation, in order to acquire and retain power to aggrandize the monarch."[243]

The court explained "[t]hat republics were founded on other principles."[244]

> They had for their object, the accommodation, the good, and the happiness of the individuals who composed them. The security of natural rights, is a primary consideration with them; and occupancy is the first[] and most natural right of mankind. Every infringement on it, is an encroachment upon a natural right, which no refined system of princely policy could justify. If, however, the principle could be considered as of force in this country, when it was originally annexed to the crown of Great-Britain; yet, when the king *parted* with his right, to the lords proprietors, this *right* went with it.[245]

Whatever the state of the law before Independence, the right could not survive Independence and the repudiation of monarchy and feudalism.

> But supposing this right to have been originally inherent in the crown, and that it had never been surrendered by the lords proprietors; yet the revolution altered the nature of public rights, and *all the feudal and royal principles which governed them,* from which it was contended that this *"nullum tempus"* principle originated, *ought not to be considered as a part of the common law of this State, adopted by our constitution; but, like the ecclesiastical jurisdiction, and feudal rights, had become obsolete, and totally inapplicable to the circumstances, and local situation of this country.*[246]

The court reversed itself and allowed the adverse possession claim to proceed to trial, seemingly on the grounds argued by the claimant that the prior rule of law was a vestige of feudalism and not appropriate to a republic committed to natural rights.

Martin v. Sterling is a 1790 case from a trial court in Connecticut that mentions the practices of "the feudal system" only to explain that they

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242. *Id.* at 26.
243. *Id.*
244. *Id.*
245. *Id.* at 26–27.
246. *Id.* at 27 (emphasis added).

have been displaced "by the law of reason and common sense."[247] A tenant under a 999-year lease purported to grant a fee simple interest, and the claim was made that granting an estate greater than one owned would forfeit title. The court disagreed, holding that a grant of one's interests conveys whatever interests one has, and this modern principle has its basis in "reason and common sense," whatever the feudal policy would have been. Moreover, the challenger cannot oust a possessor without showing that they have a better title, and that was not the case here.[248]

A 1792 case called *Kennon v. M'Roberts*[249] from the Supreme Court of Virginia decided whether the devisees under a will took the property for life or in fee simple.[250] The court noted the traditional rule that a grant of lands is presumed to be for life unless words denoting an estate of inheritance (such as "and his heirs") are used, and argued that this was a "feudal Rule."[251] The court noted that "[c]ommon sense would have dictated that an absolute estate should pass by a conveyance unlimited as to duration, and containing no provision for its return to the grantor, at a future period, or on a contingency."[252] The feudal system, however, was not focused on the intent of the grantor but on protecting the rights of the original "lord" by ensuring that property devolved to the lord's heir. Under the feudal system, the court explained,

> reason was made to yield to the spirit of a system unfriendly to alienations or divisions of lands; and, therefore, the rule that such conveyances passed only an estate for life, was established. The same spirit established the rights of primogeniture, and, (aided by the statute *de donis*,) permitted estates tail, and all lesser estates to be carved out of the fee simple; the residue ultimately continuing in the grantor, capable of being disposed of when the particular estates should be ended. This disposition gave what was called a remainder in fee; but it often happened, that the fee was not disposed of; and, generally, in such cases as this now before the Court, when that fee rested in the donor

247. Martin v. Sterling, 1 Root 210, 211 (Conn. Super. Ct. 1790); *See also* Baker v. Long, 2 N.C. (1 Hayw.) 1, 1 (N.C. Super. Ct. 1790) ("[T[he demurring of the parol had its origin in feudal principles, and does not apply here.").

248. *Martin*, 1 Root at 211.

249. Kennon v. M'Roberts, 1 Va. (1 Wash.) 96 (Va. Ct. App. 1792).

250. We should note that this case involves not only real property but a devise of property rights in enslaved persons, so that its language rejecting feudalism may be more than hypocritical given the court's embrace of slavery.

251. *Kennon*, at 1 Va. at 101.

252. *Id.* at 100; *accord,* Sinnickson v. Snitcher, 14 N.J.L. 53, 61-62 (N.J. 1833) (describing a 1784 New Jersey statute which created a presumption that devises are in fee simple not life estates as based on a "policy . . . to disenthrall the title to land, and the nature of estates, from the perplexing subtleties and refinements . . . of the feudal system . . . .").

> as part of the old estate, it acquired the character of a reversion, and descended to the heir at law.[253]

Property would traditionally go to the heir of the grantor, in keeping with the feudal protection of the rights of the lord. But, the court reasoned, the United States rejected that property law system:

> By the *American* revolution, and some of our laws, we have happily got rid of the feudal system, and the rights of primogeniture; so that the favour hitherto claimed by heirs at law in the construction of conveyances affecting their rights, will no longer be heard of, in cases happening after *January* 1787, when those laws took effect; but the intention of testators will become in *reality* the rule, which, though hitherto avowed to be such, hath been so refined away, as, in many instances, to have been sacrificed to rigid technical terms.[254]

The court adopted the view that it should focus on the "intention of the testator."[255] Under the circumstances of this case, it would be "absurd" to think that the testator would give his sons "only an estate for life in lands, for whom perpetuities would generally be created . . . "[256] and to deny his sons the power to leave the property to their own children. The testator clearly stated an intent to pass all his property via the will because there was no indication of any reserved rights. "Has the testator made but a partial disposition of the lands to his sons? The feudal law says so, but *he* does not, since he gives it to them without restraint, or direction that their estate shall cease at any fixed period, or on any event."[257]

Given the use of the word "estate" in the preamble to the will and the fact that the devises were granted to the sons without limitation, the court concluded that "a fee simple estate passed to them in the lands; which will fulfil the will of the dead, and settle the peace of the family . . . ."[258] Thus, the court was able to achieve the testator's intent, which it deemed the fair and just result, on the supposition that the reasons for interpreting a grant of lands as a life estate applied only in feudal times, and that the feudal policy of limiting alienation and preserving primogeniture had no place in

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253. *Kennon*, 1 Va. at 100.

254. *Id.* at 100-01. The court further explained: "The feudal Rule 'that where an estate was conveyed without limitation, no more than an estate for life passed, and the reversion descended to the heir,' acted for a long time merely on feoffments and grants, the only conveyances then in use, and in such, the rule has constantly prevailed." *Id.* at 101.

255. *Id.* at 102; *accord* Anderson v. Jackson, 16 Johns. 382, 435–38 (N.Y. 1819) (courts should defer to the intent of the testator).

256. *Kennon*, 1 Va. at 104-05.

257. *Id.* at 108.

258. *Id.* at 109; *but see* Hall v. Goodwyn, 11 S.C.L. (2 Nott & McC.) 383, 385 (S.C. Ct. App. 1820) (a devise without "words of perpetuity" cannot convey a fee simple estate in land).

the new American system that sought to free owners from control by their ancestors or prior owners.[259]

Another example is a concurring opinion by Justice Joseph Story in the 1814 case of *United States v. 1960 Bags of Coffee.*[260] In that case, the Supreme Court had to decide whether property forfeited to the United States because of wrongdoing by the owner belonged to the United States or to a third party who had purchased the property not knowing about the statutory forfeiture. The Court ruled that the property belonged to the United States and justified that result for reasons of policy: "if by a sale it is put in the power of an offender to purge a forfeiture, a state of things not less absurd will certainly result from it."[261] Justice Story considered precedents from feudal property law that would lead to the same result, but those were based on the fact that the "property *is in the sovereign* before any seizure."[262] Story rejected basing the holding on "analogies borrowed from the feudal tenures, because they were governed by peculiar and technical niceties, the reasons of which have long since ceased, and perhaps cannot now be well understood."[263]

In the 1822 case of *Youngblood v. Lowry*,[264] a tenant that operated a livery stable failed to pay rent owed the landlord. To pay that debt, the landlord seized a horse belonging to a customer of the tenant. The South Carolina Constitutional Court of Appeals objected to the seizure, finding it incompatible with American values and circumstances. The court began by finding the case to be one of first impression on the state:

> [A]s no such case has ever been adjudged within my knowledge [in this state], I think myself at liberty to make such a decision as will best answer the ends of justice at this day in South-Carolina, and best suit the situation and circumstances of the country in point of utility and public convenience.[265]

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259. *See* Carr v. Jeannerett, 13 S.C.L. (2 McCord) 66, 96 (S.C. Ct. App. 1822) ("Every rule, therefore, incident to the right of primogeniture, must, as far as it relates to that right, be necessarily modified; and the rule under consideration can only be recognized in our courts, after being divested of this feudal principle."); Sheppard v. Sheppard, 7 N.C. (3 Mur.) 333, 406 (N.C. 1819) ("In consequence of the revolution, the people of this State formed a republican government, and it became necessary in defending this form of government, that the aristocratical doctrine of primogeniture, in the descent of real estates, should be exploded . . . "); Lloyd v. Urison, 2 N.J.L. 212, 219 (N.J. 1807) (describing the New Jersey's legislature's abolition of primogeniture and its replacement with equal inheritance).

260. U.S. v. 1960 Bags of Coffee, 12 U.S. (8 Cranch) 398 (1814).

261. *Id.* at 405.

262. *Id.* at 413 (Story, J., concurring).

263. *Id.*

264. Youngblood v. Lowry, 13 S.C.L. (2 McCord) 39 (S.C. Ct. App. 1822).

265. *Id.* at 42.

While England allowed landlords to seize goods owned by strangers to pay debts of the tenant, that rule "is the relict of the old feudal system" which is "extremely oppressive to the community at large."[266] The court stated:

> [O]ne man's property [being] taken away from him forcibly, and without his consent, to pay the debt of a third person, to whom he was never under any obligation . . . is clearly inconsistent with every idea of justice, and that security of property which every citizen ought to enjoy in a free country.[267]

Even England had exemptions from its rule out of "necessity and public utility to the community, as also for the benefit of trade and commerce, . . . on the score of necessity, utility and public convenience, . . . [and] the sound policy and reason of the law . . . [to avoid] detriment [to] the common-weal."[268]

Examples could be added,[269] and there are cases where judges feel bound by what they saw as established common law rules even though those rules were based on now-discarded "feudal tenures."[270] The point is

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266. *Id.* at 39.

267. *Id.*

268. *Id.* at 40–41.

269. *See, e.g.*, Tomlinson v. Dillard, 7 Va. (3 Call) 105, 110–11 (Va. 1801) (praising one Virginia act as "conforming our laws to the genius of our government, and abolishing the feudal and monarchical principles derived to us, therein, from the parent government of *Britain," and criticizing another act as "founded on false principles . . . anti-republican*[,] and aristocratic, because it tended to keep up the wealth of families; and so contravene the wise policy which annihilated entails in 1776."); Campbell v. Herron, 1 N.C. 468, 472–73, 1 Cam. & Nor. 291 (N.C. 1801) (while joint tenancy was favored in feudal times to "prevent[ ] a multiplication of tenures," the tenancy in common is presumed to provide equally for a decedent's children); Lessee of Hauer v. Shitz, 3 Yeates 205, 222 (Pa. 1801) (arguing that an English judge's views would have been even stronger if made under U.S. law with its firm repudiation of feudalism) ("By much stronger reason would he have entertained that sentiment, if he had to decide in such a case, in a *country* where the spirit of the feudal law has less force; and where the laws themselves, far from being calculated to support the pride of great families, by aggrandizing the heir at law, puts real and personal estates, as to descents and otherwise, nearly on the same footing."); BANNER, *supra* note 4, at 15–16 (the U.S. shifted from a presumption that a joint conveyance was a joint tenancy to favoring tenancy in common); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 234–35 (2d ed. 1985) (presumption in favor of joint tenancy was replaced by a presumption in favor of tenancy in common); *cf.* Swann v. Mercer, 3 N.C. (3 Hayw.) 246, 253 (N.C. Super. Ct. L. & Eq. 1803) (interpreting a state statute in a way that rejected feudal rules designed to consolidate power in the hands of lords when the "reason [behind the feudal rule] *never* applied to this country, nor ought the rule"); Ballard v. Hill's Heirs, 7 N.C. (3 Mur.) 410, 427 (N.C. 1819) (interpreting inheritance statutes to avoid inheritance by heirs of the father rather than the decedent's brothers on the ground that the rules preferring the "purchasing ancestor" were "derived from the feudal system" and "repugnant to our notions of justice and the obligations of duty").

270. Brant ex dem. Heirs of Provoost v. Gelston, 2 Johns. Cas. 384, 393 (N.Y. Sup. Ct. 1801) ("It is true, as his lordship asserts, that this rule or maxim, was the offspring of the ancient feudal tenures, and that *they* have ceased. But have not the rights of primogeniture, and numberless rules,

that property law at the Founding was being analyzed by judges to determine whether inherited rules of English law were compatible with liberty, natural rights, "reason," and "common sense." Any remaining "feudal" encumbrances were to be excised, and any English property law rules that were themselves based on reforming or abolishing the feudal system were to be embraced.[271]

At the time of the Founding of the United States, property law was contested and in flux.[272] On the chopping block were quit-rents, quarter-sale provisions, and other rights of absentee lords who claimed a right to tribute from their "tenants." What emerged instead was property held free of any obligations to a lord—allodial or freehold property. We cannot get a snapshot of something that is moving without distorting its reality. Property, at the Founding, was in the process of being modernized in light of reason, common sense, and the values of liberty and equality as they were understood at the time. Our "original" property law system at the time of the Founding embraced a commitment *to change property rights* and property law to promote the autonomy of owners and the general welfare. Property rights inconsistent with "independence" and "reason" were being abolished over time, both retroactively and without compensation. We cannot understand property rights at the Founding by asking what they were; we can only get a true historical picture of them by asking *what they were becoming* along with the *reasons why they were evolving.*

B. The Invention of "Indian Title" to Justify Dispossession

The Supreme Court's campaign to use history and tradition to define and protect property rights rests on the idea that property rights are important and that they deserve protection. Yet, claiming that history and tradition are on the side of property rights overlooks the painful fact that the origin of land titles for most people in the United States comes from

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governing the transmission of real property, sprung from the same source; and can courts of justice disregard these, because the *reason* of them has ceased? It certainly would be a dangerous experiment.").

271. *See* Thompson v. The Catharina, 23 F. Cas. 1028, 1030 n.8 (D. Pa. 1795) (No. 13,949) ("The feudal parts of this law, and such as are inconsistent with the principles of our government are not, nor can they be, in force."); *cf.* Nokes v. Smith, 1 Yeates 238, 243–44 (Pa. 1793) ("Our ancestors in Pennsylvania seem very early to have entered into the true spirit of commerce, by rejecting every feudal principle that opposed the alienation or partibility of lands. While, in almost every province around us, the men of wealth or influence were possessing themselves of large manors, and tracts of land, and procuring laws to transmit them to their eldest sons, the people of Pennsylvania gave their conduct and laws a more republican cast, by dividing the lands, as well as personal estate, among all the children of intestates, and by subjecting them, in the fullest manner, to the payment of their debts.").

