The Strand not Taken:
The Taxing/Taking Taxonomy in American Property Law

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Abstract

Takings jurisprudence is struggling with a constant paradox. It is conventionally portrayed as chaotic and "muddy," and yet attempts by the judiciary to create some sense of order in it by delineating this field into distinctive categories that apply to each a different set of rules are often criticized as analytically incoherent or normatively indefensible.

This Article offers an innovative approach to the taxonomic enterprise in takings law, by examining what is probably its starkest and most entrenched division: that between takings and taxings. American courts have been nearly unanimous in refusing to scrutinize the power to tax, viewing this form of government action as falling outside the scope of the Takings Clause. Critics have argued that the presence of government coercion, loss of private value, and potential imbalances in burden sharing mandate that the two instances be conceptually synchronized and subject to similar doctrinal tests.

The main thesis of the Article is that this dichotomy, and other types of legal line-drawing in property, should be assessed not on the basis of a "pointblank" analysis of allegedly-comparable specific instances, but rather on a broader view of the foundational principles of American property law and of the way in which takings taxonomies mesh with the broader social and jurisprudential understanding of what "property" is.

Identifying American property law as conforming to two fundamental principles--formalism of rights and strong market propensity--but at the same time as devoid of a constitutional undertaking to protect privately-held value against potential losses as a self-standing "strand" in the property bundle, the Article explains why prevailing forms of taxation do seem to be disparate from other forms of governmental interventions with private property. Focusing attention on property taxation, the Article shows why taxation is considered a "lesser evil" type of government coercion, how the taxing/taking dichotomy better addresses the public-private interplay in property law, and why taxation is often viewed as actually *empowering* property rights and the control of assets.

This type of systematic inquiry is very timely. American property law is nowadays located at a crucial crossroad, with its longtime foundational premises and convictions being vigorously reexamined in the face of the domestic and global economic crisis. Although it remains to be seen whether government measures taken in the months and years to come will create a major upheaval in the fundamentals of property law, it should be clear that any such major shifts will have inevitable profound influences on what may be wrongly viewed as "isolated" legal doctrines, including the taking/taxing taxonomy.

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"I do not propose either to purchase or to confiscate private property in land. The first would be unjust; the second, needless. Let the individuals who now hold it still retain, if they want to, possession of what they are pleased to call their land. Let them continue to call it their land. Let them buy and sell, and bequeath and devise it. We may safely leave them the shell, if we take the kernel. It is not necessary to confiscate land; it is only necessary to confiscate rent." (Henry George, 1879).♦

♦ HENRY GEORGE, PROGRESS AND POVERTY (1879) Bk. VIII, Ch. 2, para. VIII.II.12 (Rev. ed. 1912, with an introduction by Henry George, Jr.).

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Introduction

Takings jurisprudence faces enormous, nearly Sisyphean challenges in trying to shore up legal doctrines to the complexities of governmental acts and omissions that affect private property. This body of law is often criticized as being ad-hocish, vague, and unpredictable.[1] Yet whenever courts do try to come up with some allegedly bright-line categorical rules within this field by viewing some instances of public intervention with property as takings "per se," others as subject to multi-factor case-specific tests, and yet others as generally falling outside the scope of this strand of constitutional protection, such taxonomies are then criticized as being too rough, conceptually inconsistent, or normatively indefensible.[2] Although such dilemmas about conceptual and doctrinal line-drawing are well familiar in other legal fields, the law of takings seems to be particularly vulnerable to perpetual discontent over the way in which its landscape is being shaped.[3]

This Article takes up what traditionally purports to be the clearest division within this alleged entanglement, i.e., the distinction between taking and taxing. American courts have been practically unanimous in viewing taxation as a chief and essential state power, and have generally refused to strictly scrutinize tax legislation and regulation.[4] As is demonstrated by the epigraph, taken from the influential "Progress and Poverty" by the nineteenth-century social reformer Henry George, the taxing / taking divide has also been hailed as normatively worthy by numerous thinkers throughout American history.

The dichotomy between the sweeping deference to taxation and the extensive judicial preoccupation with other forms of government-based, adverse effects on private property has been, however, increasingly criticized. Various theorists have pointed to the strong conceptual similarity between the compulsory levy and collection of a tax and the nonconsensual transfer of ownership or other key rights in a privately-owned asset for a public purpose. Very simply argued, in both types of cases, government forces an owner

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[1] *See, e.g.,* William P. Barr et al., *The Gild that is Killing the Lily: How Confusion over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429 (2005); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

[2] The critique of the taking/taxing division is discussed in detail in Part IIA. Other contested categories are discussed in Part III.

[3] *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 889 (2000) (reviewing a series of Supreme Court cases on constitutional protection of property, and criticizing the fact that none of these cases "makes any reference to any of the others, or makes any effort to integrate its innovations… into the preexisting fabric of the law").

[4] *See* Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMP. L. 641 (2006) (surveying the practically-sweeping judicial deference to tax legislation).

to hand over to it privately-held value.[5] Some scholars have taken this argument further by calling to formally synchronize the normative and jurisprudential framework for these currently distinctive legal spheres, albeit with differing views about the appropriate direction that this reunification should take.[6]

In this Article, I argue that despite the intuitive appeal in collapsing categorical distinctions between different forms of governmental interventions with private property and searching for a universal formula that would allegedly rub out arbitrary boundaries, such an approach misses the larger, more systematic role that these typologies play for the property law system in general. American property law, so I will argue, is conventionally driven by a *formal and market-oriented* approach that assigns certain roles to government as provider and regulator of a property rights system, and others to private property owners, relevant market players, and other stakeholders. Such institutional components are inherently intertwined with the jurisprudential structure of American property law, and may accordingly explain legal concepts that otherwise seem to make little sense under a "pointblank analysis" of specific property doctrines.

In essence, American law comprehends the governmentally-provided system of property as charged mainly with the duty to provide and enforce readily identifiable sets of entitlements and obligations in regard to resources, ones that endow property owners with the security of holding on to features that stress visible bundles such as formal title, possession, use, and control over decisionmaking. But at the same time, property law is largely devoid of an independent firm undertaking to preserve definite economic *value* for assets. In other words, whereas the American property system, as construed by the Supreme Court, considers the power to exclude to be "one of the most treasured strands in an owner's bundle of property rights,"[7] and similarly views rights of possession, control, and disposition as "valuable rights that inhere in the property"[8] and thus mandate constitutional protection, no such clear commitment exists for any particular benchmark of *value*. Counterintuitive as it may sound, value in itself is not one of the strands of constitutionally-guarded property.

I argue that this is the case not because American society is indifferent to asset values; quite the contrary. It is so since in a free market oriented yet organized society, a property rights system created and enforced by the state simply cannot commit itself simultaneously to (a) strong, constitutionally-based protection of certain property bundles such as exclusionary possession, use, control over decisionmaking, or free alienability, as *inherently* grounded in formal title; and (b) some objective, entrenched stream of economic benefits deriving from property ownership. This basic insight has enormous implications for the way in which property law is structured, including the various demarcations drawn out in takings jurisprudence.

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[5] *See, e.g.*, William B. Stoenuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 533, 571 (1972) (arguing that the power of taxation "is not merely similar to eminent domain; it is the same, as the power itself goes").
[6] See discussion in *infra* Part IIA.
[7] Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419, 435-36 (1982).
[8] Philips v. Washington Legal Foundation, 524 U.S. 156, 170 (1998).

This construction of American property law is far from being inevitable. In many national and sub-national economic systems, the rules pertaining to the control and use of resources are more oriented toward ensuring a certain value for stakeholders, but this comes at the price of stronger ongoing intervention with formal property "strands." As will be shown, not only is this the case with traditional communities in the developing world or with centrally-controlled national economies, but it can also be traced in other market economies as well as in alternative sub-society structures within the U.S.

Nowadays, following the full-scale eruption of the financial crisis, American society is undergoing a dramatic process of aggressive governmental intervention with what were considered to be the basic tenets of markets and private rights--including the spreading of a governmental "safety net" for the preservation of value in certain forms of private equity and the taking over of banks and other financial institutions to prevent asset meltdown--a development whose overall, long-term effects on the paradigm and jurisprudential contours of American property law remain to be seen.[9] Importantly, this Article does not aim at suggesting which type of property system should be considered normatively superior. What this work does, however, is to recognize the fact that American law has made some very meaningful choices--not at all universally "inherent"--in the way it has conventionally constructed its property system, and to argue that the resulting jurisprudence and its specific doctrines and line-drawing that emerged over the years, should thus be understood in view of these foundational principles. Accordingly, the Article does not offer a *normative* defense of the current taxonomies in takings law. It rather takes on the innovative *analytical* enterprise of illuminating the broader perspectives against which current legal rules have been shaped, thus tying together what are so often considered to be loose ends within the takings jurisprudence.

How does the characterization of the "grand structure" of American property law help to better explain the logic behind the intricate web of takings law, and specifically the broad gap in the constitutional approach to taxation vis-à-vis other forms of state coercion against property owners?