272. *See generally* Claire Priest, *Creating an American Property Law: Alienability and Its Limits in American History,* 120 HARV. L. REV. 385 (2006).

dispossession of Native nations—something the Supreme Court never recognizes in its campaign to portray property rights as static and settled. The truth is that property law at the Founding was far from settled. Rather, in the early years—and throughout the nineteenth century—the United States effected a massive redistribution of land from possessor-owners to non-owners. That happened mainly because of the evolving military power of the United States compared to Indian nations. But dispossession only occurred because lawyers invented justifications for it that straddled a very thin line—making property available to settlers/invaders while denying it to Native nations. The two major vehicles of justification were the invention of "Indian title" and claims of racial and civilizational superiority. Both eased the conscience of a nation intent on explaining why United States citizens deserved to own land while Indians did not.

In the colonial era, lands were acquired from Indian nations in a variety of ways. Sometimes settlers just invaded tribal lands and dealt with the local inhabitants afterwards either by arranging permission or resorting to violence. At other times, settlers made agreements with local tribes before they settled on tribal lands. Often, the process of entering and settling on tribal lands was chaotic, unsystematic, and reckless. To prevent violence and to ensure relatively peaceful acquisition of land, King George III issued a Proclamation in 1763 prohibiting settlement of lands beyond the Appalachian Mountains without consent of the King or his representatives. The goal was to centralize administration of land transfers in the Royal government. Although that policy was one of the reasons the colonists rebelled against Great Britain and fought for independence,[273] the United States continued that very policy with the Northwest Ordinance of 1787, the Trade and Intercourse Act of 1790, and the 1789 Constitution which centralized powers over Indian affairs in the federal government.

These laws were, in many ways, protective of tribal title, since they prohibited both settlers and colonial or state governments from acquiring lands without a treaty that was seen as valid both by the tribe and by the colonial powers. Protection of Native title was embraced in the Marshall Trilogy, three early Supreme Court opinions that recognized that tribes owned their lands and had sovereignty over them, and which held that no further transfers of title from tribes to non-Indians should occur unless the tribes voluntarily agreed to those transfers or if the lands were acquired in

273. Jesse Greenspan, *How the Proclamation of 1763 Sparked the American Revolution,* HISTORY (Jan. 31, 2025), https://www.history.com/news/remembering-the-proclamation-of-1763 [https://perma.cc/3SCZ-X5V7].

a just, defensive war.[274] But the Marshall Trilogy had a dark side as well. It defined tribal title as shared between the Tribes and the United States. While the Tribes had "Indian title," that title was not a fee simple. It was a "title of occupancy" or "Indian title" that coexisted with a title in the United States that was called the "absolute ultimate title."[275] Today we say that the United States holds title to tribal lands "in trust" for Indian nations.[276]

This divided title was an invention, and there was a purpose to it. Claiming that the United States had part of the title to tribal lands was intended to justify keeping other colonial powers out of areas claimed by the United States, but it also gave an excuse to find that tribes had no power to transfer title to their lands in fee simple to anyone other than the United States. That divided title framework was partly protective of the tribes since no individual or state could lawfully take tribal lands without the consent of the United States, and that normally would not happen without negotiation of a treaty between the two. Nonetheless, it was also the case that claiming title to tribal lands was reminiscent of the feudal claims of William the Conqueror to holding title to all lands in England. The notion that the United States had the "ultimate title" to Indian lands was later used to justify seizures of tribal land when the U.S. thought that was good for the tribes (as in the allotment era from 1887 to 1934) or simply because the United States wanted the land. That underlying voracious appetite for land led some states (like New York) to seize tribal lands illegally without the consent of the U.S. as required by the Trade and Intercourse Act and the Constitution itself.[277]

The important point for our purposes here is that the Supreme Court invented a new estate in land that stripped Indian nations of rights they would have enjoyed if they had been white settlers/invaders rather than Native inhabitants. "Indian title" was intended to protect the peace by discouraging violent seizures of land either by states or by individual settlers, but it was also intended to *smooth the way to dispossession*. As originally defined by the Supreme Court, Indian title was *not* to be taken without the

274. Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. 1 (1831); Worcester v. Georgia, 31 U.S. 515 (1832); *see also* Mitchel v. United States, 34 U.S. 711, 746 (1835) (the Tribal "right of occupancy is considered as sacred as the fee simple of the whites"); Singer, *Indian Title, supra* note 19.

275. Singer, *Indian Title, supra* note 19, at 21.

276. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 18.02 (Nell Jessup Newton & Kevin K. Washburn, eds. 2024) ("Today, the federal government has a trustee's interest in tribal land, with tribal nations holding a beneficial ownership under the trust").

277. *See generally* Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

voluntary consent of the tribes,[278] but later Presidents, like Andrew Jackson, among others, ignored that limitation and refused to protect Tribes from coerced seizure of their lands.[279]

This new estate in land was not a "fee simple" and it was not devoid of feudal elements. In fact, rather than repudiating the notion that all land is held "of the King" with the King as the ultimate owner of all land in the realm, Indian title embraced the feudal structure. It did so by identifying the United States as the "ultimate" title holder and even the "absolute" owner whose rights remain intact even though those living on the land share part of that title by possessing it and being free from having it seized without their consent. The new nation firmly rejected feudalism—*except when it came to Indian lands*.[280]

In other words, at the moment of the Founding, property law was being changed, both to protect Native nations and to facilitate their dispossession. Rather than finding tribes to have no property rights (as occurred in Australia which adopted the *terra nullius* doctrine)[281] or to have fee simple title, the United States, through the Constitution, federal statutes, and Supreme Court opinions, created an entirely new package of property rights held *only* by Native nations. This estate in land created ambiguities that allowed the United States to oscillate between protection of "Indian title" and dispossession.

Today, many tribes fervently seek to transmute their fee lands into trust status, i.e., the estate in land invented in the 1823 case of *Johnson v. M'Intosh*.[282] They do so, not because they want to be feudal vassals of an overlord, but because trust status protects the land from state taxation and regulation and brings it within tribal sovereign powers. It also protects the

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278. *See M'Intosh*, 21 U.S. at 587 ("Discovery gave [the U.S.] an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."); Worcester v. Georgia, 31 U.S. 515, 546 (1832) ("the power of war is given only for defence, not for conquest"); *id.* at 544 (the United States has "the exclusive right to purchase" tribal lands but does not "den[y] . . . the right of the [Indian nations] to sell [the same]");*see also Mitchel*, 34 U.S. at 745–46 (Indian lands "could not be taken [by the U.S.] without [Indian nation] consent").

279. *See* FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §2.05, 49 (Nell Jessup Newton & Kevin K. Washburn eds., 2024).

280. Nor was that decision of only historic interest. The Supreme Court continues to wrestle with the meaning of Indian title as well as challenges brought against tribes contesting their right to enjoy its benefits. *See generally* Arizona v. Navajo Nation, 599 U.S. 555 (2023) (United States has no obligation to help Navajo Nation secure its treaty-protected water rights); Littlefield v. U.S. Dep't Interior, 85 F.4th 635 (1st Cir. 2023), *cert. denied,* 144 S. Ct. 1117 (2024) (mem.) (affirming Interior Department decision to put land into trust for the Mashpee Wampanoag Tribe).

281. *See generally* Shane Chalmers, *Terra Nullius? Temporal Legal Pluralism in an Australian Colony,* 29 SOC. & LEGAL STUD. 463 (2020) (Australia generally denied land rights to aboriginal inhabitants, although such rights were sometimes recognized in parts of the Australian colony).

282. *See, e.g.*, Littlefield v. U.S. Dep't of the Interior, 656 F. Supp. 3d 280, *aff'd on other grounds,* 85 F.4th 635 (1st Cir. 2023), *cert.* denied, 144 S. Ct. 1117 (2024).

land from being lost through foreclosure or adverse possession.[283] This innovative property right both limits what Tribes can do with the land and protects the Tribal ownership and sovereignty over their lands.

If we follow history through the next two centuries, we see wild swings in the development of property law as it applies to Indian nations. We see eras where the United States saw fit to take tribal lands without just compensation, eras in which it redistributed tribal lands from tribes to tribal members, eras in which federal bureaucrats exercised dictatorial control over tribes, eras when the government changed tribal lands from "Indian title" to "fee simple," and eras when the United States facilitated tribal governments in taking control of their own lands.[284] Our history and tradition of tribal property law is one of almost constant change. Those changes were made to facilitate public policy and either to protect tribes from depredations or to impose depredations on them. There is no point in our history where tribal property law was stable and not in flux, including today.

C. Land Registries & Recording Acts

The recording office in Middlesex County, Massachusetts, where I live, was created in 1649,[285] and some of its records go back that far.[286] England did not have a similar land registry system at that time.[287] There are a lot of benefits to public registries. They help to protect owners by ensuring title and facilitating transfers and mortgages of land.[288] But they also alter priorities by imposing vulnerabilities on owners who do not follow the rules and take advantage of the protections that registries offer. If you do not follow the rules, recording statutes authorize and enforce dispossession.

The traditional rule is "[f]irst in time, first in right."[289] If A transfers land to B and then transfers the same land to C, the winner of a fight

283. COHEN, *supra* note 6, at §7.03[1][a].

284. COHEN, *supra* note 6, at §§2.01 to 2.12.

285. Middlesex South Registry of Deeds, https://massrods.com/middlesexsouth/history-2/ [https://perma.cc/L5TL-QX62]; P. H. Marshall, *A Historical Sketch of the American Recording Acts,* 4 CLEV.-MARSHALL L. REV. 56, 65 (1955) (noting 1640 act of the Massachusetts Colony providing for recording of deeds).

286. *See* Marshall, *supra* note 285, at 64 (Plymouth Colony recorded its first deed in 1627).

287. *Id*. at 61–62 (explaining the failure of the British Statute of Enrollments of 1536 followed by limited statutes requiring registration of titles in the counties of Middlesex and York); *id.* at 62 ("[F]or the most part the idea of recording acts never became generally accepted throughout England . . . .").

288. *But see* K-Sue Park, *Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power,* 133 YALE L.J. 1487 (2024) (explaining how land registries promoted both dispossession of Native lands and markets in enslaved persons).

289. JOSEPH WILLIAM SINGER & NESTOR M. DAVIDSON, PROPERTY § 11.4.5.2, at 544 (6th ed. 2022).

between B and C will be B. At the time A transferred the land to C, A no longer owned the land, and you can only transfer what you own. A owned nothing so C got nothing. Recording acts change all that. If B does not record the deed from A to B and C buys without notice of the prior sale, C wins in a contest over title with B. Most recording statutes *divest B of title*, and B's only remedy is a suit against A for fraud. The recording act makes property title *vulnerable to loss without consent of the current owner* if that owner chooses not to take advantage of the opportunity to record their deed.

Recording acts facilitated sales of and mortgages in enslaved persons.[290] They facilitated dispossession of Native nations when their property was transferred to non-Indians.[291] And they promoted a vigorous real estate market that empowered owners to exercise autonomy over their own lands. They serve a host of public purposes. But they also facilitated dispossession, not only of Native nations but of owners who failed to record their interests. I am making this point not to attack recording systems, but to emphasize that American property law changed the English system to accommodate colonial interests and norms, as well as the rapacious desires of a new nation for land owned by Native nations. Recording systems were part of the way that American property law morphed over time for reasons of prudence and liberty, as well as for less honorable interests.

IV. THE HISTORICAL EVOLUTION OF PROPERTY RIGHTS

A. Property in Flux

1. Evolving Property Law

We have just seen several important ways in which property law was evolving at the very moment of the Founding of the United States. Our "tradition" of property law and property rights is that *they need to be changed to promote the general welfare, to protect individual rights*, *and to protect the property rights of others*. And when property law has been changed or interpreted in ways that facilitated unjust practices, courts and legislatures have repudiated those oppressive property rights over time. The United States began with a commitment to eradicate feudalism, to protect the autonomy and equality of owners, and to facilitate the use and transfer of interests in land, including the power to acquire lands from the

290. K-Sue Park, *The History Wars and Property Law: Conquest and Slavery as Foundational to the Field,* 131 YALE L.J. 1062 (2022); K-Sue Park, *Property and Sovereignty in America*, *supra* note 288.

291. K-Sue Park, *The History Wars and Property Law*, *supra* note 290; K-Sue Park, *Property and Sovereignty in America*, *supra* note 288.

original nations who owned and governed them. It also obviously began as a slave nation and one that refused to "[r]emember the Ladies," as Abigail Adams had put it.[292]

Our history and tradition of change at the Founding continued—and continues—up to the present. More than 250 years of property law have seen both frequent and fundamental change. Those changes have promoted public policy and protected individual rights. This Part canvases some of the many ways that property law changed over the course of the last 250 years of U.S. history. We will present those changes through the lens of the basic Hohfeldian categories of rights, including the right to exclude, the privilege to use, immunity from loss, and the power to transfer.

2. Retroactive Versus Prospective Changes in Property Rights

Many of the changes described below were made retroactively while some were prospective only. Examples of retroactive changes include equitable distribution laws and the implied warranty of habitability. Equitable distribution statutes granted married spouses rights in property acquired by the other spouse during marriage. Those laws were applied in a retroactive manner to all existing couples, effectively depriving husbands of vested rights they previously enjoyed in property titled in their names alone.[293] The warranty of habitability prohibited landlords from evicting tenants who complained about housing code violations and withheld rent because landlords would not fix those violations.[294] Those laws also applied to all existing tenancies, stripping landlords of the right to recover title to their properties. Similarly, quit-rents were abolished retroactively in Maryland[295] and abandoned in New Jersey.[296]

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292. Letter from Abigail Adams to John Adams, (Mar. 31, 1776) (on file with Massachusetts Historical Society), https://www.masshist.org/digitaladams/archive/doc?id=L17760331aa [https://perma.cc/VX2V-VZ85]. For another treatment of changes in property law over time, see THOMAS, *supra* note 7, at 1200–1338.

293. SINGER & DAVIDSON, PROPERTY, *supra* note 289, § 9.3.1, at 402.

294. *Id.* at §§ 10.6.3-10.6.4, at 477–88.

295. BOND, *supra* note 194, at 214; GARRETT POWER, CALVERT VERSUS CARROLL: THE QUIT-RENT CONTROVERSY BETWEEN MARYLAND'S FOUNDING FAMILIES 43 (2005), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1044&context=fac_pubs; 1780 MD. LAWS ch. 18. The same legislative session confiscated all property of British subjects in the state of Maryland. 1780 MD. LAWS ch. 45*;* Bond, *supra* note 193, at 507.

296. BOND, *supra* note 194, at 107 (noting the "abandonment of feudal dues in West Jersey").

> The outbreak of the Revolution put an end to all hope of enforcing the quit-rents in East Jersey, although, as the proprietary rights to vacant lands remained undisturbed, theoretically all feudal charges upon settled lands continued also. Indeed, by the terms of the original patents, quit-rents are still legally due on many tracts of land in East Jersey. This failure formally to abolish the quit-rents in the Jerseys shows that for all practical purposes these feudal dues had entirely disappeared long before the close of the colonial period.

Id. (footnote omitted).

Examples of property law reforms that applied only prospectively include, for example, zoning laws that do not apply to prior nonconforming uses, public accommodations laws that only applied to exclusions that occurred after their passage, or changes in perpetuities law that only affect conveyances or devises that occurred after the effective dates of those statutes.

Yet the distinction between prospective and retroactive application of property law reforms is less clear than it may seem, and at close inspection disappears altogether. A regulatory law that denies an owner a right they previously had changes the owner's rights retroactively even if it does not impose liability on the owner for past acts. Thus, zoning laws that protect prior nonconforming uses prevent expansion or alteration of the use, which limits use rights the owner previously enjoyed. Public accommodation laws limit the right to exclude and thus "take" part of that right from the owner even if liability will only attach to future exclusions. Perpetuities law reforms may enlarge the powers of owners by empowering them to create property rights that were previously unlawful, but with any expansion of a property right, we confront a restriction on the property rights of those who would have benefited had the law not changed.

B. Right to Exclude: Trespass Law

Cedar Point Nursery v. Hassid[297] held that the right to exclude is a core property right and that forcing owners to allow non-owners to enter their lands without the owner's consent is a *per se* taking of their property rights, with narrow exceptions.[298] Yet you would never know from the *Cedar Point* opinion that trespass law has changed dramatically over time and that the right to exclude was never as unchanging or as rigid as the Supreme Court would like us to believe.

297. Cedar Point Nursery v. Hassid, 594 U.S. 139 (2021).
298. *Id.* at 149-50.

1. Right to Roam, Right to Hunt: From Fencing Out (or Posting) to Fencing In

English law made any entry on lands of another without consent a *prima facie* common law trespass.[299] The American colonies, on the other hand, tossed that rule aside.[300] Professor Brian Sawers explains:

> Within a few years of settlement, every colony rejected the English law of trespass and enacted new laws for a new continent. Until landowners fenced their land, the public could travel, hunt, fish, and forage on private land without permission.[301]

The colonies embraced a right to roam over the unenclosed lands of others, and to go hunting there, as long as one did no harm to the land and did not invade a private space.[302]

As the Constitutional Court of Appeals of South Carolina held in 1818, "the right to hunt on unenclosed and uncultivated lands has never been disputed, and it is well known that it has been universally exercised from the first settlement of the country up to the present time . . . ."[303] This rule was so strongly supported that "a civil war would have been the consequence of an attempt, even by the legislature, to enforce a restraint on this privilege."[304] This hunting privilege "was the source from whence a great portion of [the settlers] derived their food . . . ."[305]

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299. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 12, at *209-10 (1768) (noting that, under English common law, "EVERY unwarrantable entry on another's soil the law entitles a trespass by breaking his close." (capitalization in original)); *see* Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in* Jones, 31 GA. ST. U. L. REV. 471, 493 (2015).

300. Berger, *Property and the Right to Enter, supra* note 144, at 90–92; Brian Sawers, *Race and Property After the Civil War: Creating the Right to Exclude*, 87 MISS. L.J. 703, 705 (2018); Brian Sawers, *The Right to Exclude From Unimproved Land,* 83 TEMP. L. REV. 665, 674–84 (2011); *see also* Eric T. Freyfogle, *The Enclosure of America* (Ill. Pub. L. Rsch. Paper No. 07-10, 2007), https://ssrn.com/abstract=1024846.

301. Sawers*, supra* note 299, at 493 (footnote omitted). Mark R. Sigmon, *Hunting and Posting on Private Land in America,* 54 DUKE L. J. 549, 554 (2004); *See also* Freyfogle, *Property Law in a Time of Transformation, supra* note 189, at 899–901.

302. Sawers, *supra* note 299, at 504 (At the Founding, "entering private property without damaging the land was not penalized. None of the colonial or early Republic statutes proscribed entering private land without permission. None of these statutes challenged or modified the distinctively American common law rules that entering open land without permission was not a trespass.").

303. McConico v. Singleton, 9 S.C.L. (2 Mill Const.) 244, 351-52 (S.C. Ct. App. 1818); *accord* Macon & W. R.R. Co. v. Lester, 30 Ga. 911, 911 (Ga. 1860) ("Loose stock are not trespassers on unenclosed lands in this State.").

304. *McConico*, 9 S.C.L. (2 Mill Const.) at 352.

305. *Id.* Justice Johnson tried to defend this rule as consistent with English law by noting that both jurisdictions required some "injury" for there to be a trespass. *Id.* But then he immediately

The right to hunt on unenclosed lands of others was even included in the Pennsylvania Constitution of 1776 and the Vermont Constitution of 1777.[306] The United States Supreme Court recognized this right in 1922.[307] Moreover, this American rule extended to domestic animals: "stock owners could let their cattle or hogs graze on private land without having to seek permission."[308] This rule sometimes led to conflicts with Native inhabitants in colonial times since the unfenced livestock of the colonists would trample and graze on cornfields of the Native peoples in Massachusetts.[309]

The English rule emerged from the enclosure movement which fenced common lands and denied manorial tenants access to those lands.[310] A major statute authorizing such enclosures was the *Inclosure Act of 1773*, passed shortly before Independence.[311] As a consequence of enclosure, owners were obligated to stay off enclosed lands of others, and only the upper class was entitled to hunt on wild lands.[312] That meant owners had to erect fencing on their own lands to stop their cattle from wandering onto

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deviated from the English presumption that all nonconsensual entries cause harm by requiring evidence of harm *beyond the mere fact of the entry. Id.*

306. Sigmon, *supra* note 301, at 556 n.45; PA. CONST. of 1776, §43; VT. CONST. of 1777 ch. II, §39. The current Vermont Constitution also contains this entitlement. VT. CONST. ch. II, § 67.

307. McKee v. Gratz, 260 U.S. 127, 136 (1922).

> The strict rule of the English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of unenclosed and uncultivated land in many parts at least of this country. Over these it is customary to wander, shoot and fish at will until the owner sees fit to prohibit it. A license may be implied from the habits of the country.

Id. Cf. Buford v. Houtz, 133 U.S. 320, 326 (1890).

> [T]hey seek to introduce into the vast regions of the public domain, which have been open to the use of the herds of stock-raisers for nearly a century without objection, the principle of law derived from England and applicable to highly cultivated regions of country, that every man must restrain his stock within his own grounds, and if he does not do so, and they get upon the unenclosed grounds of his neighbor, it is a trespass for which their owner is responsible. We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.

Id.

308. Sawers, *supra* note 299, at 493; *see, e.g.*, Knight v. Albert, 6 Pa. 472, 472 (Pa. 1847) ("In this, and perhaps every other American state, an owner of cattle is not liable to an action for their browsing on his neighbour's unenclosed woodland.").

309. STEVEN F. JOHNSON, NINNUOCK (THE PEOPLE): THE ALGONKIAN PEOPLE OF NEW ENGLAND 156 (1995).

310. *See* Berger, *Property and the Right to Enter, supra* note 144, at 106–08.

311. *See* Zach Fruit, *Enclosure,* 46 VICTORIAN LITERATURE & CULTURE 672, 673 (2018). Sigmon, *supra* note 301, at 552.

312. *See* Berger, *Property and the Right to Enter, supra* note 144, at 106–08.

neighboring lands and causing a tortious trespass.[313] But the colonies and the states at the Founding repudiated the English "fencing in" property rule, opting instead for a "fencing out" system.[314] If you wanted to keep your neighbor's cattle off your land, you had to build a fence to keep them out.[315] The American rejection of the fencing-in rule is another example of the ways that the states changed English property law both before and after Independence to reject aspects of English law that the states deemed incompatible with the norms of a democratic society.

Contrary to the assumptions underlying the *Cedar Point* decision, the "traditional" property law rule in the United States allowed people to enter property owned by others, as long as it was unenclosed and you did not enter a private space. Non-owners were entitled to walk or ride across the lands of others, to hunt on those lands, and to allow their cattle to wander on those lands. A trespass occurred only if those acts resulted in damage.[316] And while current trespass law assumes that *any* unprivileged entry is a tortious trespass, the general rule is that damages are merely nominal in the absence of harm to the land.[317] Moreover, such entries are not trespasses at all in many states which give non-owners the right to hunt on the unenclosed lands of others unless "no hunting" or "no trespassing" signs are posted.[318]

It is true that the rule changed after the Civil War to make any unprivileged entry a presumptive trespass. The states also moved from a "fencing out" system to a "fencing in" system. Owners of cattle now had a duty *not* to let them roam onto neighboring land. Rather than privileged, such entries now became trespasses. One motive for that change may have been to deny foraging opportunities to people who had been formerly

313. Sawers, *Right to Exclude, supra* note 300, at 675 ("The common law of England gave the landowner an unqualified right to exclude people and required fencing livestock in."); *see also* Freyfogle, *Property Law in a Time of Transformation, supra* note 189, at 901 (noting that the California Supreme Court in 1859 rejected the fencing in system in *Waters v. Moss*, 12 Cal. 535 (1859)).

314. Sawers, *Right to Exclude, supra* note 300, at 675 ("By statute, the colonials reversed the English rule, invariably within a few years of settlement.").

315. *See* McConico v. Singleton, 9 S.C.L. (2 Mill Const.) 244, 352 (S.C. Ct. App. 1818) (not a trespass to go hunting or "riding" over unenclosed fields); Berger, *Property and the Right to Enter, supra* note 144, at 91–92; ERIC T. FREYFOGLE, ON PRIVATE PROPERTY: FINDING COMMON GROUND ON THE OWNERSHIP OF LAND 29–44 (2007); Eric T. Freyfogle, *The Enclosure of America* (Ill. Pub. L. Rsch. Paper No. 07-10, 2007), https://ssrn.com/abstract=1024846.

316. FREYFOGLE, ON PRIVATE PROPERTY, *supra* note 315, at 34–44.

317. Kinderhaus North LLC v. Nicolas, 314 A.3d 300, 315 (Me. 2024) ("[T]he awarding of nominal damages in a common law trespass case reflects 'damage . . . presumed to flow from a legal injury to a real property right . . . '" (quoting Gaffny v. Reid, 628 A.2d 155, 158 (Me. 1993)); Berger, *Property and the Right to Enter, supra* note 144, at 89-90 (common law trespass is not worth enforcing unless to establish boundary lines since the usual remedy is only nominal damages).

318. Richard M. Hynes, *Posted: Notice and the Right to Exclude,* 45 ARIZ. ST. L.J. 949 (2013); *cf.* Sigmon, *supra* note 301, at 581 (arguing that "right to hunt" laws should be repealed).

enslaved so as to force them to work as sharecroppers for their old enslavers.[319] The change from a fencing out to a fencing in rule is a dramatic one; it significantly expanded the right to exclude by putting obligations on owners to ensure that their animals did not wander off their lands. Of course, that change relieved others of the obligation to erect fences to keep cattle off. It illustrates that the current rule, as embodied in *Cedar Point,* is, in some sense, *not* the traditional rule but one adopted by most states nearly a century after the Founding.

Many states still retain the rule that people are free to hunt on unenclosed lands of others unless the owner posts "no hunting signs," although there are significant differences among the states on the requirements for posting and the scope of allowable activities.[320] Such laws are sometimes challenged as takings of property, but since that hunting right has been in existence in many states since their very beginning, the rule has the weight of tradition behind it and is a counterweight to the notion that *any* entry on land of another is a *per se* trespass unless the owner gives some indication of consent to the entry.[321]

2. Jim Crow Laws, Public Accommodations Laws, and Fair Housing Laws

Public accommodations have always had a duty to serve the public without unjust discrimination. There is debate about how wide the category of "public accommodation" was in American law between 1789 and 1880. I read the case law as imposing a duty on any business that held itself out as ready to serve the public, at least when the business was offering generic goods for sale rather than personalized services.[322] Others think the duty only applied to innkeepers and common carriers or businesses that provided necessities and were functional monopolies,[323] or that the law depended on a fact-specific inquiry about the intentions of the business owner.[324] But there is no debate about the fact that, after Reconstruction ended and the Jim Crow system of racial segregation grew in the

319. *See* Berger, *Property and the Right to Enter, supra* note 144, at 108–10; Sawers, *supra* note 300, at 707.

320. Sigmon, *supra* note 301, at 558 (noting that, as of 2004, "twenty-nine states require[d] posting to exclude hunters"). *But see id.* at 560 (noting that twenty-one states "require permission for entry onto any kind of private land . . . ."); *id.* at 563 ("[E]ven on unposted land in states with posting statutes, if landowners see hunters and tell them to leave, the hunters must leave.").

321. *See* Hynes, *supra* note 318; Sigmon, *supra* note 301.

322. *See generally* Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property,* 90 NW. U. L. REV. 1283 (1996).

323. Christopher R. Green, *Speech, Complicity, Scarcity, and Public Accommodation,* 2022 CATO SUP. CT. REV. 93, 99-108 (2022–2023).

324. *See* Adam J. MacLeod, *The First Amendment, Discrimination, and Public Accommodations at Common Law,* 112 KY. L.J. 209 (2023-2024).

South, states limited the duty to serve the public to innkeepers and common carriers while enabling them to engage in racial segregation.[325] There is also no debate over the fact that, over the course of the twentieth century, forty-five states passed statutes that remain in effect today which require businesses that serve the public to admit and to serve customers without regard to factors like race, religion, sex, national origin, or disability.[326] While the federal public accommodations law of 1875 was struck down as unconstitutional in 1883,[327] a similar statute in 1964 was upheld by the Supreme Court.[328] Moreover, the federal Americans with Disabilities Act passed in 1990 prohibited public accommodations from excluding or denying service to people with disabilities.[329]

That means that both state and federal public accommodation laws took away the property right that owners previously had to exclude unwanted customers from their businesses for reasons defined by civil rights statutes. These laws granted strangers a right to enter land of another regardless of the owner's desire to exclude. Moreover, they not only made

325. *See* Singer, *supra* note 322, at 1351–1412.