First, a formal, market-oriented system that consecrates certain "sticks" as indispensable seems to view as a "lesser evil" those forms of governmental extraction of private value that minimize the explicit derogation of such prominent property incidents. Whenever a government act coercively acquires entitlements such as ownership, leasehold, or easement, either explicitly by registering such rights in the government's or in a third party's name; or implicitly, by using rights and prerogatives that are regularly considered to represent the core of such rights, e.g., by entering land to set up public facilities thus undermining the right to exclude,[10] by making certain interventionist decisions about the use of the resource,[11] or by prohibiting or limiting certain forms of asset transfers,[12] the

[9] *See, e.g.,* Stephen Labaton & Edmund L. Andrews, *In Rescue to Stabilize Landing, U.S. Takes over Mortgage Finance Titans*, N.Y. Times, Sept. 8, 2008, A1; Mark Landler & Edmund L. Andrews, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. Times, Oct. 4, 2008, A1; Mark Landler, *U.S. Investing $250 Billion in Banks*, N.Y. Times, Oct. 14, 2008, A1.
[10] *Loretto*, 485 U.S. at 434-36.
[11] *Phillips*, 425 U.S. at 470.

owner's remaining rights are viewed as "crippled." This is so even if the pure economic consequences of such government acts are not harsher than those inflicted by a newly-imposed tax on the property. The property system has been better accustomed to view taxation as a background institution, which although financially significant, creates less uncertainty in figuring-out who the owner is and what she owns.[13]

Second, legal concepts and doctrines controlling governmental interventions with private property are obviously not hermetically detached from the private law of property, especially in a market-oriented system. Although the interface between the private and public realms in property is highly intricate and avoids clear demarcation,[14] and although I definitely do not argue that the law of governmental intervention with private property should necessarily aspire for harmony with the law governing property relations among private parties,[15] it would be safe to say that the law of takings does have bearing on the way people understand property entitlements and obligations in a broader sense. Thus, for example, the public and legal outrage over the *Kelo v. City of New London* decision, as vividly expressed in Justice O'Connor's assertion in her dissent that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory,"[16] expressed a deep concern that the overbroad construction of "public use" to facilitate a condemn-and-transfer practice for economic development was not only a matter of governmental abuse, but one that also undermines the very fundamental understanding of what it means to be a property owner, including vis-à-vis other persons.[17] Indeed, in a number of cases, the Supreme Court has made cross-references between the public law and private law of property, for example by referring to its private law jurisprudence in defining the "treasured" right to exclude in takings cases such as *Loretto*[18] and *College Savings Bank*.[19] Viewed through this prism, one might understand why taxation is generally considered to be less controversial than the governmental taking of property strands that are intuitively analogized to the core concepts of private law. In this sense, it is more convenient for courts to view taxation as a qualitatively distinctive type of governmental intervention with private property.

Third, taxation may often be considered to actually entrench and validate formal ownership, thus *strengthening* the security of title and formal rights. As this Article shows, this is especially the case with the property tax, which has received scant attention in the taking/taxing debate, but is nevertheless considered a major source of revenue for government, as well as a chief determinant of local governance and property-owner-

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[12] See discussion of Hodel v. Irving, 481 U.S. 704, 715 (1987) in text accompanying *infra* note 160.
[13] *See infra* Part IIB1.
[14] Amnon Lehavi, *The Property Puzzle*, 96 GEO. L. J. 1987, 2000-12 (2008) (hereinafter Lehavi, Puzzle).
[15] *Id.* at 2017-18.
[16] Kelo v. City of New London, 545 U.S. 469, 503 (2005) (O'Connor, J., dissenting).
[17] *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1879-1884 (2007) (portraying a *Kelo*-type condemn-and-transfer use of the eminent domain power as contradicting popular conceptions about the overall morality of property rights).
[18] *Loretto*, 485 U.S., at 436 n.12 (referring to Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980), discussing the private property rights of a shopping mall that banned the handing out of antiwar pamphlets).
[19] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd., 527 U.S. 666, 673 (1999) (referring to K Mart Corp. v. Cartier, Inc., 485 U.S. 108, 185-86 (1988), a trademark law dispute).

based collective control.[20] In fact, one underlying characteristic that seems to broadly differentiate legal systems with state-dominated formal private property rights in land from those that have a less comprehensive formal regime, is the extent to which the imposition and collection of property taxation is fiscally significant and administratively feasible, since such a tax inevitably depends on a centrally-coordinated recordation (or at the least governmental validation) of lands and title holdings.[21]

An important caveat is in order at the outset. Even if one accepts the categorization of taxation as a distinguishable type of governmental action in the American setting, this does not necessarily mean that judicial review of such acts must always be lenient. Specifically, the ability of courts to divert their attention in such matters to other constitutional channels, most prominently to procedural and substantive due process, may be considered a potential blessing rather than a matter of confusion or undue fragmentation. Since the "property" component of due process is quite consistently considered to be more detached from the private law of property than is the case with the "private property" of the Takings Clause,[22] due process jurisprudence may enjoy a better ability for a "doctrinal severance" in reviewing such types of governmental actions.

The Article is structured as follows: Part I identifies the core ingredients of a property system committed to the formality of private property rights and to free market trade, and explains why such a legal regime cannot purport to protect both firm private control *and* guaranteed value for such assets. It then shows why such an approach is not necessary, by concisely drawing on some alternative property formats. Part II presents the doctrinal differentiation between taxation and other forms of government intervention with property. It briefly discusses prominent critiques of current doctrine, and then explains why this taxonomy does seem to make better sense when viewed through the larger framework of the American property system. Part III reflects briefly on the potential pros and cons of creating categories in property law, by reevaluating other types of legal line-drawing in takings jurisprudence and the more general nature of legal taxonomy in property law. The Article concludes that since legal taxonomy is necessarily embedded in broader normative and institutional considerations, any major shifts in the fundamental paradigms of American property law that would ensue in the aftermath of the financial crisis are bound to reconfigure the line-drawing of property doctrines.

I. The Core of American Property Law

II.

A. Property as a Formal, Market-Based System

Reducing American property law to a clear-cut paradigm is obviously highly challenging. First, local and state property laws may substantially diverge among different

[20] For these features of the American property tax, see *infra* Part IIB3(b).
[21] *See id*.
[22] *See* Merrill, *supra* note 3, at 969-70 (identifying takings jurisprudence as especially befitting discrete assets that are the object of ownership and that include in turn a right to exclude others, hence doing "a good job of identifying those interests which we may loosely call common-law property rights").

jurisdictions within the U.S.,[23] and federal law in itself is highly complicated and often obscure, with federal constitutional property being a special source of intricacy.[24] Second, the law of property is also highly contingent on the type of resource being the object of property rights, both in defining the scope of rights and in providing remedies to protect them, such that the laws of land, chattels, intellectual property, or securities may significantly differ from one another.[25] Third, on a normative level, it is highly doubtful whether American property law adheres to any predominant goal, as various values such as societal welfare, liberty, personhood, equity, or social responsibility battle it out not only in scholarly discourse,[26] but also in the actual design of property doctrines.[27] This latter aspect is obviously pertinent in dramatic times such as the current ones, in which government engages in a major restructuring of property markets and institutions.[28]

That said, in analyzing the current landscape of the American property, it seems that at least two traits can be discerned as typifying the "grand structure" of property law, even if applied somewhat differently in various contexts.

1. The Formality of Property…

Property law in the U.S. is by and large formal, meaning that state institutions set out to create and enforce sets of private and public entitlements and obligations pertaining to resources,[29] to make them publicly known and transparent to the extent necessary and feasible,[30] and to generally subject other--i.e., informal--types of property arrangements to the overall supervision and control of the centrally-coordinated property system.[31]

Formality of property is obviously no novelty. It is a fundamental feature of the "social contract" underlying modern organized society and government, by which the protection

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[23] *See* Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L. J. (2005) (calling to validate differences among states in property regimes to allow for interlocal competition); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007) (suggesting to allow local governments to select the level of property protection they want to offer).

[24] *See supra* note 3.

[25] The question of the degree to which there is--or should be--similarity in defining property rights for different resources is highly contentious, and will not be discussed here. For the tension between tangible and intangible property, see Timothy J. Brennan, *Copyright, Property, and the Right to Deny*, 68 CHI.-KENT L. REV. (1993), and the recent exchange of Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36, and Richard A. Epstein, *A Response to Peter Menell: The Property Rights Movement and Intellectual Property*, REGULATION, Winter 2008, at 58; *See also* Eduardo Peñalver, *Is Land Special?*, 31 ECOLOGY L. Q. 227 (2004) (criticizing law's "favoritism" towards land).

[26] *See* Lehavi, Puzzle, *supra* note 14, at 1997-2000.

[27] *See, e.g.*, THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY PRINCIPLES AND POLICIES 243-91 (2007) (discussing the influences of personhood considerations on designing the objects and contents of property).

[28] *See supra* note 9.

[29] *See* Lehavi, Puzzle, *supra* note 14, at 1993-96 (discussing creation of property norms by the state); YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE 13–58 (2002) (analyzing state enforcement as essential to a stable functioning of a property system).

[30] *See* text accompanying *infra* notes 33-36.