326. ALASKA STAT. ANN. § 18.80.230 (West 2025); ARIZ. REV. STAT. ANN. § 41-1442 (2025); ARK. CODE ANN. § 16-123-107 (2025); CAL. CIV. CODE § 51 (West 2025); COLO. REV. STAT. ANN. § 24-34-601 (West 2025); CONN. GEN. STAT. ANN. §§ 46a-63 to 46a-64, 46a-81d (2025); DEL. CODE ANN. tit. 6, § 4504(a) (West 2025); D.C. CODE ANN. § 2-1402.31 (West 2025); FLA. STAT. ANN. § 760.08 (West 2025); HAW. REV. STAT. ANN. § 489-3 (West 2025); IDAHO CODE ANN. § 67-5909 (West 2025); 775 ILL. COMP. STAT. ANN. 5/1-102, 5/5-102 (West 2025); 22 IND. CODE ANN. § 22-9-1-2 (West 2025); IOWA CODE ANN. § 216.7 (West 2025); KAN. STAT. ANN. § 44-1001 (West 2025); KY. REV. STAT. ANN. §§ 344.120, 344.145 (West 2024); LA. STAT. ANN. § 51:2247 (2024); ME. REV. STAT. ANN. tit. 5, §§ 4552, 4591 (2025); MD. CODE ANN., STATE GOV'T § 20-304 (West 2025); MASS. GEN. LAWS ANN. ch. 272, § 98 (West 2024); MICH. COMP. LAWS ANN. §§ 37.1102, 37.2302 (West 2025); MINN. STAT. ANN. § 363A.11 (West 2025); MO. ANN. STAT. § 213.065 (West 2025); MONT. CODE ANN. § 49-2-304 (West 2025); NEB. REV. STAT. ANN. § 20-134 (West 2025); NEV. REV. STAT. ANN. § 651.070 (West 2025); N.H. REV. STAT. ANN. §§ 354-A:16 to 354-A:17 (2025); N.J. STAT. ANN. § 10:5-12(f) (West 2025); N.M. STAT. ANN. § 28-1-7(F) (West 2025); N.Y. CIV. RIGHTS LAW §§ 40 to 40-c (McKinney 2025); N.D. CENT. CODE ANN. § 14-02.4-14 (West 2025); OHIO REV. CODE ANN. § 4112.02(G) (West 2025); OKLA. STAT. tit. 25, § 1402 (2025); OR. REV. STAT. ANN. §§ 659A.103, 659A.403 (West 2025); 43 PA. STAT. AND CONS. STAT. ANN. § 953 (West 2025); 11 R.I. GEN. LAWS ANN. §§ 11-24-2 to 11-24.2.2 (West 2025); S.C. CODE ANN. §§ 43-33-520, 45-9-10 (2025); S.D. CODIFIED LAWS § 20-13-23 (2025); TENN. CODE ANN. § 4-21-501 (West 2025) (does not prohibit discrimination based on disability in public accommodations); UTAH CODE ANN. §§ 13-7-3, 26B-6-802 (West 2025); VT. STAT. ANN. tit. 9, § 4502 (West 2025); VA. CODE ANN. § 2.2-3900 to § 2.2-3904 (West 2025); WASH. REV. CODE ANN. § 49.60.215 (West 2025); W. VA. CODE ANN. §§ 16B-17-2, 16B-17-9(6) (West 2025); WIS. STAT. ANN. § 106.52 (West 2025); WYO. STAT. ANN. §§ 6-9-101, 35-13-201 (West 2025). States without public accommodation statutes are Alabama, Georgia, North Carolina, and Texas. Mississippi has an anti-public accommodation statute that empowers stores to refuse customers for any reason, MISS. CODE ANN. § 97-23-17 (West 2025), and a civil rights statute granting disabled individuals equal access to public accommodation. MISS. CODE ANN. § 43-6-5 (West 2025).

327. The Civil Rights Cases, 109 U.S. 3, 25-26 (1883).

328. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249-50 (1964) (upholding 42 U.S.C. §§ 2000a to 2000a-6 (1964)).

329. 42 U.S.C. §§ 12101-12213.

entry not a trespass but also imposed a duty on the owner to sell goods and services to customers without regard to invidious discrimination, giving customers a power to demand that title to goods pass from the seller to the buyer upon the buyer's request and payment for services rendered.

It is important to remember as well that states that had Jim Crow statutes or municipal ordinances actually prohibited public accommodations from serving Black and white patrons equally.[330] Indeed, Jim Crow laws imposed a duty to exclude customers of the wrong race. That was a significant change in prior law which had either imposed a duty to provide service or gave owners the liberty to choose whether to exclude customers or let them in.[331]

These access rights also extended to housing, insurance, mortgages, and employment with constitutional rulings,[332] state and federal laws passed in the mid-twentieth century,[333] and reinterpretation of the Civil Rights Act of 1866.[334] Such laws require landlords to rent to tenants, homeowners to sell to buyers, banks to grant loans to prospective home buyers, and employers to hire and pay wages to employees without regard to characteristics such as race and sex. These laws confer privileges but also impose forced redistribution of property rights from some people to others. Yet, there appears to be no question that these antidiscrimination laws remain valid even after *Cedar Point*, despite the fact that they do not fit easily into any of the four exceptions the Court recognized in that case.[335] Public accommodation statutes and common law cases[336] substantially limited the right to exclude, and they prohibit segregation. In so doing, they reflect twentieth century values, not the values at the Founding or the time of the Reconstruction amendments or during the

330. *See generally* PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 7 (U. Ga. Press, 1997) (1951) (finding that, as of 1951, "[t]wenty-two jurisdictions by law require or permit racial segregation in one form or another."); *See, e.g.*, *Examples of Jim Crow Laws—Oct. 1960—Civil Rights,* JIM CROW MUSEUM (Jul. 26, 2025, 15:57 PM), https://jimcrowmuseum.ferris.edu/links/misclink/examples.htm [https://perma.cc/5YDR-RR7H].

331. *See* Singer, *supra* note 322, at 1348–90.

332. *See* Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding racial covenants unenforceable under the Fourteenth Amendment's equal protection clause); Carol M. Rose, *Property Law and Inequality: Lessons from Racially Restrictive Covenants,* 117 NW. U. L. REV. 225, 234-36 (2022).

333. Fair Housing Act, 42 U.S.C. §§ 3601–3631; *See, e.g.*, MASS. GEN. LAWS ch. 151B, §§ 1–10 (2023).

334. Civil Rights Act of 1866, 42 U.S.C. §§ 1981–1982 (as amended in 1991); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413 (1968) (holding that §1982 prohibits private, as well as public, discrimination).

335. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82–85 (1980); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 260–61 (1964); Newman v. Piggie Park Enters., 390 U.S. 400, 402 n.5 (1968).

336. *See, e.g.*, Uston v. Resorts Int'l Hotel, Inc., 445 A.2d 370, 374–75 (N.J. 1982) (holding that all places open to the public have a duty to provide reasonable access and to serve without unjust discrimination).

Progressive/Jim Crow Era. If civil rights statutes are not unconstitutional "takings" of property, then that is *not* because of history or tradition or precedent but because of evolving values, public policies, and laws.

3. Implied Warranty of Habitability & Retaliatory Eviction

Before 1970, landlords had no implied contractual duty to provide habitable housing, and even if they had such duties, those duties were independent of the duties owed by tenants to landlords. All that changed with the ruling in *Javins v. First National Realty Corp*.[337] The landlord in *Javins* was alleged to have violated over a thousand housing code violations and refused to make repairs.[338] Public enforcement mechanisms by the housing inspector were inadequate. The tenants withheld rent on the ground that they were not getting what they were paying for and that the landlord had breached an implied obligation to provide housing consistent with the housing code.[339] The tenants prevailed in a precedential case that fundamentally altered two principles of property law.[340]

First, *Javins* held that, by leasing the property, the landlord made an implied promise to comply with the housing code and to provide habitable housing.[341] Breach of the implied promise was a breach of the landlord's implied covenant to provide habitable housing. This was a huge change in property law because it treated the lease in the same way the courts treated other consumer transactions. It effectively imported contract law concepts and norms into property transactions.[342] Prior to *Javins,* the leasehold was treated as a transfer of possessory rights from the owner to the tenant for a term (or month-to-month) with no obligations other than the duty to deliver possession.

The landlord's duty to provide habitable housing was initially imposed by statute. Building codes that ensure that buildings are structurally sound are as old as the Republic, although they developed over time to be more and more specific.[343] Housing codes are a creature of the twentieth century, originating in tenement laws that applied to urban apartment

337. Javins v. First Nat'l Realty Corp. 428 F.2d 1071 (D.C. 1970). Two similar state cases preceded *Javins* and were cited in the *Javins* opinion. *See generally* Lemle v. Breeden, 462 P.2d 470 (Haw. 1969); Reste Realty Corp. v. Cooper, 251 A.2d 268 (N.J. 1969).

338. *Javins,* 428 F.2d, at 1073.

339. *Id*.

340. *Id*.

341. *Id.* at 1081–82.

342. *Id.* at 1074–75.

343. *See Short History of Codes,* FIRE MARSHALS ASS'N OF MINN., https://fmam.org/about-fmam/short-history-of-codes/ [https://perma.cc/H6JL-5GJY] (last visited Oct. 6, 2025).

buildings, reaching their current form only in the mid-twentieth century.[344] They parallel building codes, requiring structures to be safe, but they go beyond building codes by imposing requirements to ensure that buildings are suitable for habitation.[345] This means that property owners were *not* obligated to make housing habitable in the eighteenth or nineteenth centuries; the obligation was imposed only in the mid-twentieth century.

Before *Javins,* violations of housing codes could be remedied only by calling on public officials (e.g., housing inspectors) to enforce the code against particular offenders. Tenants had no power to sue landlords to seek injunctions ordering landlords to fix code violations. That was because the lease agreement was seen as a transfer of possession alone, not a promise to provide "housing" that was either habitable or consistent with the state or municipal housing code. After the 1970 *Javins* decision, nearly all states embraced its new property law rule, and a violation of the housing code became a violation of an implied contractual promise in the lease agreement to comply with the housing code. The obligation to provide habitable housing was not new; the housing code imposed that. What was new was conferring a property right on the tenant that would be enforceable in court. A tenant could now sue the landlord seeking a court order to the landlord to fix the premises.

Second, the tenant's obligations under the lease, including the duty to pay rent, were held to be contingent on the landlord's compliance with their contractual promises.[346] Contract law generally makes promises dependent on each other. Violation of a promise to a contractual partner generally relieves the other contractual party from their future obligations under the contract.[347] This is not true for real covenants or equitable servitudes under property law.[348] When a homeowner violates a covenant limiting property to residential purposes, that does not relieve other owners of their own obligations under similar covenants. The remedy is not for neighbors to start violating the covenant also, but a suit to compel

344. *See* Eric W. Mood, *Housing Codes . . . Origin Characteristics Application,* 39 J. ENV'T HEALTH 418, 418 (1977); *see, e.g.*, 105 MASS. CODE REGS. §§410.001-410.950, https://www.mass.gov/info-details/housing-code; *State Housing Codes,* NAT'L CTR. FOR HEALTHY HOUSING, https://nchh.org/information-and-evidence/healthy-housing-policy/state-and-local/healthy-housing-codes/by-state/.

345. *Javins*, 428 F.2d at 1078.

346. *Id.* at 1082 ("Under contract principles, however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition.").

347. *See* RESTATEMENT (SECOND) OF CONTS. ch. 10, topic 2, § 237 (AM. L. INST. 1981) ("Except as stated in §240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

348. *See* SINGER & DAVIDSON, *supra* note 289, § 6.5, at 266–70.

compliance by the recalcitrant owner.[349] Before *Javins,* the landlord's duty to confer possession was contingent on the tenant's duty to pay rent; failure to pay rent empowered the landlord to evict the tenant. But the reverse was not true; a violation of a covenant by the landlord (other than the duty to confer possession) did *not* empower the tenant to repudiate the lease or to stop paying rent.

Before *Javins*, tenants could stop paying rent and move out only if they were "constructively evicted" by landlord actions that effectively barred them from the premises or which were so substantial that they made the apartment unlivable. Tenants could take advantage of the constructive eviction doctrine only if they moved out.[350] After *Javins*, tenants could stop paying rent if there was a material breach of the housing code and the landlord refused their request to repair the premises, and they could stay in the apartment.

This implied warranty of habitability doctrine stripped landlords of the right to evict tenants who were not paying rent. And to protect tenants from being penalized for asserting their rights under the housing code and their rights under the new implied warranty of habitability to stop paying rent, the courts invented a new doctrine of *retaliatory eviction* which denied the power to evict if the reason for the eviction was to retaliate against the tenant for seeking compliance with the housing code or withholding rent because of code violations by the landlord.[351]

Nor was this judicial intervention in the housing market an example of wild judicial activism. To the contrary, state legislatures saw that there was a gap in their statutes, and they eagerly embraced the new doctrine by passing statutes to codify it. Many were based on the Uniform Residential Landlord and Tenant Act.[352] That meant that the new doctrine originated in a statute (housing codes), developed in a change in the common law of estates in land, and matured in new statutes that increased tenant rights by imposing new obligations and vulnerabilities on landlords, some of which limit the landlord's right to exclude. This limit on the right to exclude protects the property rights of residential tenants, now defined in a more capacious manner than in the eighteenth and nineteenth and early twentieth

349. *Id.*

350. By the way, the constructive eviction doctrine was itself an innovation. Traditional law allowed tenants to stop paying rent only if they were *actually* evicted, as when the landlord barred them from the premises and changed the locks. The doctrine also applied when the landlord engaged in a wrongful act that substantially interfered with the tenant's quiet enjoyment of the premises. But the doctrine did not apply unless the property was unlivable. 5 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY at § 41.03(c).

351. SINGER & DAVIDSON, *supra* note 289, § 10.6.4, at 485-88.

352. Unif. Residential Landlord & Tenant Act (Unif. L. Comm'n 1972).

centuries, while obligating landlords to use their property in a manner that complies with mandated duties to the people they invited onto their land.

4. Beach Access

Public access to beaches for fishing and navigation purposes was extended to recreational uses in all states other than Massachusetts and Maine.[353] That change in the law limited the powers of seaside owners to exclude the general public from walking along the tidelands or swimming in the ocean. Traditional law (still in effect in Maine and Massachusetts) gave the public the right to use the tidelands for navigation and fishing purposes but not for recreation. States have expanded those access rights to include recreation, and Oregon and Hawai'i extend those rights even farther to the dry sand area up to the vegetation line.[354] The addition of recreational uses limited the right to exclude and created a public easement of access for that purpose.

5. Improving Trespasser (Relative Hardship Doctrine)

Traditional rules provide that a fixture built on land belongs to the landowner even if someone mistakenly builds a structure on land owned by another.[355] The owner has the right to exclude the builder under this legal rule. Tradition also has it that such a significant trespass can be remedied by making the builder pay to demolish the structure. In addition, the owner of the land owns the building constructed on it because it is a fixture.[356]

Modern cases, however, judge the appropriate result by reference to the relative hardship rule.[357] They impose an obligation on owners to notice that someone is building a structure on their land and hold them responsible for not stopping it from happening. When both sides make a

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353. *Compare* Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47, 54 (N.J. 1972), *and* Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 363 (N.J. 1984), *and* City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 75 (Fla. 1974) (public right to use tidelands for bathing and recreational purposes), *with* Bell v. Town of Wells, 557 A.2d 168, 180 (Me. 1989), *and* Opinion of the Justices, 313 N.E.2d 561, 567 (Mass. 1974), *and* Dep't of Nat. Res. v. Mayor & Council of Ocean City, 332 A.2d 630, 638 (Md. 1975); *Cf.* Gunderson v. State, 90 N.E.3d 1171, 1173 (Ind. 2018) (high water mark is the boundary between privately-owned riparian land and the public trust).