[31] The issue of formal versus informal sub-society property regimes is a complicated matter that often involves highly contentious political, social, and economic factors, and thus poses a major challenge to modern liberal democracies. *See* Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Property*, 10 THEORETICAL INQUIRIES IN LAW 43 (2009).

and stability of private property is both cause and effect in the entrustment of rulemaking and enforcement at the hands of the sovereign--even if the various prominent theories in Western thought substantially diverge on the proper scope of government power in shaping the procedural and substantive ingredients of such a property system.[32]

In the case of land, the most significant step in the evolution of property in the Anglo-American tradition was the gradual shift of the land tenure system from the original, early medieval interpersonal web of direct services and duties through the chain of feudal hierarchy, into the impersonal, permanent, and inheritable system of land entitlements. This process reflected and further entrenched the centralization of political power, the shifting focus from the family to the individual as the subject of law, and the constant expansion of market--rather than status--society.[33] Accordingly, two prominent principles that emerged from the formalization of property were, first, standardization of the types of officially-recognized forms of property entitlements and obligations (i.e., the *numerus clausus* principle, explicit in the civil law system[34] but also highly indicative of the Anglo-American one);[35] and, second, the creation of mechanisms for publicizing such rights and duties, mainly by public recordation or registration of entitlements in land.[36]

The resulting structure of the American legal regime is thus that property rights (ownership, leasehold, servitude, mortgage, etc.) are each comprised of a set of rights and duties that are "endorsed" by the state--to use Felix Cohen's famous depiction of property[37]--and are accordingly enforced and remedied when rights are being breached. As is well known, the specific content of the property bundle is a source of fierce debate, mainly between essentialists--those who believe that certain sticks inhere in property rights with the right to exclude being most often associated with the inevitable core of ownership--and those who take the "bundle" concept to have a normative meaning such that the array of rights and duties can and should be contextually crafted by state institutions as the latter deem fit.[38] But regardless of this debate, property is typified by the fact that the various entitlements and obligations, the "strands" in the bundle that are recognized by the state institutions, are formally enshrined, respected, and enforced.[39]

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[32] *See, e.g.,* JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1989) (offering a critical assessment of prominent property theories, from Marxist to libertarian ones).

[33] JESSE DUKEMINIER ET AL., PROPERTY 204-09 (5th ed. 2002); Amnon Lehavi, *The Universal Law of the Land*, Pt. IA (Nov. 2008), available at http://ssrn.com/abstract=1260366 (hereinafter Lehavi, Universal).

[34] UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 39 (2000).

[35] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus* Clausus *Principle*, 110 YALE L.J. 1, 12–24 (2001).

[36] *See* Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401 (2003) (justifying governmental monopoly in land recording and registration activities as facilitating private contracts and protecting third parties).

[37] Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

[38] For this debate, see Lehavi, Puzzle, *supra* note 14, at 2000-07.

[39] Importantly, the specific composition of the bundle is a source of argument even among those who subscribe to an essentialist viewpoint. *See, e.g.*, Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008) (arguing that the core feature of ownership is not physical exclusion, but rather the owner's exclusive right to "set the agenda" for the resource).

One needs, however, not to confuse the "formal" trait of property with any of the terms "absolute," "clear-cut," or "complete." *First*, the absolutistic conception of ownership as a "sole and despotic dominion"[40] is long considered obsolete, normatively unworthy, and practically unfeasible.[41] *Second*, property entitlements and obligations are often not clear-cut either in terms of the nature of the right or in the scope of its remedial enforcement. As Henry Smith shows, whereas some property doctrines follow an "exclusion" strategy, others--such as nuisance conflicts--often adopt a "governance" approach that break up property rights into more specific-use entitlements and also tend to contextualize the remedy awarded, if any.[42] Put somewhat differently, property law often resorts to legal "standards" when it deems the advantages of ex post facto contextual balancing to outweigh the potential drawbacks of ex ante vagueness.[43] This does not undermine, however, the formality of property in the senses elaborated above. *Third*, the formality of property law does not necessarily mean that property rights are "complete" such that law is able to conceive of every possible conflict in advance, explicitly allocate every potential attribute of the resource,[44] or predict every relationship that will develop among persons with respect to the resource.[45] Potential loopholes are probably inevitable, leaving such conflicts to ex post judicial rulings or legislative amendments, yet this too does not undercut the overall formal structure of property.

That said, American property law does place enormous weight on defining types of property interests, crafting the bundle of entitlements and obligations for each one of them, and viewing property rights as worthy of legal validation and protection *as such*--so that the jurisprudential inquiry starts with the identification of rights and duties and whether these were violated, and only then moves to evaluate the effects of the infringement for designing the appropriate remedy. Hence, for example, in the constitutional setting, it is not the loss of value in itself that triggers constitutional scrutiny and intervention, but rather the identification of constitutionally-protected rights and a resolution that such rights have been infringed by state action.

This trait of American property law is vividly demonstrated in a couple of seminal Supreme Court cases, which quite dramatically separated the component of the taking of a constitutionally-protected property right from the different question of loss of value.

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[40] WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND 2 (Univ. of Chicago Press 1979) (1765).

[41] Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–06 (1998) (citing Blackstone's self-admission that this concept did not depict the legal reality of his time); Hanoch Dagan & Michael A. Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES IN LAW 37, 40 (2005).

[42] Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 966-75, 992-96 (2004).

[43] A seminal work on rules-versus-standards in law is Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 DUKE L. J. 557 (1992). For a slightly different depiction of this type of difference, in the context of property, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 57 (1988).

[44] YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 90–96 (2d ed. 1997) (explaining that a resource consists of multiple attributes, not all of which are necessarily captured by contract, and are hence left in the "public domain." The party able to capture these attributes, in view of such imperfect delineation of the rights, may be viewed de facto as holding the "economic property rights" to these attributes).

[45] *See* Antonio Nicita et al., *Towards a Theory of Incomplete Property Rights* 6, 9-13 (May 2007), *available at* http://ssrn.com/abstract=1067466.

In *Loretto*,[46] the Court reviewed section 828 of the 1973 Executive Law enacted by the State of New York to facilitate tenant access to cable television.[47] Section 828 provided that a landlord may not "interfere with the installation of cable television facilities upon his property" and limited compensation to an amount later set by the Cable Television State Commission at $1.[48] The Court accepted the New York Court of Appeals' determination that § 828 serves a legitimate purpose. Yet, portraying the power to exclude as "one of the most treasured strands in an owner's bundle of property rights," the Court viewed permanent physical invasion to land as qualitatively different from other types of intervention, noting that a special injury occurs when such an invasion and occupation is made by "a stranger,"[49] and concluded that State-authorized permanent invasions constitute a taking per se.[50] On remand, the New York Court of Appeals upheld the State Commission's determination regarding the $1 compensation, relying, inter alia, on the relatively insignificant market value damage to an owner's property by attachment of cable facilities.[51] And yet, *Loretto* remains deeply rooted in American takings jurisprudence as constituting a rule that any type of permanent government invasion to land, regardless of its actual effects, violates constitutionally-protected property rights.

Even more instructive in this respect are the Court's decisions in *Philips v. Washington Legal Foundation*[52] and later in *Brown v. Legal Foundation of Washington*.[53] The two cases dealt with the Interest on Lawyers Trust Accounts (IOLTA) programs adopted in different states. Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in a bank account, with the interest income generated by the funds being paid to foundations that finance legal services for low-income individuals. The Court generally recognized the respondents' argument that each one of the separate client funds was too small to generate interest income in itself, such that there was no direct economic loss, but at the same time held that:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example, in *Loretto*… we held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue. Our conclusion in this regard was premised in our long standing recognition that property is more than economic value; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it." While the interest income at issue here may have no economically realizable value to

[46] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[47] N.Y. EXEC. LAW § 828 (McKinney Supp. 1981–1982). Prior to 1973, Teleprompter obtained installation permits from property owners along the cable route in return for a standard rate of 5% of the gross revenues that it realized from the particular property. *Loretto*, 458 U.S. at 422–24.
[48] *Loretto*, 458 U.S. at 423–24.
[49] *Id.* at 435–36.
[50] *See id.*
[51] *See* Loretto v. Teleprompter Manhattan CATV Corp. 446 N.E.2d 428, 434-45 (N.Y. 1983).
[52] 524 U.S. 156 (1998).
[53] 538 U.S. 216 (2003).

> its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property."[54] *(Internal citations omitted)*.

In *Brown*, in a 5-4 decision, the Court once again held that the IOLTA programs constituted a taking, since the interest of the bank accounts' beneficial owners was "taken for a public use when it was ultimately transferred over to the Foundation."[55] But the Court then went on to say that no "just compensation" was due for the taking, because "compensation is measured by the owner's pecuniary loss--which is zero whenever the Washington law is obeyed" so that "there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case."[56]

One may be left to wonder--as the minority opinion in *Brown* did[57]--what point is there in recognizing an infringement of property rights as a "taking" but at the same time holding that no compensation is due. Puzzling and controversial as this ruling may be,[58] it does seem to reflect a persisting *leitmotif* in U.S. property law, by which formal property rights, and not value, are the subject of legal protection, whereas lost private value serves as a benchmark--though not the only possible measure--in designing the remedy.

As a matter of fact, the less clear the issue of formal rights, the "muddier" the applicable legal doctrine. The two most prominent examples are land use regulations that frustrate future uses in private land, and government acts that derogate from previously-endowed forms of government benefits (typically referred to as the "New Property").[59]

First, the body of law that deals with non-confiscatory regulations that adversely affect private assets is governed by the extremely complicated and ad-hocish test developed in *Penn Central Transportation Co. v. City of New York*,[60] according to which the court examines (1) "the economic impact of the regulation on the claimant"; (2) the extent of interference with "distinct investment-backed expectations"; and (3) "the character of the governmental action."[61] Although at least one prong of the test seems to focus on *value* as an independent factor that must be considered in itself to determine whether a "taking" has occurred, it seems that the enormous confusion that has since governed regulatory takings can be attributed to the fact that the Court has been unable, or perhaps unwilling, to address a much more straightforward though obviously difficult question: What kind

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[54] *Phillips*, 524 U.S., at 169-70.
[55] *Brown*, 538 U.S., at 235
[56] *Id.* at 240-41.
[57] *Brown*, 538 U.S., at 252 ("Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking… to extend to the entire run of Compensation Clause cases the rationale supporting today's judgment… would be disastrous") (Scalia J., dissenting).
[58] Debate lingers both as to the finding of a "taking" in this case (see MERRILL & SMITH, *supra* note 27, at 1333, questioning whether the Court engaged in inappropriate "conceptual severance" of the right to the interest as distinctive of the overall right to the principal in a single account balance); and even more so, as to the question of compensation. *See, e.g.,* Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in Brown v. Legal Foundation of Washington*, 37 IND. L. REV. 417 (2004) (criticizing Brown's compensation principle of "net loss to the owner" as inconsistent with Just Compensation precedents).
[59] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
[60] 438 U.S. 104 (1978).
[61] *Id.* at 124-25.

of legal right, if any, does a person have to develop his privately-owned land?[62] The difficulty in defining the nature and extent of such a strand and the ensuing ad-hocery are understandable, yet they emphasize that when the Court moves away from the notion of rights, it truly struggles in shaping its takings jurisprudence.[63]

Much the same can be said about the constitutional protection of governmental benefits, such as certain types of social welfare, against consequent deprivations, based on the "property" component in the due process clause.[64] Although the Court recognized procedural due process rights for welfare recipients based on the "property" framework in *Goldberg v. Kelly*,[65] in later cases it narrowed the application of this right by reasoning that the "property" interest is not created by the Constitution, but is rather created and defined by "existing rules or understandings that stem from an independent source such as state law."[66] This positive law definition of the "property" interest allows the government to statutorily design the program in a way that could effectively deprive its beneficiaries of procedural due process protection.[67] Hence, the existence of an economic loss of private value has not been considered as sufficient to create a new type of protected property interest, in the absence of the court's willingness to clearly define a new type of formal property *right* in the matter.

2. … and its Market Propensity

The relationship between property rights and markets might seem straightforward at first glance, but it is far more subtle and intricate, and avoids inherent causality in either direction. Section B demonstrates some of the ways in which these two components may be decoupled and reconfigured, but one such observation requires attention at the outset.

The right of alienability, i.e., the right to transfer property rights in assets to others, is considered to be a standard ingredient of the institution of property. Beyond the clear economic benefit that it endows on the property owner by allowing her to realize the asset's long-term value at the timing of her choice, it is also perceived as enhancing her autonomy in controlling the identity of the successor to the rights, be it in case of a transfer for consideration (sale) or for none (gift, inheritance).[68] In some outstanding cases, the legal system prohibits alienability, when it considers the general societal

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[62] *See* Gideon Kanner, *Makings Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 653, 675-76 (2005) (arguing that although no clear decision exists in the matter, "the right to build in one's land is by degrees becoming so enfeebled that in some cases it de facto ceases to exist, except to the extent it is created on an ad hoc basis by the issuance of some sort of government entitlement"). There are, of course, other opinions in the matter, but there is consensus that the *Penn Central* doctrine is confusing. *See* sources in *supra* note 1.
[63] *See* text accompanying *infra* notes 244-249.
[64] U.S. CONST., amend. V, § 4.
[65] 397 U.S. 254 (1970).
[66] Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
[67] *See* RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 598–615 (4th ed. 2002). The Court has also offered a more recent analysis of this "property" interest in Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005) (holding that a wife did not have a protected "property" interest in police enforcement of a restraining order against an abusive husband).
[68] MERRILL & SMITH, *supra* note 27, at 531-32.

benefits of allowing assets to end up in the hands of those who value them most to be much more than offset by particular moral, societal, or economic considerations--prohibitions on most types of transfers of body parts being a prominent example.[69]

However, the options for legal ordering of alienability do not necessarily narrow down to either authorizing property owners to act in an unfettered market or prohibiting owners altogether from engaging in any sort of transfer. Alienability may be legally sanctioned, but at the same time be denied certain features of the free market, e.g., by restricting the identity of potential buyers or sellers, limiting overall supply, substantially intervening in the terms of marketing and transference, or otherwise constructing the bundle of rights in certain resources so as to constrain the development of wholly decentralized, impersonal markets (consider instances such as tradable allowance schemes,[70] taxi medallions,[71] tenancy by the entirety,[72] or a partner's interest in the standard business partnership[73]).

Other legal structures for transfer of rights may include pricing mechanisms that deviate from free market rules. This is the case, for example, with the rapidly growing sector of "shared equity housing,"[74] most dominantly Community Land Trusts (CLTs) discussed in Section B below. One of the underlying features of CLTs is that upon resale of an individual housing unit, the CLT repurchases the property itself or monitors its direct transfer from seller to buyer, but in any case restricts the resale price to a formula which aims at giving the departing homeowner a fair return on his investment, while giving future income-eligible homebuyers fair and affordable access to this housing. Hence, CLTs formally circumvent free market pricing in transfers of housing units.[75]

The main point here is that a societal choice to resort to the full-blown features and effects of free markets regarding property rights is neither automatic nor indispensable. It reflects a conscious determination, according to which the implementation of property rights through largely unfettered markets will optimize the attainment of organized society's goals and values. This, so I argue, is (or at least was, up until most recently) the case with constitutional, statutory, and judicially-created American property law. What this means is that for most types of resources, property law and policy rely on free markets not only as a measure to implement existing rights, but also as the normative paradigm based on which property rights are designed *ab initio* by the legal system.

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[69] The concept of inalienability is famously developed in Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972). A recent discussion by one of the authors, expanding on the viewpoints of different approaches to legal analysis to the allocation of human organs is Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113 (2003).

[70] *See* Carol M. Rose*, Expanding the Choices for the Global Commons: Comparing Tradable Allowance Schemes to Old-Fashioned Common Property Regimes*, 10 DULE ENVTL. L & POL'Y F. 45 (1999).

[71] Katrina M. Wyman, *From Privilege to Property: The Case of Taxi Medallions* (2008) (on file with author).

[72] MERRILL & SMITH, *supra* note 27, at 635-36.

[73] *See* text accompanying *infra* note 100.

[74] *See* JOHN EMMEUS DAVIS, SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE RESTRICTED, OWNER OCCUPIED HOUSING 1 (2006), at http://www.nhi.org/pdf/SharedEquityHome.pdf.

[75] *See infra* Part IB.

A prominent example for property law's market propensity is the evolution of the land system. In Part IA1, I mentioned the major shift in English land law, by which the original feudal system was gradually replaced by an impersonal, inheritable, and marketable system of property rights, reflecting major socio-political changes.[76]

The intensification of such processes typified American law's early endeavors to break ranks with those elements of English land law heritage that were still considered archaic in the American context.[77] Thus, for example, Thomas Jefferson's view that the fee tail and primogeniture were detestable means of perpetuating a hereditary aristocracy led him to persuade the Virginia legislature to abolish these mechanisms around the time of the American Revolution, with most other state legislatures soon following suit.[78] More broadly, American law consistently worked to entrench concepts of standardization of estates and types of property rights, promote free alienability, coordinate registration of transactions in land, and facilitate a broad impersonal free market for real estate.[79] Not surprisingly, the fee simple soon came to dominate the landscape of American real estate, as it seemed to epitomize the idea of clearly delineated strong property rights that allow for easy recordation, facilitation of credit, and broad mandate for transfer of rights.[80]

Moreover, in view of the fact that public housing traditionally has not played a dominant role in shaping land development,[81] the real estate economy that developed over the years was one of a decentralized market that is governed mainly by the forces of supply and demand,[82] and is regulated chiefly by local governments that in turn rely extensively on value-based property tax as a major source of public revenue.[83] Real property has thus been dominated, for better and for worse, by market forces and trends.

This market propensity is evident in the crafting of property institutions for other resources. Intellectual property law, for example, is an immensely broad field that does not follow a single blueprint either in its normative underpinnings or in the doctrinal rules applying to each one of its different branches.[84] But it seems safe to say that the market is

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[76] Lehavi, Universal, *supra* note 33, at Pt. IA.

[77] For the immigration of English land law to the American colonies and later to the United States, see LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 58-65, 230-45, 412-21 (2d. ed. 1985).

[78] DUKEMINIER ET AL., *supra* note 33, at 218.

[79] *See, e.g.*, Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1189-90 (1981-1982) (explaining the development of new types of servitudes in America both by the lessened fear of impeding assignability in a country that had vast resources of uncultivated land and by the existence of an efficient recording system in the U.S. from early on).

[80] *See, e.g.*, Robert C. Ellickson, *Property in Land*, 102 YALE L. J. 1315, 1568-71 (1993).

[81] *See* Robert C. Ellickson, The Mediocracy of Government Subsidies to Mixed-Income Housing Projects 4-7 (Working Paper, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1217870 (describing the failure of the direct provision of public housing as of the mid-1930s, and the current reliance on subsidies to private developers and individual housing vouchers to income-eligible residents).