354. *See* SINGER & DAVIDSON, *supra* note 289, § 2.8, at 90–94; Diamond v. State, 145 P.3d 704, 712 (Haw. 2006); Application of Ashford, 440 P.2d 76, 77 (Haw. 1968); State *ex rel.* Thornton v. Hay, 462 P.2d 671, 677-78 (Or. 1969) (narrowed by McDonald v. Halvorson, 780 P.2d 714 (Or. 1989)).

355. *See, e.g.*, Rose Nulman Park Found. *ex rel.* Nulman v. Four Twenty Corp., 93 A.3d 25, 32-33 (R.I. 2014).

356. Banner v. U.S., 238 F.3d 1348 (Fed. Cir. 2001), *aff'g* 44 Fed. Cl. 568 (Fed. Cl. 1999) (Seneca Nation of Indians owns houses built on land leased from the tribe).

357. *See* SINGER & DAVIDSON, *supra* note 289, § 4.7.1, at 173; *See, e.g.*, Mannillo v. Gorski, 255 A.2d 258, 264 (N.J. 1969); Hoffman v. Bob Law, Inc., 888 N.W.2d 569 (S.D. 2016); Proctor v. Huntington, 238 P.3d 1117 (Wash. 2010); Somerville v. Jacobs, 170 S.E.2d 805 (W. Va. 1969).

mistake (the builder building on land of another and the landowner failing to stop visible construction), the courts abhor a waste of resources and will either order the landowner to sell the land at a reasonable price to the builder or to "purchase" the building either at its fair market value or its construction costs. The new equitable rules limit or deny the landowner the power to exclude the structure, and even perhaps the trespassing builder.

6. Punitive Damages for Trespass

A common law trespass occurs when one enters land of another without consent or other privilege.[358] If no damage is done to the land, then the victim can get nominal damages only.[359] More severe penalties may be imposed by criminal trespass statutes if one enters land knowing they are not allowed to be there or if they refuse to leave after being asked by the owner or possessor to do so.[360] However, an important case in Wisconsin authorized *punitive damages* for intentional trespass against the owner's express wishes in the amount of $100,000 even though the civil claim garnered only nominal damages of $1.[361] Whether this is consistent with due process is unclear, but it certainly seemed to be a change in the law. Previously, it had not been thought possible to get a punitive damages award when damages were only nominal, especially when the fine for criminal trespass was only $35.

C. Privilege to Use: Nuisance Law

Owners have the right to use their property as they see fit, but this privilege has always been limited not only by common law doctrines, like the doctrine of nuisance, but by statutes such as height and setback restrictions, use restrictions under zoning law, and environmental regulations designed to protect both other owners and the public in general. Dramatic changes have occurred over time in the scope of the privilege to use property.

1. Abolition of Ancient Lights Doctrine

To promote development of land, the United States rejected the English doctrine of "ancient lights."[362] There is no easement for light and air

358. SINGER & DAVIDSON, *supra* note 289§§ 2.1-2.3, at 26–43.

359. *Id.* § 2.2.1, at 30.

360. *Id.* § 2.2.1, at 31.

361. Jacque v. Steenberg Homes, Inc., 563 N.W.2d 154 (Wis. 1997).

362. BLACKSTONE, *supra* note 299, at *5 ("If a house or wall is erected so near to mine that it stops my ancient lights, which is a *private* nuisance, I may enter my neighbour's land, and peaceably

in the United States unless it is created by agreement between neighbors through an easement or covenant. One cannot acquire a view by prescription.[363] Although some early cases embraced the notion that one can stop a neighbor from building on their own land if you have enjoyed a view over their property for a long time,[364] that limitation on the right to build on one's land would have substantially limited the development rights of landowners—exactly the policy that the United States did not want. Statutes and case law rejecting the doctrine emerged over the course of the nineteenth century.[365] The rejection of the doctrine stripped owners of a right they had previously enjoyed under the common law inherited from England while enlarging their rights at the same time since they were free from lawsuits that might challenge their own liberties on their own land.

2. Nuisance Law: From Rural Peace to Industrial Development

Nuisance laws that protected owners from noxious uses changed over the course of the nineteenth century to pave the way for industrialization.[366] Courts were solicitous of "natural" land uses—by which they meant agricultural uses—and skeptical of more intensive "artificial" uses that disturbed the quiet enjoyment of neighbors. The law moved from a

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pull it down."); *id.* at *216 ("[T]o erect a house or other building so near to mine, that it obstructs my ancient lights and windows is a nuisance . . . ").

363. *See* Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So.2d 357 (Fla. Dist. Ct. App. 1959); W. VA. CODE §2-1-2 (West 2025) ("The common law of England in regard to ancient lights is not in force in this state."); 2 THOMAS, *supra* note 7, at 1167 ("During the 19th century . . . some aspects of English easement law were rejected, most notably the doctrine of 'ancient lights . . . '"); 1 THOMAS, THOMPSON ON REAL PROPERTY, *supra* note 9, at § 7.03 ("During the 19th century . . . some aspects of English easement law were rejected, notably the doctrine of 'ancient lights . . . .'"); 7 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 51.02(b) ("Although a few early American courts initially embraced the ancient lights doctrine, subsequent American courts unanimously repudiated this English doctrine."); *Compare* Turner v. Thompson, 58 Ga. 268, 271-72 (Ga. 1877) (repudiating the ancient lights doctrine), *with* Clawson v. Primrose, 4 Del. Ch. 643, 672 (Del. Ch. 1873) (accepting the ancient lights doctrine as binding law).

364. *See Clawson* 4 Del. Ch., at 672.

365. *See* BANNER, *supra* note 4, at 16–18 (describing the American rejection of the ancient lights doctrine).

366. MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860, at 74–78, 102–103 (1977); Morton J. Horwitz, *The Transformation in the Conception of Property in American Law, 1780–1860,* 40 U. CHI. L. REV. 248 (1973); *see* Joel Franklin Brenner, *Nuisance Law and the Industrial Revolution,* 3 J. LEGAL STUD. 403 (1974); Freyfogle, *supra* note 189, at 905–08; Paul M. Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor,* 17 WM. & MARY L. REV. 621 (1976); Jeff L. Lewin, *The Silent Revolution in West Virginia's Law of Nuisance,* 92 W. VA. L. REV. 235 (1990). *But see* Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,* 90 YALE L.J. 1717 (1981) (arguing that courts protected victims of industrial activity better than scholars have claimed, canvassing cases from California and New Hampshire).

seemingly absolute right to protection from neighboring noxious uses[367] to a balancing test that protected socially valuable uses like dams, mills or factories.[368] While English common law appears to have "imposed absolute liability for interference with the enjoyment of property,[369] that rule could not operate the same way if it were not to stop industrialization in its tracks.[370]

Nuisance law evolved to meet changing needs and conceptions of both liberty and property,[371] as evident in the famous *Boomer* decision which denied injunctive relief against a factory even though it was causing a nuisance.[372] So too did a Kentucky court argue that "[t]he law is made for the times, and will be made or modified by them," and railroads "should not, in themselves, be considered as nuisances, although, in ages that are gone, they might have been so held . . . ."[373]

3. Right to Farm Laws

In general, one cannot complain about a nuisance if one "came to the nuisance" by buying property near an existing facility.[374] At the same time, that is not, in general, a complete defense to a nuisance claim; rather, it is

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367. BLACKSTONE, *supra* note 299, at *216–17 (noting that nuisance "signifies any thing that worketh hurt, inconvenience, or damage" such as "an offensive trade . . . for though . . . lawful and necessary . . . yet they should be exercised in remote places.").

368. *See* Louise A. Halper, *Nuisance, Courts, and Markets in the New York Court of Appeals, 1850–1915,* 54 ALB. L. REV. 301, 306–328 (1990); Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future,* 54 ALB. L. REV. 189, 198–209 (1990); Lewin, *supra* note 366; D.M. Provine, *Balancing Pollution and Property Rights: A Comparison of the Development of English and American Nuisance Law,* 7 ANGLO-AM. L. REV. 31, 33, 45–48 (1978) (U.S. courts began to deny injunctive relief against factories, given their perceived social utility); *cf.* Brenner, *supra* note 366, at 408, 411 (finding that nuisance law in England was "applied differently to factories than to private individuals" and that courts began to consider the utility of the offending activity rather than just the nature of the harm); John P. S. McLaren, *Nuisance Law and the Industrial Revolution—Some Lessons from Social History,* 3 OXFORD J. LEGAL STUD. 155, 169–180 (1983) (until the 18th century, any non-trivial inconvenience caused by land use could be enjoined but social factors impeded claims against industrial polluters). For an argument that nuisance law became even more defendant-friendly in the second half of the twentieth century, see generally Jill M. Fraley, *The Uncompensated Takings of Nuisance Law,* 62 VILL. L. REV. 651 (2017).

369. Kurtz, *supra* note 366, at 622; *accord,* Cooper v. Randall, 53 Ill. 24, 26, 29 (1869) (any inconvenience caused by dust and dirt thrown onto plaintiff's property is a nuisance, no matter how slight).

370. Kurtz, *supra* note 366, at 623 ("If such injunctions were readily accessible to private persons, industrialization would have confronted a serious, if not insurmountable, obstacle.").

371. *See generally* Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920,* 59 S. CAL. L. REV. 1101 (1986); *see also id.* at 1105 (explaining that nuisance doctrine "varied across jurisdictions and within particular jurisdictions over time" from 1850 to 1920); Fraley, *supra* note 368, at 656-61 (showing how nuisance law changed in the 20th century); Halper, *supra* note 368 (explaining how nuisance law changed over time in New York in the late 19th century).

372. Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970); *see* Lewin, *supra* note 366.

373. Lexington & Ohio R.R. Co. v. Applegate, 38 Ky. (8 Dana) 289 (Ky. 1839).

374. SINGER & DAVIDSON, *supra* note 289§ 3.2.3, at 123–24.

a factor to be considered and given due weight.[375] However, after suffering lawsuits to shut down farm operations in the Midwest, many states passed "right to farm" laws that generally prohibit suing a farm for nuisance if farm operations were established before the complaining neighbors moved in.[376] Those laws effected a significant change in nuisance law. They gave farms immunity from suit for causing a nuisance even if they would have otherwise been liable for nuisance under the common law. That change was so significant that one court held it to be an unconstitutional taking of the vested right to sue for nuisance.[377] While that precedent has not been followed in other courts,[378] it does indicate the fact that property owners generally do have a right to quiet enjoyment of their property and stripping them of the right to sue for nuisance takes that property right away from them. Whether or not it is correct that right to farm laws are unconstitutional takings,[379] there is no doubt that right to farm laws were intended to, and did, effect an important change to nuisance law.

4. Zoning & Environmental Laws

Zoning and environmental laws in the twentieth century substantially limit freedom to develop one's own property to enable public control over neighborhood character and to preserve the natural environment needed for safety, comfort, ecological health, and food production. The Supreme Court approved zoning statutes in 1926 in *Village of Euclid v. Ambler Realty Co.*,[380] even though prohibiting industrial use and limiting an owner to residential uses caused a seventy-five percent decrease in the fair market value of the land.[381] In effect, the case held that a vested right cannot exist based on the mere purchase of the land; protection from retroactive limits on land use only applies to established developments.

While litigation has abounded claiming that limits on land development imposed by federal and state environmental laws are unconstitutional takings of property, the vast majority of these claims have failed. They have failed because regulation of land development to protect the

375. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (not an unconstitutional taking to prohibit operation of a brickyard even though the neighbors came to the nuisance).

376. Tiffany Dowell, *Understanding and Interpreting Right to Farm Laws,* 26 NAT. RES. & ENV'T 39, [PINCITE] (2011); Joseph Malanson, *Returning Right-to-Farm Laws to Their Roots,* 97 WASH. U. L. REV. 1577 (2020); Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound,* 73 N.Y.U. L. REV. 1694 (1998).

377. Bormann v. Bd. of Supervisors in & for Kossuth Cnty., 584 N.W.2d 309 (Iowa 1998).

378. *See* Terence J. Centner, *Governments and Unconstitutional Takings: When Do Right-to-Farm Laws Go Too Far,* 33 B.C. ENVT'L AFFS. L. REV. 87 (2006).

379. *See* SINGER & DAVIDSON, *supra* note 289§ 14.6.2, at 751–52 (reciting arguments on both sides of this question).

380. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

381. *Id.* at 384.

environment not only protects other landowners but also promotes public interest in preserving the environment within which landowners live, work, and thrive.[382]

5. Building & Housing Codes; Workplace Safety

As noted above, states have enacted both building[383] and housing codes[384] that regulate the construction of homes and other structures to ensure that they are safe and suitable for habitation.[385] Owners are not free to ignore these regulations when they build structures on their land and when they rent those structures to residential tenants. Contractors must be licensed in most states, and their work is often inspected at various stages to ensure it is done to code. Owners may not be legally free to occupy their buildings unless an occupancy permit is issued. These regulations limit the freedom to use your own property to ensure that construction is safe, environmentally sound, and that housing is habitable.

Similar safety-based regulatory regimes exist for workplaces and for businesses that serve the public, such as restaurants and grocery stores. Both federal and state laws regulate workplace safety, and consumers are protected by health inspections of places that store and sell foodstuffs. These regulations not only regulate land use but often make owners vulnerable to periodic inspections by public officials to ensure businesses are operating in a safe manner with respect to both employees and customers.

Cedar Point suggests that all these inspection systems under these laws can be understood to be legitimate obligations imposed in return for a government benefit in the form of permission to operate a facility that poses risks to the public.[386] That justification for these forced entries by strangers is hard to credit given that the labor access rule in *Cedar Point* itself could have been justified as a legitimate condition on employment

382. *See, e.g.*, Cobin v. Pollution Control Bd., 307 N.E.2d 191, 199 (Ill. App. Ct. 1974) (prohibition of open burning by pollution control board did not effect an unconstitutional taking of property); *cf.* Am. Vanguard Corp. v. U.S., 142 Fed. Cl. 320 (2019) (not an unconstitutional taking of property to stop a chemical manufacturer from marketing and selling harmful pesticides); Palazzolo v. State, 2005 WL 1645974 (R.I. Super. Ct. Jul. 5, 2005) (limit on development imposed by environmental law not a taking when it would have caused a public nuisance).

383. *See Short History of Codes, supra* note 343.

384. *See* Mood, *supra* note 344; *see, e.g.*, 105 MASS. CODE REGS. §§410.001-410.950, https://www.mass.gov/info-details/housing-code; *State Housing Codes,* NAT'L CTR. FOR HEALTHY HOUSING, https://nchh.org/information-and-evidence/healthy-housing-policy/state-and-local/healthy-housing-codes/by-state/ [https://perma.cc/C56W-QVZQ] (last visited Oct. 6, 2025).

385. On the potential negative effects of housing codes for neighborhoods when owners are financially unable to comply with them, see generally H. Laurence Ross, *Housing Code Enforcement and Urban Decline,* 6 J. AFFORDABLE HOUS. & CMTY. DEV. L. 29 (1996). *Contra* E. Carrington Boggan, *Housing Codes as a Means of Preventing Urban Blight: Constitutional Problems,* 6 WAKE FOREST INTRAMURAL L. REV. 255 (1970).