[82] Major exceptions to this have been the federally-sponsored mortgage insurance and secondary mortgage market starting as of the mid 1930s. *See* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES: AN INTRODUCTION 47-68 (2006).

[83] *See* Amnon Lehavi, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 948-52 (2006) (hereinafter Lehavi, Intergovernmental).

[84] There are of course other approaches to intellectual property law, emphasizing values such as democracy, openness, and pluralism, calling in turn to extend the scope of "public domain" in regard to such resources.

not only the mechanism through which intellectual property rights are being implemented and given economic substance, but also a dominant goal in its own right in the very creation of certain intellectual property rights. The intellectual property field has thus been portrayed as fulfilling two fundamental distinct functions: first, promoting innovation in technological or expressive works (being a principal motive behind patent, copyright, and other laws), and second, "ensuring the integrity of the market place" (pertaining to trademark law and issues of unfair competition law).[85]

As for innovation, the choice to promote it through the allocation of exclusive property rights in the information output, rather than through other potential legal mechanisms for reward--such as a governmental grant for the innovative effort--is by no means self-evident and has been the subject of increasing debate in legal and economic literature.[86] This is especially so in view of the concern that the benefits of awarding exclusive property rights may be offset by problems such as consumer deadweight loss,[87] inefficient under-utilization of information for further development by others,[88] and transaction costs that may prohibit efficient reallocation of the rights.[89]

Yet irrespective of the normative debate whether the mechanism of exclusive property rights is better than others, by awarding innovators exclusive rights such as making, using, selling, displaying, or reproducing the protected information, the legal system consciously absolves itself of the need to measure and legally entrench the value of the input or of reasonable expected returns to it.[90] Rather, law awards the innovator with an exclusive right to capitalize on her innovation through the market for the period of protection, thus granting the forces of market demand the power to decide the economic fate of the information's realized value. As is well known, while a small percentage of patent- or copyright-protected information turn out to enjoy high, long-enduring streams of incomes, most others turn out to be commercially insignificant or outright failures.[91] Hence, notwithstanding any intrinsic autonomy-based benefits that a creator may enjoy when she is recognized as formal owner of her innovation, the actual economic value of such protected information is not in any way enshrined or guaranteed by the state, as opposed to the protection of the legal right in it.[92]

See, e.g., Yochai Benkler, *Through the Looking Glass: Alice and Constitutional Foundations of the Public Domain*, 66 J. LAW & CONTEMP. PROBS. 173 (Winter/Spring 2003).

[85] *See* Peter Menell & Suzanne Scotchmer, *Intellectual Property Law, in* 2 HANDBOOK OF LAW AND ECONOMICS 1473, 1475 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

[86] *See, e.g.*, Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J. L. & ECON. 525 (2001).

[87] Menell & Scotchmer, *supra* note 85, at 1476-77.

[88] *See* MICHAEL A. HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 1-22 (2008).

[89] Menell & Scotchmer, *supra* note 85, at 1476-77.

[90] *See, e.g.*, Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L. J. 1742, 1747-78, 1795-1806 (2007) (arguing that devising legal rights that rely on simple "on/off signals" of exclusion that allow right holders to reap the benefits from their input is generally more cost-effective than a system that aims at directly valuing and rewarding innovators' inputs).

[91] 97% of U.S. patents generate no revenues. *See* Samson Vermont, *The Economics of Patent Litigation,* in FROM IDEAS TO ASSETS: INVESTING WISELY IN INTELLECTUAL PROPERTY 327, 332 (B. Berman, ed. 2002).

[92] Accordingly, the most aggressive legal interventions with the rights to exclude--compulsory licenses in patents or copyright--are introduced when the monopolist property owner wholly refrains from bringing the

The second major pillar of intellectual property law, that of "protecting the integrity of the marketplace," is obviously not less inclined towards the market. It is in fact the *cause* for the creation of the rights. The conventional economic rationale for protecting trademarks or restricting certain types of "unfair competition" is to ensure the "quality of information in the marketplace" so that consumers would not be misled or confused about the source of goods and accumulated information on producers' goodwill and products' quality. In this sense, granting legal rights and subsequent causes of action to producers is conceived largely as a vehicle to promote the functionality of the market.[93]

As a final example, the unique property structure of business organizations, and especially of the modern corporation, has been the subject of much analysis.[94] My interest here is in the property rights of corporate shareholders, in view of the corporation's separate legal entity and its ownership of the corporation's assets.[95] This "asset partitioning"[96] between the corporation's separate pool of assets and the personal assets of the firm's owners calls into question what it is exactly that the shareholder "owns."

In their classic work, *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means define the shareholder interest as "passive property," endowing him with the beneficial interest of "an expectation that a portion of the profits remaining after taxes will be declared as dividends, and that in the relatively unlikely event of liquidation, each share will get its allocable part of the assets."[97] This is in addition to the right to vote (which they deemed to be diminishing to negligible importance) and the right to bring action against the corporation in cases of theft, fraud, or certain wrongdoing by managers. According to Berle and Means, shareholders in the corporation have "exchanged control for liquidity."[98] Although the argument that power and control in the corporation had shifted away from the common shareholders is the subject to much criticism and indeed seems to be overbroad in reality, the second part of their insight seems to adequately reflect what is perhaps the most striking feature of shareholding: the nearly unconstrained ability to sell the shares in the market "for ready cash."[99] As Robert Clark notes, the free

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information into the market and thus prevents consumers from exercising their demand for the resource. For compulsory licenses in patent versus copyright, see Smith, *supra* note 90, at 1811-12.

[93] The legal system therefore protects formally recognized rights, but not an independent commitment to guarantee some benchmark of economic value for the producer of information. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 354-56 (2003).

[94] The two foundational works on the organizational structure of the corporation and its property attributes are Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937), and ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (rev'd ed 1968, with a new introduction by M. Weidenbaum & M. Jensen, 1991)

[95] *See generally* ROBERT CHARLES CLARK, CORPORATE LAW 15-19 (1986).

[96] *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L. J. 387, 392-96 (2000) (explaining that such a partition awards the firm's creditors a claim on the firm's assets that is prior to the claims of the personal creditors of the firm's owners, while granting the owners' personal creditors a claim in the owners' separate personal assets that is prior to the claims of the firm's creditors).

[97] BERLE & MEANS, *supra* note 97, at xxxi.

[98] *Id.*

[99] *Id.*

transferability of shares and the existence of organized stock markets make the shareholder's bundle of rights easily sold and realized, in stark contrast to the property interest of a partner in a business partnership, hence promoting investor liquidity and indirectly facilitating the capital formation process.[100]

Somewhat surprisingly, the doctrinal development of the shareholder's right to sell his shares has been rather sparse, perhaps because it has been seen as self-evident in the absence of specific circumstances that justify the imposition of limits on this right.[101] In practice, the right to sell shares in the market is considered to be much more significant and readily viable than the right to receive actual dividends, and thus seems to reflect the economic core of property rights in corporate shares.[102] This means that similar to other types of resources that have been discussed above, property rights in corporate shares are very much market-oriented, meaning that whereas the legal system protects the right of shareholders to approach the market and not to be abused by other shareholders or the corporate managers,[103] the price of the share is generally determined by the market, meaning that no set or minimal value is enshrined by law as part of the property right. The decentralized market-setting of the value of ownership obviously has its price tag, as we are witnessing in the current financial downturn. But this principle has been, at least until now, *the* key to the social and legal understanding of what stock ownership means.

B. The Shifting Balance of Alternative Property Systems

An exhaustive analysis of other property systems is obviously outside the scope of this Article. One point, however, is essential in emphasizing why the choices made by the crafters of American property law are not inevitable or inherent to the institution of property.

My aim here is to go beyond the basic observation that the fundamental choices in constructing a property system do not narrow down to anarchy, strict collectivism, or wholesale private property. In this respect, I have shown elsewhere how property regimes across different countries and societies, and within each society--including the most "Westernized" ones--are in effect comprised of a wide array of open-access, private, common, and public property regimes and, moreover, of different mixtures of them.[104] I further demonstrated how the multitude of property mixtures that have proliferated over the past few decades embody potential normative advantages for attaining both utilitarian and non-utilitarian values such as liberty, autonomy, dignity, equity, or social justice.[105]

In the context of this work, I am specifically concerned with the property law traits of rights formalism and free-market propensity, in order to show that different property

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[100] CLARK, *supra* note 96, at 14.
[101] *See* J. P. Ludington, *Validity of Restrictions on Alienation or Transfer of Corporate Stock*, 61 A.L.R.2d 1318 (originally pub. 1958).
[102] *See* Julian Valesco, The *Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 107 (2006) (arguing that the right to sell--which he considers to be the core economic right--alongside the right to elect directors, should be considered and respected as the two "fundamental rights" of the shareholders).
[103] *Id.* at 421-24.
[104] *See* Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137 (2008) (hereinafter Lehavi, Mixing).
[105] *Id.* at 162-68.

systems may not only diverge in the way they embrace these principles, but, moreover, that these two features are not intrinsically positively correlated. This means that we may witness, for example, formal property arrangements that do not adhere to the rule of markets, as well as less formal property systems that are nevertheless typified by vibrant decentralized trade and transfer of assets.

In *The Mystery of Capital*, economist Hernando De Soto famously tries to tie a Gordian knot between legal formality of property rights and free markets as an indispensable precondition for the success of property. Briefly, De Soto argues that the prevailing informality of rights in developing countries causes substantial under-investment in resources by both occupiers and governments, impedes access to capital and credit, and inhibits the development of impersonal, efficient markets.[106] De Soto's normative contention is that without state-provided formal titles to resources such as land and the opening-up to capital and trade markets, residents in developing countries would continue to suffer from under-utilization of assets and socioeconomic inferiority.[107]

Informality may indeed entail significant drawbacks, but a uniform Western-style cure may often turn out to be worse than the disease, and, moreover, in some societies, deviation from a standard formal rights model may yield satisfactory results.

First, as Daniel Fitzpatrick shows in the context of land systems, problems pertaining to informality may be especially acute in polynormative and multilayered societies in which informal claims by tribes are not recognized by the state, have not yet been fully resolved, or are otherwise incapable of being enforced de facto vis-à-vis outsiders; but at the same time, the state lacks sufficient mechanisms to enforce its own rules on all society members. The result is often one of a deadlock, in which the state, tribal communities and other parties are able to employ only partial exclusionary measures against others, thus leading lands to a state of forced, suboptimal "open access."[108] However, attempts to standardize property rights so that they are allegedly clearer (e.g., by centralized land titling) may only bring about the eruption of disputes and the collapse of traditional governance systems. Moreover, though somewhat counterintuitive, awarding formal property rights may at times expose individuals and communities to a greater risk of governmental abuse, since government may find it rather easier to take away formal rights through the employment of allegedly neutral, legalistic mechanisms.[109]

The potential fallacy of automatically identifying a uniform and exhaustive property rights system with social order, productivity, and sense of security, may also present itself in societies in which governments are able to effectively set up and enforce land laws. In the context of agricultural land in China, the government's decision to create "intentional institutional ambiguity" in the traditional legal structure of land ownership has had rather

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[106] HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 32-35, 155-57 (2000).
[107] *Id.* at 188-98.
[108] Daniel Fitzpatrick, *Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access*, 115 YALE L.J. 996, 1011-16 (2006).
[109] Larissa Katz, Governing through Owners (unpublished manuscript Aug. 2008, on file with author).

positive effects on the functionality of agricultural land for many decades.[110] Thus, the occasional reallocation of use rights in agricultural lands, especially during times of crisis, was supported by the majority of farmers who viewed tenure in lands as a system of employment and social security, and not as mere commodity.[111]

Second, recent empirical and theoretical research casts doubts on whether formal, centrally-registered rights are indeed indispensable for the creation of markets. Empirical findings in some developing countries point to the existence of active markets for the transfer of "informal" rights outside the narrow circles of trustworthy acquaintances.[112] Other research demonstrates that rather than there being a single blueprint for land titling, the efficient creation of land titling institutions--including, for that matter, the alternative of opting out of the public titling system altogether and settling for private recordation and enforcement of transactions--hinges essentially on empirical observations about the particular circumstances pertaining to the relevant society.[113]

The flip-side of the latter argument is that systems of state-created formal private property rights need not necessarily adopt a full-scale free market model to be able to function. In 2007, China enacted its *Property Rights Law of the People's Republic of China*.[114] The statute, viewed as a "historic" event,[115] was explicitly influenced in its drafting by codes of civil law countries.[116] But this is far from indicating that China simply turned its back on its ideological, cultural, and legal past, or that the adoption of "Western" formats and concepts, such as the *numerus clausus* principle or the setting-up of a unified conclusive land registry system,[117] necessarily dictates a particular substantive outcome. Thus, for example, alongside the protection of individual property rights in Article 4,[118] the statute includes the same protection for state and collective property rights, and further maintains a division of labor between these categories of ownership so as to implement "the socialist market economy, ensuring equal legal status and right for development of all market players."[119] Accordingly, Articles 47 and 58 reiterate the principle, already embedded in China's constitution, by which all lands "are

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[110] PETER HO, INSTITUTIONS IN TRANSITION: LAND OWNERSHIP, PROPERTY RIGHTS, AND SOCIAL CONFLICT IN CHINA 12 (2005).
[111] *Id.* at 186-88.
[112] *See, e.g.*, Alan Gilbert, *On the Mystery of Capital and the Myths of Hernando de Soto*, 24 INT'L DEV'T PLANNING REV. 1, 9 (2002); Carmen G. Gonzalez, *Squatters, Pirates, and Entrepreneurs: Is Informality the Solution to the Urban Housing Crisis*, U. MIAMI INTER-AMERICAN L. REV. (forthcoming, 2009).
[113] *See* Benito Arruñada & Nuno Garoupa, *The Choice of Titling System in Land*, 48 J. L. & ECON. 709, 710-12 (2005).
[114] Order of the President of the People's Republic of China (No. 62), 2007. An unofficial English version is available at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/property-rights-law-of-the-peoples-republic-of-china.html.
[115] *See, respectively*, BBC Monitoring International Reports, *Chinese Congress Passes Law For "Equal Protection" of Public, Private Property*, March 17, 2007; Mo Zhang, *From Public to Private: The Newly Enacted Chinese Property Law and the Protection of Property Rights in China*, 5 BERKELEY BUS. L. J. (forthcoming), available at http://ssrn/com/abstract-1084363.
[116] Zhang, *supra* note 115, at 27.
[117] *See, respectively*, Article 4 and Articles 9-22 of the Property Rights Law, *supra* note 114.
[118] *Id.* at Art. 4.
[119] *Id.* at Art. 3.

owned by the State, that is, by the whole people,"[120] so that any individual rights in land are basically only usufructuary ones.[121] However, one can hardly argue that China today lacks either a formal property rights system or an intensive utilization and allocation of resources simply because it is reluctant to conform to conventional free markets.

The decoupling of formal property rights and free markets in certain resources is also gaining currency in Western countries, including the United States. In Part IA2, I mentioned briefly the growing phenomenon of the Community Land Trusts (CLTs). The CLT is a community-based non-profit that acquires land for the purpose of retaining ownership in it forever for affordable housing. The individual homeowner leases the land for a long period of time and is the owner of the building that is erected on the land. The lease agreement on the land divides the property bundle between the individual and the CLT both during the tenancy and upon its transfer by inheritance or resale. Thus, for example, the homeowner must occupy the land as his primary residence, may not sublease the land without the CLT's consent, is required to receive permission for major capital improvements and is obligated to properly maintain the building. If the homeowner fails to pay the mortgage, his interests may be taken over by the CLT. The CLT thus creates an intricate yet formal system of formal property rights.[122]

But at the same time, the founding principles of CLTs deviate from the free market model. To keep the land available for affordable housing in perpetuity, when the homeowner decides to sell, the CLT repurchases the property or monitors the direct transfer from seller to buyer, but in any case subjects the resale price to a fixed formula. CLTs are thus able to create a formal property system that prevents such housing units from reverting to the free market, thus quickly driving out low- and modest-income families in neighborhoods enjoying rising market values. This organizational structure is increasingly met with enthusiasm by local and state governments that seek to support CLT projects to foster effective aid to needy families.[123] Moreover, the various front- and back-end measures aimed at mitigating the risks of insolvency and inadequate foreclosure procedures have led to exceptionally low foreclosure rates in CLT units.[124]

Summing up so far, the analysis of alternative property regimes does not aim at arguing for a normative superiority of one model over the other. What it does, however, is demonstrate that the systemic choices made by American law are not self-evident.

II. Property System Analysis of the Taking/Taxing Taxonomy

[120] *Id*. at Art. 47.

[121] Moreover, the underlying assumption of the law is that "equal protection" does not mean equal role for private and state ownership, so that the dominant role of public property in Chinese society is maintained. Zhang, *supra* note 115, at 26.

[122] Because of the unique property structure of CLTs, housing units are in fact substantially subsidized, typically in the 25-30 percent range. E-mail from Mr. Michael Brown, Director, Burlington Associates in Community Development, LLC to author, Jan. 18, 2008 11:48 AM EST (on file with author).

[123] Thus, for example, in May 2006, the City of Irvine, California, declared its commitment to fund the creation of nearly 10,000 new CLT units within a decade. Yesim Sungu-Eryilmaz & Rosalind Greenstein, A National Study of Community Land Trusts 4 (Lincoln Institute of Land Policy Working Paper, Code WP07YS1, 2007).

[124] E-mail from Mr. Michael Brown, Director, Burlington Associates in Community Development, LLC to author, Jan. 17, 2008 12:32 PM EST (on file with author).