386. Cedar Point Nursery v. Hassid, 594 U.S. 139.

of farmworkers or operation of a farm. After all, laws promoting collective bargaining are designed to promote the public welfare by making it more likely that employees earn enough to live comfortable lives and to have workplaces that function well, thereby decreasing the need for social services and public subsidies like food stamps and the disruptions caused by labor unrest and strikes.

6. Fair Housing & Public Accommodation Laws

It may seem obvious that restaurant and hotel owners cannot refuse service because of race or religion, but the federal public accommodation law was only passed in 1964, about the same time as the union access law at issue in *Cedar Point*. The Fair Housing Act was passed only in 1968,[387] and the Americans with Disabilities Act was passed in 1990.[388] Sexual orientation and gender identity were added to state statutes only in the twenty-first century.[389] All these laws regulate uses of property that are either open to the public for business or devoted to residential purposes. We might add the employment discrimination laws that were also created in 1964 on the federal side.[390]

Antidiscrimination laws regulate the use of property and limit the powers of owners to exclude or segregate customers, employees, tenants, and home buyers for reasons that are deemed by legislatures to be irrelevant to the transactions or operations of the landowner. It is important to note that Jim Crow laws had the opposite effect in the sense that they denied the power to operate a racially integrated restaurant or hotel.

D. Immunity from Deprivation: Title & Possession

Owners keep their property unless they choose to sell or give it away. Owners are immune from dispossession, in general, absent an exercise of eminent domain by the government. But this immunity from seizure, loss, or deprivation has always had limits, and those limits developed—and changed—over time.

1. Aboriginal Title

It is ridiculously easy for many Americans to forget that Native nations were deprived of millions of acres of land, and that those lands were redistributed from those Native nations to non-Native settlers. Almost all lands in the United States were taken from Native nations, sometimes

387. 42 U.S.C. §§ 3601–3631.

388. 42 U.S.C. §§ 12101–12213.

389. *See* Joseph William Singer, *Shopping While Queer: Public Accommodations Law after* Masterpiece Cakeshop *and* 303 Creative, 57 SUFFOLK U. L. REV. 493 (2025).

390. 42 U.S.C. §§2000e to 2000e-17.

voluntarily in treaties that served the interests of both sides, but often in one-sided deals that were more akin to eminent domain. Forced redistribution of land is the basis for most current land titles in the United States. Moreover, the compensation paid to tribes was so inadequate that Congress passed a reparations law in 1946 that authorized a federal agency, the Indian Claims Commission, to award tribes compensation for the inadequate amounts originally paid to them.[391]

An analysis of United States law and policy regarding tribal lands would fill a book, but what matters here is that most land titles in the United States originate in the *dispossession* of Native nations and the *redistribution* of lands from Tribes to non-Native settlers or—to be less polite about it—colonial invaders. Nor was this dispossession an act that magically happened at some point before the Founding; the process of dispossession involved multiple statutes, treaties, and administrative interventions that only ended in the 1970s. And even after that date, federal law involves management of tribal lands in ways that continue to deny full agency to tribal owners.

2. Recording Statutes

The Middlesex County Registry of Deeds in the Commonwealth of Massachusetts was established in 1649.[392] We take such registries for granted and may forget how profoundly they changed property rights from the English model. If A sells a plot of land to B and then to C, B wins in any contest over title with C under the common law doctrine of "first in time, first in right." Recording statutes change this if C records the deed from A before B records B's deed if C was not on notice of the prior transfer. That allows A to dispossess B, relegating B to a suit for damages against A for fraud. Recording acts change the common law by making buyers vulnerable to dispossession if they do not record their deeds and by giving sellers powers to engage in sometimes nefarious acts, i.e., going back on their word by selling the same property twice. There are policy reasons to have recording systems; if people abide by them, they make title more secure and create public notice of land transactions. But we cannot forget that they may empower prior owners to dispossess current owners who do not comply with the regulations.

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391. Indian Claims Commission Act, Pub. L. No. 79-726, 60 Stat. 1049 (1946) (codified at 28 U.S.C. § 1505, 25 U.S.C. § 70 *et seq*.) (omitted from 25 U.S.C. § 70 upon termination of Commission in 1978).

392. Middlesex County Registry of Deeds, https://massrods.com/middlesexsouth/history-2/ [https://perma.cc/L5TL-QX62] (last visited Oct. 6, 2025).

3. Adverse Possession

While England had a twenty-year period for adverse possession beginning in 1623,[393] some U.S. states adopted time periods of as little as three to seven years during the nineteenth century. Many adopted ten-to-fifteen-year periods, and some chose much longer periods.[394] In general, most states allowed adverse possession in less than twenty years, repudiating the English tradition. The relatively shorter periods in the states had the effect of promoting the use and occupation of lands by stripping absentee owners of title, thereby facilitating both settlement and development.

Time periods for adverse possession have both lengthened and shortened over time,[395] and there remain extreme variations among the states. Seven states have short five-to-seven-year periods;[396] the majority have ten- or fifteen-year periods;[397] a sizable group has twenty years or more.[398] In recent years a number of states have passed statutes or issued court rulings denying adverse possession unless the possession was in good faith,

393. William F. Walsh, *Title by Adverse Possession,* 16 N.Y.U. L. Q. REV. 532-33 (1939). The period remained at twenty years in England until 1874 when it was reduced to twelve years. *Id.* at 533.

394. *See* Itzchak Tzachi Raz, *Use It or Lose It: Adverse Possession and Economic Development* 58-64 (J. ECON. HIST., Working Paper, 2018), https://scholar.harvard.edu/files/iraz/files/Raz_UILI.pdf. States with shorter statutory periods were: Arizona 1864 (5 years, later expanded to 10 years); Colorado 1859 (6 years, expanded to 7 years in 1893); Montana 1865 (3 years, expanded to 10 years in 1895); North Carolina 1837 (7 years); South Carolina 1712 (5 to 7 years, expanded to 10 years in 1824); while states with longer periods were Florida 1828 (20 years, reduced to 7 years in 1872); Kentucky 1796 (20 years, in 1852 adopted 15 years without title and 7 years with title); Michigan 1820 (20 years, reduced to 15 years in 1864); Mississippi 1822 (20 years, reduced to 10 years in 1844); Missouri 1835 (20 years, reduced to 10 years in 1847); Oregon 1862 (20 years, reduced to 10 years in 1878); Rhode Island 1844 (20 years, reduced to 10 years in 1912); Washington 1854 (20 years, reduced to 7 years in 1893); Many states were in the middle (ten to fifteen years) but still less than the twenty-year English period. Arkansas 1838 (10 years, reduced to 7 years in 1851); Kansas (10 years, increased to 15 years in 1868); West Virginia 1831 (15 years). Some states had very long statutes of limitation: Alabama (30 years, reduced to 10 years in 1852); New Jersey 1787 (60 years, reduced to 30 years in 1922, except for woodlands or uncultivated tracts).

395. *Id.*

396. Five years (California, Idaho, Montana); seven years (Arkansas, Florida, Tennessee, Utah). *See* 10 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY §87.01.

397. Ten years (Alabama, Alaska, Arizona, Indiana, Louisiana, Mississippi, Missouri, Nebraska, New Mexico, New York, Oregon, Rhode Island, South Carolina, Texas, Washington, West Virginia, Wyoming); fifteen years (Connecticut, Kansas, Kentucky, Michigan, Minnesota, Nevada, Oklahoma, Vermont, Virginia). *Id.*

398. Twenty years (Delaware, Georgia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, New Hampshire, North Carolina, North Dakota, South Dakota, Wisconsin); twenty-one years (Ohio, Pennsylvania); thirty years (New Jersey); forty years (Iowa); and a whopping 118 years (Colorado). *Id.*

meaning the possessor had no knowledge of the fact that they were trespassing on land of another.[399]

Changes in adverse possession law affect both title holders and adverse possessors, altering both their powers and their vulnerabilities. While some changes made title holders more vulnerable to loss of their lands, others inhibited adverse possession and may have the effect of destroying the expectations of longstanding possessors. While students tend to view adverse possession as enabling land theft, its normal operations either protect those who have color of title to land or who have mistakenly placed borders in the wrong location. Adverse possession law protects established expectations better than rigid adherence to deed descriptions or title documents. Both courts and legislatures have changed or reinterpreted the elements needed to acquire land by adverse possession based on views about legitimate expectations and the legitimate obligations that owners have to provide notice to others when they occupy their property.

4. Acquiescence

You might think that adverse possession doctrine would be sufficient to protect the rights of longstanding possessors of land who inadvertently (or even intentionally) occupy lands belonging to others, usually because they mistakenly placed the border in the wrong location. But the courts have thought otherwise. Even if the time period for the statute of limitations has not passed, courts have moved borders between neighboring plots based on a variety of equitable doctrines that set the borders where the owners have recognized them for a significant period of time. Courts have recognized *oral agreement* on where the border is as an exception to the statute of frauds and have also *estopped* owners from denying that the border is in the right place if they made representations on which their neighbor relied.[400] But some courts have also set borders based on

399. *See, e.g.*, Carpenter v. Ruperto, 315 N.W.2d 782, 786 (Iowa 1982); ALASKA STAT. § 09.45.052 (2024); COLO. REV. STAT. § 38-41-101(3)(b)(II) (2024); GA. CODE ANN. §§ 44-5-161 to 44-5-162 (West 2024); N.M. STAT. ANN. § 37-1-22 (West 2024); N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2008); OR. REV. STAT. ANN. § 105.620(1)(b) (West 2025).

400. SINGER & DAVIDSON, *supra* note 289 § 4.7.3, at 174–75 (oral agreement); *id.* § 4.7.5, at 175 (estoppel). *See* Suitzgable v. Worseldine, 15 P. 144, 145 (Utah 1887) (recognizing the doctrine "that boundary lines long acquiesced in conclusively establish that they are the true boundaries . . . ."); *accord* Mayes v. Massery, 2005 WL 605611, at *3 (Ark. Ct. App. Mar. 16, 2005) ("When adjoining landowners silently acquiesce for many years in the location of a fence as the visible evidence of the division line and thus apparently consent to that line, the fence becomes the boundary by acquiescence."); Beitner v. Marzahl, 819 N.E.2d 1266, 1272 (Ill. App. Ct. 2004). An increasing number of states have passed statutes substituting a fixed time period for "a long period of time." *See, e.g.*, Saunders v. Snyder-Johnson, 987 N.W.2d 451 (Table), 2022 WL 3069836, at *3 (Iowa Ct. App. Aug. 3, 2022) (applying Iowa Code § 650.14, which requires 10 years of acquiescence to recognize a boundary line).

longstanding acquiescence even if the statute of limitations for adverse possession has not yet run and even if no one made representations of any kind.[401]

5. Statute of Fraud and Its Exceptions

Over time, courts created exceptions to state statutes of frauds, such as the promissory estoppel doctrine for land sale contracts[402] and equitable border adjustment doctrines (oral agreement, acquiescence, estoppel).[403] Those who reasonably rely on promises to sell land may be given a right to complete the purchase even if they do not have a writing that would satisfy the local statute of frauds. And borders adjust even if the requirements for adverse possession have not been met when the evidence is overwhelming that the parties have informally set a new border. While application of these doctrines is not uniform, and they seem to involve judicial nullification of a crystal-clear statute requiring a writing to transfer interests in real estate, they were developed over time by judges in light of disputes that presented strong cases for assigning title to the right person *even though they were not the title holder.*

6. Married Women's Property & Tenancy by the Entirety

In the middle of the nineteenth century, most states stripped husbands of the powers they previously enjoyed in controlling the property of their wives. Married Women's Property Acts gave control over property to the actual owners; women could now control their own property.[404] An even more dramatic change occurred in the mid-twentieth century when separate property states passed equitable distribution statutes, effectively adopting a community property system on the occasion of divorce. These statutes stripped husbands of title to their lands and personal property by distributing portions of it to their wives even though those wives were not the title holders to the property or had any role in paying for it.[405] There were, of course, limits to the ability of these statutes to improve the economic condition of women or their autonomy in the home, but they nonetheless should be seen as monumental alterations in property rights that redistributed property from husbands to wives without compensation.

While it is true that there has always been regulation of marital property, these laws represented revolutionary changes in the legal position of married women that not only increased their access to property but

401. *Id.* § 4.74., at 175.
402. SINGER & DAVIDSON, *supra* note 289 § 11.3.2, at 511–12.
403. *Id.* §§ 4.7.3-4.7.5, at 174–75.
404. *Id.* § 9.2.2, at 399–401.
405. *Id.* § 9.3.1, at 401–05.

imposed vulnerabilities on husbands who lost property rights they previously had. Moreover, both types of laws were imposed in a retroactive manner, perhaps on the ground that marital property has always been highly regulated, but perhaps also on the ground that prior law denied women ownership of property to which they should have been entitled had they not been denied equal protection of law.[406]

Originally, the tenancy by the entirety was a form of co-ownership of property by husbands and wives which gave the husband sole management powers over the property.[407] Given the gender inequity in the traditional rule, states changed the law to allow co-management by both owners, and a state law rule to the contrary was held to be unconstitutional as a violation of equal protection of law in the case of *Kirchberg v. Feenstra* as recently as 1981.[408]

7. Equitable Distribution Statutes

Before the 1960s, no fault divorce existed only in Nevada, and states that had "separate property" systems gave married women no rights in property earned by their husband either during marriage or on divorce.[409] The sole remedy on divorce was alimony. But the entry of millions of women to the workforce and feminist ideas led to the notion that women contribute equally to the marital community and thus deserve a portion of the property earned during marriage if the couple gets divorced.[410] Those statutes retained alimony but made it temporary (in most cases) so as to disentangle the couple rather than having years of litigation over alimony payments. As a counterweight to making alimony exceptional, the separate property states gave women rights to a significant portion of property earned during the marriage.

Equitable distribution states, at the point of divorce, redistributed title to property from one married partner to the other (generally from the husband to the wife) and assigned ownership of property regardless of who held the title. The statutes were justified by the notion that marital property had always been heavily regulated, that women who work at home deserve to be treated as equal partners with their husbands, and because of the

406. *See, e.g.*, Kirchberg v. Feenstra, 450 U.S. 455 (1981) (state giving husbands control over property jointly owned by the spouses violates the equal protection clause).

407. 4 DAVID A. THOMAS, THOMPSON ON REAL PROPERTY § 33.05 ("Despite the fact that the title [by the entirety] was in husband and wife together, the common law accorded the husband all the powers of dominion and control over the property . . . .").

408. Kirchberg v. Feenstra, 450 U.S. 455, 459-61 (1981).

409. *See* Jane J. Felton & Barbara A. Schweiger, *Toward a More Perfect Dissolution: The History of American Divorce Law and Its Ghosts in Contemporary Practice,* 37 J. AM. ACAD. MATRIMONIAL LAW 501 (2025).