A. The Judicially-Created Divide and its Critique

The judicial treatment of taxing as a governmental power that is inherently different from other types of economic deprivations of private wealth is one of the most long-standing and entrenched concepts of American constitutional law.[125] The constitutional "power to lay and collect taxes"[126] had been depicted by the Court from early on as "essential to the very existence of government,"[127] and has consequently been viewed as located well within the domain of the legislature.[128] Without going into a detailed chronology of the fate of different channels of constitutional challenges to tax legislation, this basic conception of taxation means that courts broadly defer to legislatures and guard only against rare instances in which the act demonstrates a gross abuse of the taxing power.[129]

Moreover, the Court has made clear that taxation for a public purpose does not even trigger the Takings Clause, since taxation, "however great,"[130] is not considered "the taking of private property for public use, in the sense of the Constitution."[131] Thus, although the Court has stated that it will intervene in "rare and special instances" in which the tax is "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property, that is, a taking of the same in violation of the Fifth Amendment,"[132] the judicial review of taxation has been conceptually and doctrinally divorced from takings jurisprudence, with the Court emphasizing time and again that these two realms are "inherently different."[133] Put somewhat differently, tax legislation is being scrutinized only when the government act is considered to be illegitimate in its own terms: the focus is on the appropriateness of the public action, and less on the nature and extent of the loss suffered by the taxpayer. This is unlike takings law, under which an adverse effect may require constitutional compensation even if the government act is otherwise legitimate, reasonable, and furthers a public purpose.[134]

This traditional divide has been increasingly criticized. Commentators, looking at the substantive effects of tax legislation: the amounts extracted, the proportionate sacrifice of the taxpayer vis-à-vis others, and the reciprocity of governmental benefits in return for the tax, have argued that the cases in which a taxpayer is forced to depart from substantial

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[125] Mazza & Kaya, *supra* note 4, at 641.
[126] U.S. CONST. art. I, § 8, cl. 1.
[127] M'Culloch v. Maryland, 17 U.S. 316, 428 (1819).
[128] Leo P. Martinez, *"To Lay and Collect Taxes": The Constitutional Case for Progressive Taxation*, 18 YALE L & POL'Y REV. 111, 114 (1999).
[129] *See id.*, at 126-144; Eric Kades, *Drawing the Line between Taxes and Takings: The Continuous Burdens Principle, and its Broader Applications*, 97 NW. U. L. REV. 189, 204-06 (2002); Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J. L. & PUB. POL'Y 85, 102-11 (1996).
[130] Mobile County v. Kimball, 102 U.S. 691, 703 (1880).
[131] *Id.*
[132] Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 24-25 (1916).
[133] *Kimball*, 102 U.S, at 703.
[134] *See* Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L. J. 47, 55-56 (1996) (arguing that injuries caused by taxation are *intentional*, designed to achieve certain legitimate aims and policies (such as progressivism) so that compensation might frustrate the very achievement of these purposes, whereas in takings, the damage is only a by-product of the government action so that compensation will not frustrate the attainment of the action's goals, thus further justifying the right to compensation).

value on a disproportionate or nonreciprocal basis are not inherently different from the taking of property. In other words, whatever, if any, the institutional or power-conferring-source differences between tax legislation and other government measures are, overlaying substantive principles such as fairness, proportionality, or efficiency in burden-sharing for the public benefit, are those that should govern legal delineation.[135]

Accordingly, numerous writers, albeit with very different normative agendas, have called to formally unify the legal principles pertaining to takings and taxings. At one end of the spectrum, Richard Epstein has seen the conceptual similarity as vindicating the case for circumventing any type of governmentally-imposed burden that does not conform to strict proportionality, most notably progressive income taxation.[136] Calvin Massey, driven by a similar normative agenda, calls to extend the various takings doctrine tests to progressive taxation,[137] such that in appropriate cases the court could "conclude that the portion of the income taken by progressive taxation is an uncompensated taking either because it is a permanent dispossession or because it deprives the taxpayer of all economically viable use of the severed strand of property."[138]

At the other end, progressive writers take a different route in calling for such a synthesis. Eric Kades identifies an overreaching constitutional principle of preventing the singling-out of a few property owners for an unfair share of public burdens while allowing reasonably-constructed progressivism, and thus calls to apply a "Continuous Burden Principle" that would monitor against too discontinuous "jumps" in marginal burdens imposed on owners or taxpayers.[139] Eduardo Peñalver identifies two principles that should guide all inquisitions as to the constitutionality of governmental burdens: (1) effect on nonfungible property interests, and (2) singling-out of owners for disparate treatment.[140] Yet Peñalver works in exactly the opposite way from Epstein or Massey. Viewing taxation doctrines as ones that enjoy "greater consensus,"[141] he suggests that it is rather takings law that should make systematic adjustments, such that many types of government interventions that are currently being considered as takings--physical or regulatory--should be regarded as legitimate forms of "regulatory taxation," thus *narrowing* the scope of the takings doctrine.[142]

Irrespective of these normative divergences, all of these writers are probably correct in their basic intuition that an isolated, "one on one" comparison of taking and taxing cases yields little support for the type of deep and uncompromising divide created by the Court over the years. Possible "compromising theories"[143] trying to distinguish either the facts of specific cases, the economic consequences of certain taxing schemes versus

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[135] *See, e.g.*, Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990).
[136] RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 283-305 (1985).
[137] Massey, *supra* note 129, at 111-123.
[138] Id. at 124.
[139] Kades, *supra* note 129, at 223-47.
[140] Eduardo Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2215-18, 2223-28 (2004).
[141] *Id.* at 2187.
[142] *Id.* at 2248-51
[143] *Id.* at 2192.

confiscatory or regulatory acts, or the doctrinal sources of government authority as a ground for such a categorical disconnect, are bound to encounter some substantial degree of incoherence or overlapping.

Yet the key to understanding why the Court has been so consistent in developing such an allegedly inconsistent jurisprudence lies, so I argue, in figuring out the broader-based pillars of American property law, and most specifically the two traits of rights formalism and market propensity. This part now moves to explicate how these features better explain the development of the taxing/taking taxonomy. It might be worthwhile, however, to flag a pre-announced conclusion that will be discussed further in Part III: *The taxing/taking divide is not inherent to the institution of property as such*; it was created and is maintained in American law as a progeny of the general paradigms of its property system, such that a change of paradigms in American jurisprudence may in turn influence this seemingly persistent enclave of a judicially-created categorical distinction.

B. Reevaluating the Taking/Taxing Line-Drawing

1. The Divide and the Constitutional Protection of Rights, not Value

What is it exactly about property that the Constitution protects under the Fifth Amendment? My argument is that it does not protect the asset's value in itself against government-inflicted losses, but rather that it shields those legally-recognized rights contained within the statutorily- or judicially-crafted "bundle of rights" in regard to such assets, with the question of restoring lost value coming into play mostly during the second stage of remedying the infringement.[144] The thrust of the judicial enterprise of creating content in constitutional property thus lies in delineating the type of protected rights and entitlements and the kind of circumstances under which the government invasion of such rights amounts to a constitutional violation that requires a remedy.

Moreover, the unequivocal embracement of "fair market value" as the measure of constitutional "Just Compensation"[145] further illustrates that the question of value is not only contingent on the identification of an otherwise protected right, but also that the quantification of compensated for value is in effect delegated to the forces of the market. The top-down constitutional protection of rights is not followed by an enshrinement of a certain socially-determined stream of benefits or by yielding to the subjective demands of the injured owner: value is set by aiming to mimic the market and trying to identify what would have been agreed upon between a "willing buyer" and a "willing seller."[146] Opting for "fair market value" frees the government from making difficult policy choices about what is the proper value that a person is entitled to enjoy as owner of a certain resource, a

[144] This is not to say that the question of loss is irrelevant to the first stage of inquiry. As I showed in Part IA1, the amount of loss is one of the prongs of the *Penn Central* test for regulatory takings--but as I argued, this is exactly why regulatory takings law is so "muddy." *See* text accompanying notes 60-63.
[145] U.S. CONST., amend. V, cl. 4.
[146] *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).

determination that may have enormous implications on the government-individual property relationships in many ways beyond the specific instance of a taking.[147]

In these two fundamental respects, the public law of property very much resembles the American private law of property. In setting up a system of formal, enforceable private property rights that applies among members of society, the law determines what are the interests or "strands" that are enshrined, and under what circumstances these would be enforced and remedied in case of a breach by another. But unlike the state endorsement of such rights and correlative duties, no such guarantee exists in regard to the actual value that the legally-undisturbed owner would enjoy. As Lee Anne Fennell notes, whereas a homeowner more or less controls the "onsite factors" of the resource (and I would add the control of onsite-related legal infringements such as nuisances), the owner can do no more than hope for the best as for the substantial value influences of "offsite factors" such as "neighborhood changes and larger housing market trends."[148]

The private law of property thus enshrines a certain bundle of rights and access to the market. But it does not vouch for the actual stream of benefits that the owner derives, either as consumption or as investment within the market. What one therefore *legally* owns is the set of exclusive rights allocated to her, not the resource's value.[149] Accordingly, although different in many ways from the public law realm, the private law of property similarly protects rights, not value.

This, I think, is a point that is largely overlooked in many of the current critiques that seek to analyze and "deconstruct" the basic taxing/taking taxonomy. A comparative examination that isolates the amount of economic loss or the spread of economic deprivation among different owners/citizens as *the* all-embracing legal watermark cutting through different categories of government action, misses the enormous importance that the American property system places on identifying the different types of property strands, the diverging ways in which these strands may be infringed upon, and the signals that a certain government action affecting property sends to the entire property system.