410. *See* Emily J. Stolzenberg, *Nonconsensual Family Obligations,* 48 BYU L. REV. 625 (2022).

fundamental unfairness of denying married women any economic benefits from the marital partnership at termination.

8. Conflicting Property Rights: Safety and Welfare

Property is legally vulnerable to destruction when necessary to protect the property or lives of others. That is the case when a building is demolished to stop the spread of a fire[411] or cedar trees are destroyed to protect the apple industry.[412] It also occurs when police injure or destroy property in the course of apprehending a suspect.[413] It is also the case when something that would not have been recognized as a nuisance becomes so when science learns how it harms human beings.[414] The same is true when smoking became known to be harmful such that it might constitute a nuisance for one condo owner to smoke in her unit in a way that spreads smoke to neighboring owners.[415] And even though the common law does not impose a duty to support structures on neighboring land, building codes generally prohibit any excavation that harms neighboring buildings.[416] When it comes to the attention of the courts that a particular exercise of a property right harms the property rights of others, courts (and legislatures) use their judgment to determine who should prevail, and they do that based on notions of social policy and fairness, not the rules in force in 1791 or 1868.

9. Leasehold Law: Warranty of Habitability & Just Cause Eviction

Landlords were stripped of the right to evict tenants who are not paying rent if those tenants stopped paying because the landlord failed to correct housing code violations or to remedy other serious habitability issues after being made aware of the problem(s). We earlier noted the way the warranty of habitability regulates land use; here we can see that the landlord's immunity from forced occupation of his property by a tenant who refuses to pay rent has been partially abrogated in order to promote compliance with the housing code when the implied warranty works to enable

411. *See*, *e.g.*, Bowditch v. City of Boston, 101 U.S. 16 (1879).

412. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928).

413. SINGER & DAVIDSON, *supra* note 289 § 14.5.1, at 715–16.

414. *See, e.g.*, Wood v. Picillo, 443 A.2d 1244 (R.I. 1982) (holding that disposal of toxic waste constituted a common law nuisance).

415. UTAH CODE ANN. § 78B-6-1101(3) (West 2024) ("A nuisance under this part includes tobacco smoke that drifts into a residential unit a person rents, leases, or owns, from another residential or commercial unit . . . .").

416. *See, e.g.*, JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 434–35 (8th ed. 2022) (Massachusetts state building code require landowners to protect adjoining structures during construction work).

tenants to stay in their homes even if they have stopped paying rent. And recently, a number of states have joined New Jersey and the District of Columbia in prohibiting eviction of tenants without just cause.[417]

10. Easements by Necessity

Private eminent domain has been allowed in some states to ensure that owners have access to a public road. Statutes allow owners to sue a neighbor to obtain an easement by necessity.[418] Other states recognize that doctrine under the common law by prohibiting owners from selling landlocked parcels.[419] Owners have a nondisclaimable right to travel over remaining lands of the grantor to reach a public road if their lot is otherwise landlocked.

11. Redistribution to Spread Access to Property

Property is forcibly redistributed when needed to promote widespread access to it. As I have noted, the biggest redistribution program was the seizure of tribal lands through (often coerced) treaties for transfer to non-Native settlers. But a forced redistribution also occurred in Pullman, Illinois when a company was required to sell off its property so that those living there could own their own homes and business.[420] A massive redistribution occurred in Hawai‘i when a state law required redistribution of lands from landlords to tenants to create a real estate market.[421]

12. Antitrust Law

Businesses that have been held to be monopolies have sometimes been required to sell off parts of the business to comply with antitrust laws.[422]

13. Debtor/Creditor Law

Professor Claire Priest has shown that the abolition of the fee tail was only partly about rejection of "aristocratic" property rights. It was also an

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417. *See, e.g.*, D.C. CODE § 42-3505.01 (2024); N.J. STAT. ANN. §§ 2A:18-53, 2A:18-61.1 (West 2025); *See also* CAL. CIV. CODE § 1946.2 (West 2024); N.H. REV. STAT. ANN. § 540:2 (2025); N.Y. REAL PROP. LAW § 216 (McKinney 2024); OR. REV. STAT. § 90.427(4) (2019).

418. SINGER & DAVIDSON, *supra* note 289 § 5.4.4, at 214-17. *See*, *e.g.*, ALA. CODE § 18-3-20 (2025); ARK. CODE ANN. § 27-66-401 (2013); FLA. STAT. § 704.01(2) (2005); MISS. CODE ANN. § 65-7-201 (West 2025); OR. REV. STAT. ANN. § 376.150-376.175 (2025); WASH. REV. CODE § 8.24.010 (West 2025).

419. *See* SINGER & DAVIDSON, *supra* note 289 § 5.4.4, at 215–16.

420. People *ex rel.* Moloney v. Pullman's Palace-Car Co., 51 N.E. 664 (Ill. 1898).

421. Hawai‘i Housing Authority v. Midkiff, 467 U.S. 229, 245 (1984).

422. *Cf.* U.S. v. Google, LLC 747 F. Supp. 3d 1 (D.D.C. 2024) (finding Google to have created a monopoly in the online search services market).

effort to make lands available to be reached to pay off debts. Entailed land could not be sold in fee simple to obtain funds to pay creditors, so making it possible to "bar the entail" removed a shelter that debtors had while increasing the power of creditors to recover unpaid debts by the forced sale of lands.[423]

14. Forced Pooling of Fossil Fuels

Property law gives landowners rights to oil and gas lying beneath their properties, and the right to exclude would seem to give them the power to refuse to exploit those resources if they wish. However, most states have adopted "forced pooling" statutes that allow oil and gas producers to extract certain minerals underlying the lands of non-consenting landowners when the oil and gas are part of a "common pool."[424] Initially, the "capture rule" empowered owners to drill on their own lands and withdraw oil and gas even if some of it was "captured" from beneath neighboring lands. That rule gave an incentive to owners to race to withdraw the minerals as fast as possible lest they lose them to a driller on someone else's land who got there first. That led to inefficient spacing and waste of the minerals and could, in extreme cases, make it impossible to withdraw oil and gas that remained below the land.

To respond to that problem, states regulated the withdrawal of minerals, regulating the spacing of wells and the amounts that could be withdrawn to avoid waste. Those laws effectively adopted a version of the "correlative rights" system based on the notion that each surface owner had the right to exploit the minerals beneath their property and each should have a reasonable chance to do so. That created a "holdout problem" where individual owners might refuse to consent to have "their" oil or gas taken without their consent or compensation they deemed adequate. Companies seek to get landowners' permission to drill on or beneath their lands, but if the landowners refuse to agree to the lease, the companies can use a statutory process to mine those minerals without the consent of the surface owner when the minerals are in a common pool. The regulations require paying the owner some set amount for the right to withdraw and sell the oil and gas beneath their lands, which effectively constitutes a forced sale of the owner's rights in the minerals.

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423. *See* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA (2021); Claire Priest, *The End of Entail: Information, Institutions, and Slavery in the American Revolutionary Period,* 33 L. & HIST. REV. 277 (2015).

424. Frank Sylvester & Robert W. Malmsheimer, *Oil and Gas Spacing and Forced Pooling Requirements: How States Balance Energy Development and Landowner Rights,* 40 U. DAYTON L. REV. 47 (2015); Kevin J. Lynch, *Forced Pooling: The Unconstitutional Taking of Private Property,* 75 UC L.J. 1335 (2024).

That means that many states evolved from a capture rule to a correlative rights rule to a forced pooling rule. This reshuffling of rights occurred because of social needs to exploit energy resources and the ways those perceived needs altered conception of individual property rights. Ordinarily, one would think that the law would prohibit a forced sale of someone's land, but in this instance, the traditional immunity from nonconsensual seizure has given way to a policy objective to make it less costly and cumbersome to exploit energy resources and deny owners' rights to prevent that from happening.

E. Power to Transfer: Conveyances & Estates in Land

Most property law rules concern the allowable "estates in land," or packages of property rights that are recognized and valid and which invalidate or void certain interests as incompatible with the values of a free and democratic society that respects individual rights.

1. Fee Tail, Quit-Rents, & Primogeniture

As explained above, early on, states abolished or reformed fee tail interests in real property,[425] quit-rents,[426] and primogeniture.[427] Statutes allowed conversion of fee tail interests into fee simple interests, while quit-rents disappeared over time or were formally abolished after Independence, and intestacy statutes provided for equal inheritance among children, including daughters, rather than giving everything to the oldest son (primogeniture). Each of these changes modernized property law to be consistent with the anti-feudal policies that animated the new nation. Some were real innovations, like the abolition of quit-rents and primogeniture. Others, like the abolition of the fee tail, adopted current English laws which had not previously extended to the colonies and perpetuated or

425. *See* PRIEST, CREDIT NATION, *supra* note 423, at 138–141; Priest, *The End of the Entail*, *supra* note 423*; see also* Young v. Robinson, 5 N.J.L. 689, 696 (N.J. 1819) (lawyer argument describing the fee tail as a remnant of the "abominable system of feudal slavery"); *see also* BANNER, *supra* note 4, at 14–15 (describing the ideological and pragmatic reasons the fee tail "vanished shortly after independence").

426. *See generally* BOND, *supra* note 194.

427. *See, e.g.*, *Georgia Constitution Abolishes Primogeniture and Entail,* HISTORY (May 28, 2009), https://www.history.com/this-day-in-history/georgia-constitution-abolishes-primogeniture-and-entail [https://perma.cc/55S5-P4HS] (Georgia Constitution of 1777 first to abolish primogeniture). Maryland abolished primogeniture in 1786. *Understanding Maryland Records: Inheritance of Property,* MD. STATE ARCHIVES, GUIDE TO GOV'T RECORDS, https://guide.msa.maryland.gov/pages/viewer.aspx?page=inheritanceproperty; *See also* Donna J. Spindel, *Primogeniture,* NCPEDIA (2006), https://www.ncpedia.org/primogeniture (all states had abolished primogeniture by the end of the eighteenth century); BANNER, *supra* note 4, at 13 ("Shortly after independence, all seven states with primogeniture abandoned it."); FRIEDMAN, *supra* note 269, at 221 (describing the abolition of primogeniture in the early Republic).

empowered feudal interests. The fee tail had long been moribund in England because methods had been created to "bar the entail," but those English methods did not apply in the colonies.[428] Abolishing the fee tail modernized U.S. property law by abolishing a "feudal" doctrine that had already been marginalized in England.[429]

2. No New Estates (*Numerus Clausus* Principle)

While on the Supreme Judicial Court of the Commonwealth of Massachusetts, Justice Oliver Wendell Holmes, Jr. wrote the 1893 opinion in *Johnson v. Whiton.*[430] That case involved a will that left property to Sarah A. Whiton "and her heirs on her father's side."[431] What estate in land did she possess? Holmes began by assuming that the words in question were "words of limitation and not words of purchase."[432] They did not describe who got title but the quality of the title, i.e., what kind of property interest Whiton inherited.

Holmes then explained that this type of property interest would have been perfectly comprehensible under traditional English law associated with the primogeniture system designed to keep land in the family. The English intestacy statute allowed inheritance only by "the blood of the first purchaser," there, Whiton's grandfather. But, Holmes noted, the United States rejected the primogeniture system and allowed inheritance to flow from the decedent, not the decedent's ancestors.[433] To allow a fee simple to be limited to heirs on one side would resurrect a defunct English property system. That system was favorable to the preservation of manorial estates, while the American system spread title among descendants, effectively democratizing and spreading ownership of land.

To approve an "estate descending only to heirs on the father's side [would be] a new kind of inheritance."[434] The problem was not really that it was new but that it was old, and that it would limit the powers of Whiton to convey a fee simple interest in land or to leave such an interest in her will. Recognizing a limitation on who could own the land would, Holmes

428. Priest, *The End of Entail*, *supra* note 423, at 296.

429. Professor Claire Priest has found that an even more profound motivation for getting rid of the fee tail was to empower creditors to seize land to pay off debts, and that slave states had even greater motivations in this regard than free states. Priest, *End of the Entail, supra* note 423, at 281–82. Whatever the reason, the change in property law represented by the reform or abolition of the fee tail stands as an important instance of change in property law both at the Founding and over the course of the nineteenth century.

430. Johnson v. Whiton, 34 N.E. 542 (Mass. 1893).

431. *Id.* at 542.

432. *Id.*

433. *Id.* ("But our statute of descent looks no further than the person himself who died seised of or entitled to the estate.").

434. *Id.*

argued, impede the "alienability" of the land that would "impose such a qualification upon a fee, and to put it out of the power of the owners to give a clear title for generations."[435] And just as the Massachusetts legislature had abolished the fee tail,[436] "[i]t is not too much to say that it would be plainly contrary to the policy of the law of Massachusetts to deny the power of Sarah A. Whiton to convey an unqualified fee."[437]

The case perfectly illustrates the effect that the American rejection of feudal property rights had on the interpretation and validity of interests in real property. The "estates system" limits the types of future interests owners can create by requiring property rights to fit into a small list of established packages or "estates." We have the fee simple absolute, defeasible fees, life estates, trusts, mortgages, and tenancies. Over time other "estates" have been recognized like installment land contracts, condominiums, homeowners' associations, joint tenancy, tenancy in common, and tenancy by the entirety. But the policy decision to shape property law to consolidate powers in current owners rather than enforcing limitations that take property out of the market reverberate intensely in historical and modern property law cases.

When a personal contract is involved, courts give the parties great freedom to shape the terms of their arrangement, and ambiguities are resolved by looking to the intent of the parties. When ambiguities arise in the property area, in contrast, courts do look to the intent of the grantor but not to find out exactly what the grantor intended to do, but *what estate the grantor intended to create.* Today, courts interpret ambiguous conveyances or wills by figuring out which package of approved rights is closest to what the grantor intended to create.[438] Older cases do not even focus on the grantor's intent at all; they adopt a *presumption against forfeitures.*[439] If the language is ambiguous, the courts adopt the interpretation least likely to result in a loss of title to the present estate owner. A covenant is preferred over a future interest; a fee simple subject to condition subsequent is preferred over a fee simple determinable; a defeasible fee is preferred to a life estate, etc.[440] Although the rule against "new estates" is an old one, it has been repeatedly interpreted over history to ensure that property rights are (generally) transferable in the marketplace and that current owners are not unduly limited by the whims of owners from the distant

435. *Id.*

436. *Id.*

437. *Id.*

438. *See, e.g.*, Edwards v. Bradley, 315 S.E.2d 196 (Va. 1984) (interpreting an ambiguous conveyance to achieve the grantor's intent of protecting the property from creditors).

439. Wood v. Bd. of Cnty. Comm'rs, 759 P.2d 1250, 1253 (Wyo. 1988) (applying the presumption against forfeitures to prefer a fee simple over a defeasible fee).

440. SINGER, BERGER, DAVIDSON & PEÑALVER, *supra* note 416, at 777–78.

past. The same is true of covenants which only run with the land if that is appropriate and if they do not violate public policy.[441]

3. Private Transfer Fees

We have noted how the states abolished feudal rights, and that this included the quarter-sale provisions in New York "leases in fee." A modern version of the same thing is the *private transfer fee* which has now been abolished or heavily regulated in 43 states, with New York being the most recent to abolish it.[442] Private transfer fees are payments owed to a prior seller whenever the property changes hands. They resemble feudal incidents, and they burden ownership with a perpetual obligation to an "absentee lord" when the property is sold. They arguably burden alienability and are viewed by many states as incompatible with a fee simple interest in land.[443] At the same time, some states have allowed private transfer fees created in the past to continue to be enforceable, although

441. *Id.* at 619–680.

442. N.Y. REAL PROP. LAW § 471 (McKinney 2025). *See* ALA. CODE § 35-4-432 (2025); ARIZ. REV. STAT. ANN.§ 33-442 (2025); ARK. CODE ANN.§ 18-12-107 (West 2025); CAL. CIV. CODE § 1098.6 (West 2025); COLO. REV. STAT. § 38-35-127 (2025); CONN. GEN. STAT. ANN. § 47-17A (West 2025); DEL. CODE ANN. tit. 25, § 319 (West 2025); FLA. STAT. ANN. § 689.28 (West 2025); GA. CODE ANN. § 44-14-15 (West 2025); HAW. REV. STAT. ANN. § 502-112 (West 2025); IDAHO CODE ANN. § 55-3101 (West 2025); 765 ILL. COMP. STAT. ANN. § 155/5 (West 2025); IND. CODE ANN. § 32-21-14-4 (West 2025); IOWA CODE ANN. § 558.48 (West 2025); KAN. STAT. ANN. § 58-3821 (West 2025); KY. REV. STAT. ANN. § 382.794 (West 2025); LA. STAT. ANN. §§ 9:3131, 9:3133 (West 2025); ME. STAT. tit. 33, § 163 (2025); MD. CODE ANN., REAL PROP. § 10-708 (West 2025); MICH. COMP. LAWS ANN. §§ 565.882, 565.892 (West 2025); MINN. STAT. ANN. §513.74 (West 2025); MISS. CODE ANN. § 89-1-69 (West 2025); MO. ANN. STAT. § 442.558 (West 2025); MONT. CODE ANN. § 70-17-212 (West 2025); NEB. REV. STAT. ANN. § 76-3109 (West 2025); NEV. REV. STAT. ANN. § 111-865 (West 2025); N.J. STAT. ANN. §§ 46:3-28, 46:3-30 (West 2025); N.C. GEN. STAT. ANN. § 39A-3 (West 2025); N.D. CENT. CODE ANN. § 47-33-02 (West 2025); OHIO REV. CODE ANN. § 5301.057 (West 2025); OKLA. STAT. ANN. tit. 60, § 350 (West 2025); OR. REV. STAT. ANN. § 93.269 (West 2025); 68 PA. STAT. AND CONS. STAT. § 8104 (West 2025); 34 R.I. GEN. LAWS ANN. § 34-11-42 (West 2025); S.C. CODE ANN. § 27-1-70 (2025); S.D. CODIFIED LAWS § 43-4-49 (2025); TENN. CODE ANN. § 66-37-104 (West 2025); TEX. PROP. CODE ANN. § 5.202 (West 2025); UTAH CODE ANN. § 57-1-46 (West 2025); VA. CODE ANN. § 55.1-358 (West 2025); WASH. REV. CODE ANN. § 64.60.020 (West 2025); WYO. STAT. ANN. § 34-28-102 (West 2025).

443. For analysis of private transfer fees, see generally R. Wilson Freyermuth, *Private Transfer Fee Covenants: Cleaning Up the Mess,* 45 REAL PROP. TR. & EST. L.J. 419 (2010); R. Wilson Freyermuth, *Putting the Brakes on Private Transfer Fee Covenants,* 24 PROB. & PROP. 20 (2010); Amy Kathleen Lewis, *Developing Disaster: How Developers Are Using a Covenant to Steal from Homeowners and Why the States Should Stop Them,* 64 OKLA. L. REV. 377 (2012). *But see* Burke T. Ward & Jamie P. Hopkins, *Private Transfer Fees: Developer Exploitation or Legitimate Financing Vehicle,* 56 VILL. L. REV. 901, 911–15 (2012) (defending private transfer fees and arguing that they are not an unreasonable restraint on alienation).

sometimes limited by regulations imposing notice obligations so that buyers are aware of these fees before they purchase.[444]

In my view, courts could have struck down these fees under the reasoning of *De Peyster v. Michael*[445] as incompatible with allodial property and a relic of feudalism. Such a common law ruling would have been consistent with the *numerus clausus* principle (no new estates in land). It is important to note that some of the statutes that regulate private transfer fees apply retroactively, invalidating private transfer fees created in past deeds, even though, in doing so, they "take" the beneficiary's property rights in the covenant that created those fee obligations.[446] Many statutes abolishing private transfer fees provide that the covenants will not run with the land,[447] but they may be ambiguous as to whether fees created before the effective date of the statute are valid.[448]

My view is that these fees should have been invalid under the common law as unreasonable restraints on alienation, so invalidating previously created private transfer fees retroactively should not have caused a regulatory takings problem.[449] Moreover, these covenants do not "touch and concern the land" as traditionally required because the benefit of the covenant is held "in gross" and there is no landowner that benefits from the restriction.[450] Whether or not one thinks private transfer fees are a good idea, they are an example of an attempt to create a new property right that many state legislatures thought inhibited the alienability of land and saddled owners with obligations they should not have. Because private

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444. *See, e.g.*, Covenant Clearinghouse, LLC v. Kush & Krishna, LLC, 607 S.W.3d 855 (Tex. Ct. App. 2020) (applying a state notice requirement to a private transfer fee case); Marina Pacifica Homeowners Ass'n v. S. Cal. Fin. Corp., 217 Cal. Rptr. 3d 474 (2017) (enforcing transfer fees that complied with statutory notice requirements).

445. De Peyster v. Michael, 6 N.Y. 467, 488–89 (N.Y. Ct. App. 1852).

446. *See, e.g.*, ALA. CODE § 35-4-430 (2025) (providing that the covenant will not run with the land, retroactively abolishing the obligation when the property is sold).

447. *See, e.g.*, N.J. REV. STAT. § 46:3:28 (2010) ("[A] private transfer fee obligation shall not run with the title to property or bind subsequent owners of property under common law or equitable principles.").

448. *See, e.g.*, N.J. REV. STAT. § 46:3-30 (2010) ("This section shall not apply to a private transfer fee obligation recorded or entered into in this State before the effective date of [the enactment of the 2010 New Jersey Session Law Service, ch.102, assembly 2861]. This subsection does not mean that a private transfer fee obligation recorded or entered into in this State before the effective date of [the same] is presumed valid and enforceable."); *see* Ward & Hopkins, *supra* note 443, at 921–22 (describing three state regulatory approaches to private transfer fee covenants, all of which apply prospectively); *Cf.* FLA. STAT. ANN. § 689.28(3) (West 2008) (invalidating only private transfer fees created after the effective date of the statute: "[t]his subsection does not mean that transfer fee covenants or liens recorded in this state before July 1, 2008 are presumed valid and enforceable.").

449. *Accord* Freyermuth, *Putting the Brakes, supra* note 443, at 23 (arguing that transfer fee covenants "unreasonably hinder the alienability of land" and should be unenforceable against successors on that ground); Freyermuth, *Private Transfer Fee Covenants, supra* note 443, at 461–63.

450. Freyermuth, *Putting the Brakes, supra* note 443, at 22; Lewis, *Developing Disaster, supra* note 443, at 380, 397; *See* SINGER & DAVIDSON, *supra* note 289 § 6.3.1, at 258; *id.* § 6.3.2, at 262–63.

transfer fees were thought to have bad economic consequences and because they unduly limited the rights of property owners, states intervened to abolish them and stop developers from creating these fees and imposing them on their customers.

4. Covenants & Homeowners Associations

Real covenants and equitable servitudes law were both modified in the United States by expanding the concept of privity of estate from landlord/tenant relationships to seller/buyer relationships. English law limited covenants running with the land to covenants contained in leases on the ground that landlords and tenants are in "privity of estate" with each other, but that buyers and sellers are not.[451] American law invented the notion of "instantaneous privity" that existed at the moment of the sale of a property right from one person to another, making covenants in deeds of sale capable of running with the land.[452]

Equitable servitudes law in the United States was modified through the doctrine of implied reciprocal negative easements.[453] When a grantor sells multiple parcels in a neighborhood, and most, but not all, are burdened with uniform covenants, courts will sometimes enforce those limitations on land use against owners whose deeds lack those restrictions and will allow any owner to enforce the restriction against any other owner in the planned community.[454]

More recently, states have passed laws authorizing the creation of condominium and homeowners' associations that record declarations of covenants that are intended to bind and benefit all subsequent owners of property in a defined area or building. This new practice makes recorded declarations binding on subsequent buyers who are put on constructive notice of their restrictions on land use, even if the restrictions do not appear in their deeds.[455] And homeowners associations have been allowed to promulgate sometimes highly intrusive rules governing the use, not just of property held in common, but of individual homes or apartments. When

451. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands,* 55 S. CAL. L. REV. 1261, 1270, 1274 (1982).

452. SINGER & DAVIDSON, *supra* note 289§ 6.2.4, at 250. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4 cmt. a (AM. L. INST. 2000).

453. *See* SINGER, BERGER, DAVIDSON & PEÑALVER, *supra* note 416, at 600–01; *see, e.g.*, Evans v. Pollock, 796 S.W.2d 465 (Tex. 1990).

454. SINGER, BERGER, DAVIDSON & PEÑALVER, *supra* note 416, at 600–07.

455. SINGER & DAVIDSON, *supra* note 289§ 6.1, at 232; *id.* § 6.2.1, at 240–41.

owners complained about those rules, courts invented a new legal doctrine subjecting those rules to reasonableness requirements.[456]

In addition, covenants have morphed from being seen as unwelcome "encumbrances" on the rights of owners to being valuable property rights in themselves. That change is reflected in a movement to interpret covenants to achieve the goals of the grantor rather than to construe covenants narrowly to free owners from restrictions on their freedom to use their land as they wish.[457]

5. Tenants' Rights

The implied warranty of habitability imposed by both common law and statute fundamentally altered landlord-tenant law by imposing new obligations on landlords and granting new rights to tenants. These new regulations of the leasehold estate in land impose mandatory terms on the agreement between the landlord and tenant and function in the same way that the *numerus clausus* principle does for future interests. These laws shape the allowable contours of the residential leasehold relationship by imposing mandatory obligations on landlords that are not waivable by contract. They therefore limit the power of landlords to grant possession of their property under terms they might prefer, and conversely, grant tenants significant property rights, such as the right not to be evicted for withholding rent if done in response to the landlord's refusal to comply with the housing code.

6. Antidiscrimination Law

Antidiscrimination laws shape the way businesses operate in the context of public accommodations, housing, and employment, as well as insurance, banking, and mortgages. Covenants limiting land occupation or ownership on the basis of race were abolished by the Fair Housing Act of 1968.[458] While such covenants were deemed unenforceable after the Supreme Court's ruling in *Shelley v. Kraemer* in 1948,[459] they were still included in deeds after that point, and they discouraged sales to Black buyers. Public accommodation laws (both federal and state) prevent the

456. *Id.* § 8.5.1, at 383; *See, e.g.,* Worthinglen Condo. Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275, 1277 (Ohio Ct. App. 1989) (condominium rules must be reasonable); Ests. at Desert Ridge Trails Homeowners' Ass'n v. Vazquez, 300 P.3d 736, 744 (N.M. Ct. App. 2013) (rule restricting leasing is unreasonable and void). *But see* Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1074-75 (N.J. 2007) (homeowners association rules are valid under the "business judgment rule" unless unauthorized by statute, bylaws, the master deed, or by fraudulent, self-dealing, or unconscionable behavior on behalf of the association).

457. SINGER & DAVIDSON, *supra* note 289 § 6.6, at 274–75.

458. 42 U.S.C. §§ 3601–3631.

459. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

creation of segregated public facilities and limit the power of owners to create them.

F. Property Law: Stability Through Change

Property law serves many functions. On one hand, it promotes rights by protecting autonomy, equality, and just social relationships. On the other hand, it promotes the general welfare by promoting investment and development, satisfying human needs, and shaping healthy real estate markets to enable land to be transferred in ways that provide comfort, safety, and security for homes and businesses. One might summarize all these goals as protecting justified expectations while also recognizing that justified expectations change when we confront new social problems and when our values change. Protecting justified expectations requires stability in property rights but it also requires not only flexibility to attend to changing circumstances and needs, but adaptability to new social values and conditions.

Our economy, our polity, and our individual rights would not be the same if owners still had to pay quit-rents to a few aristocratic families. Our lives would be worse if we did not have antitrust laws, antidiscrimination laws, consumer protection laws, or recording statutes. We would be shackled by rules that no longer make sense, if they ever did, and we would be less free and less secure and less comfortable and happy if the changes in property law outlined in this section had never happened. And make no mistake: requiring compensation for all changes in common law or statutory regulations would have prevented these changes from happening. It is not the case that compensation would have been paid and they would have happened anyway. Without those changes, landlords could violate housing codes with impunity, hotels could refuse to serve African Americans, married women would have no control over their own property, and condominiums and homeowners' associations would never have been created.

Property law changes over time for a reason. It promotes human values, and when those values change—or our interpretation of their meaning changes—property law changes with it. Property law promotes comfort, security, and dynamism, and when circumstances change, or human interests or values change, property law changes with them. Fixing property rights by fiat to prevent regulations that reshape the contours of property rights to achieve these important social and normative ends not only denies human rights but would harm real estate markets and social welfare.

V. CONCLUSION

Property is a living system and property rights change over time to reflect our best understanding of land use and just social relationships. The Supreme Court, in recent years, has forgotten the myriad ways that property law has changed over time and the good reasons why this has happened. The Supreme Court sometimes acts as if history brought us to a perfect system sometime in the nineteenth century and that any legal alterations to that system deny "property per se." It is generally unjust to take property without compensation, but that does not mean that property rights are immune from change *regardless of the reason for the legal change.* Property rights benefit owners but they can also harm others and the general public. Lawmakers must be able to attend to the harms caused by property as well as its benefits.

What we need is not a method to identify objective, "established," "core," or "per se" property rights, but a method that can help us identify instances of *injustice* when regulations cannot be fairly imposed on particular owners without compensation.[460] Both property law and regulatory takings law are founded on "fairness and justice," and when our views about what is fair change, so must property law. And when justified expectations about property change, so must constitutional protections for property. Property rights legitimate in one era are not legitimate in another. Our focus should be on whether a regulation of property can be justified without compensation, not whether something is "property per se," as if we could define property in an ahistorical manner. We would be better off if the Court understood that we have a living property tradition.

460. *See generally* Joseph William Singer, *Justifying Regulatory Takings,* 41 OHIO N.U. L. REV. 601 (2015) (developing this approach).