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[147] *See* Katrina M. Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239 (2007) (criticizing the sweeping adherence to "subjective" measures, and calling to incorporate objective parameters for compensation that will reflect broader societal perspectives about the goals of property). Other legal systems do tie up the question of just compensation for takings to fundamental societal concepts about property. For example, Section 25 of the 1996 South African Constitution forbids the deprivation of property except "for a public purpose or in the public interest" and "subject to compensation," but explicitly states that "the public interest includes the nation's commitment to land reform, and to bring about equitable access to all South Africa's natural resources." Constitution of the Republic of South Africa, 1996, Sections 25(1)-(2), (4). Accordingly, the compensation paragraph creates a multi-factor test, in which the market value is but one component, aimed at achieving "an equitable balance between the public interest and the interests of those affected." *Id.* at Section 25(3). For the scholarly debate in the matter, compare Jill Zimmerman, *Property on the Line: Is an Expropriation-Centered Land Reform Constitutionally Permissible*, 122 SOUTH AFRICAN L. J. 378 (2005) with AJ van der Walt, *Reconciling the State's Duties to Promote Land Reform and to Pay "Just and Equitable" Compensation for Expropriation*, 123 SOUTH AFRICAN L. J. 23, 23-25 (2006).

[148] Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1048-49, 1054-63 (2008).

[149] *See* J E Penner, Value, Property, and Wealth 1-7 (unpublished manuscript, 2007) (on file with author).

Disregarding these elements makes it very difficult to understand why the Court is taking pains to hold that the government acts in *Loretto*[150] or in the *Washington Legal Foundation*[151] cases constitute a "taking" and to hail the significance of constitutionally-recognized strands such as possession, use, or alienability, when it is obvious at the outset that no actual economic or market value loss has occurred, and the Court accordingly refrains from awarding actual compensation.[152] But this is the way in which American property law works: it attributes enormous significance to identifying the formal features and attributes of property rights, pointing out these cases in which recognized rights are considered to be infringed upon and to what degree, and advocating a sense of security in the delineation of the bundles pertaining to different resources--although it is at the same time careful and pragmatic in selecting the actual modes of intervention, relying as it does broadly on the dominance of markets in value-setting.

It is this broader perspective of American property law that helps to explain why taxation is generally considered to be the "lesser evil" among the different forms of governmental extraction of private value. The property system is better accustomed to viewing taxation as a "background" institution, which although financially significant, creates less uncertainty in figuring out who the owner is and what is the bundle she owns, as compared to other types of government interventions with property rights in resources.

The starting point of this differentiation is the pragmatic understanding that government must act at times through coercion to finance public goods, solve other collection action problems, or promote values and goals that cannot be advanced solely through the market, and to gain access to economic resources to achieve these purposes. The qualitative nature and extent of such government activity is of course a matter of a fundamental normative resolution, be it a "night watchman's state,"[153] a highly progressive interventionist welfare state, or anywhere in between, but the essentiality of some level of resource coercion in itself cannot be denied.

Given this upfront dictate, the way that typical taxing schemes work, including for that matter progressive income or business taxation, is that these may be very irritating to those who pay them, but they do not tend to undermine the broader understanding of who the formal owner and the person who otherwise controls decisionmaking, use, and other legally-recognized strands in regard to such a resource is. Taxes also tend to impinge less on the basic freedom that a person has to act in the market (in most cases, taxation *is* a result of a person's otherwise-autonomous decision to sell or buy, although some specific types of taxes do seek to change actors' incentive structure),[154] and, moreover, these are

[150] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).
[151] Philips v. Washington Legal Foundation, 524 U.S. 156 (1998); Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003).
[152] *See infra* Part IA1.
[153] *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26-27 (1974).
[154] Roy Bahl, Jorge Martinez-Vazquez, and Joan Youngman, *The Property Tax in Practice*, *in* MAKING THE PROPERTY TAX WORK: EXPERIENCES IN DEVELOPING AND TRANSITIONAL COUNTRIES 3, 5-8 (Roy Bahl et al. eds., 2008).

not generally interpreted as reshuffling common understandings about *other* property institutions that are not directly affected by the tax.[155]

It would be safe to say that although progressive income taxation in the U.S. is not a matter of consensus, it is not understood by its proponents and opponents alike as giving government a *carte blanch* to similarly intervene with all other types of privately held resources. Even with its various taxing schemes intact, the U.S. has been perceived from both outside and within as the paradigm of a formal property rights, free market society. In this respect, taxes are more easily regarded as an "isolated" phenomenon that does not undercut, and at times--such as with property taxation discussed below--even entrenches ownership, enforcement and protection of rights, and free market propensity. Obviously, a 100 percent income tax or anything close to it would be viewed differently by everyone,[156] but this is exactly the kind of "rare and special instances" that take such government deprivation way outside the scope of conventional taxation in American law.

This state of affairs is very different for high profile cases regarding other types of government interventions with private property. I mentioned above the public outcry and legal backlash following the *Kelo* case,[157] but this is in no way an isolated phenomenon. Other key takings cases typically have much broader effects beyond the contours of the specific dispute, and it thus seems clear why the Court is paying such close attention to reviewing these cases and why it retains its ability to intervene in designing and re-designing through them the constitutional landscape of property. Thus, for example, the Court places enormous weight on portraying the nature and scope of the various "strands" such as possession (e.g., *Loretto* or the recent *Wilkie v. Robbins* case),[158] use and control (the *Washington Legal Foundation* cases),[159] or alienability (consider the *Hodel v. Irving* ruling on the invalidity of prohibitions on descent of fragmented individual ownership within Indian tribal land).[160]

Whereas all of these cases greatly differ from one another, and so often lack orderly intra-field rules and classifications in the delineation of the spectrum of takings, they do seem to share a distinctive feature, as they all touch in some significant manner on the core understandings of the institution of property and the underlying features of the American

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[155] In referring to such "understandings" or "perceptions" of taxes versus takings, one may be left to wonder who is the subject of such property views; is it what Bruce Ackerman calls the "Scientific Policymaker" (i.e., the learned legal professional) or rather the "Ordinary Observer" (i.e., the layman)? BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 26-31, 97-103 (1977). I shall not delve here into a discussion of Ackerman's theory of property as deriving from the tension between these two viewpoints, but would rather make the argument--that would have to be articulated elsewhere--that property legal categories tend to be more sustainable when they do not consistently clash with "laymen" concepts.

[156] *See* Massey, *supra* note 129, at 104; Kades, *supra* note 129, at 189-90, 198-200.

[157] *See* text accompanying *supra* note 17.

[158] 127 S. Ct. 2588 (2007) (rejecting a takings claim by a Wyoming rancher whose land has been trespassed upon and otherwise "harassed" for six years by a federal agency looking to attain a free easement on the land).

[159] *Philips*, 524 U.S. 156; *Legal Foundation of Washington*, 538 U.S. 216.

[160] 481 U.S. 704 (1987). The Court invalidated as a taking the provision of Section 207 of the Indian Land Consolidation Act, Pub. L. No. 97-459, Tit. II, 96 Stat. 2519 (1983). Section 207 prohibited the descent or devise of any individual interest in Native-American tribal land that represented less than two percent of the total tract, so that upon the death of the fractional owner the shares would escheat to the tribe.

property system, and thus go well beyond questions of the legitimacy of government authority or the sheer economic consequences of the forced contribution of privately held value. This, so I argue, substantially distinguishes them from tax disputes.

2. Incorporating the Public/Private Interface in Property

The interrelationship between the public and private law of property is extremely complex, although it receives surprisingly scant attention within the broader public law/private law discourse.[161] Although a detailed analysis is outside the scope of this Article, a few observations are in order to explicate why this intricate issue may further support the taking/taxing differentiation.

I referred above to an underlying similarity between the public and private law of property regarding the two basic traits of rights formalism and market propensity.[162] This does not mean, of course, that these two branches of law are synchronic or anything close to it. There are good reasons to award government with certain powers that should not be granted to private persons who interact with private property owners--including the power to exercise coercion at times--just as there are solid arguments to impose certain duties and restrictions on government that should not apply, at least not in the same magnitude, to individuals, including limits on discrimination against owners or non-owners,[163] due process requirements,[164] transparency in property dealings,[165] and so forth.

Yet even given these differences, it is clear enough that no hermetic separation exists between public law and private law in just about any specific doctrine. First, as I have shown elsewhere, simply drawing the line between "public" and "private" in property is especially complicated as compared to other fields of law, in a way that mandates that decisions shaping the "core" aspects of property law be taken by state entities entrusted with the power and duty of collective decisionmaking--chiefly legislative and administrative bodies supervised in turn by judicial review.[166]

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[161] For the public/private distinction in general, see, e.g., *See* N.E. Simmonds, *Justice, Causation and Private Law*, *in* PUBLIC & PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 149 (Maurizio Passerin d'Entrèves & Ursula Vogel eds., 2000); Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, *in* PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE 1, 2–4 (Jeff Weintraub & Krishan Kumar eds., 1997).

[162] *See* text accompanying supra notes 148-149.

[163] The borders between public and private action in this respect are not, however, clear-cut. In the famous Shelley v. Kraemer case, the Court invalidated race-based restrictive covenants in privately-owned houses reasoning that "in granting judicial enforcement of the restrictive agreements… the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." Shelley v. Kraemer, 334 U.S. 1, 20 (1948). An even earlier example, the roots of which are located in common law, is the limits on exclusion from privately-owned public accommodations. See Joseph William singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283 (1996).

[164] *See* MERRILL & SMITH, *supra* note 27, at 1164-91.

[165] Consider, for example, the prohibitions on government to secretly purchase land for public purposes since it is subject to the transparency of democratic deliberations, a limit that does not apply to private actors. Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 31-33 (2006).

[166] Lehavi, Puzzle, *supra* note 14, at 2012-25.

Second, in dealing with specific doctrines in takings law, it is evident that the Court is aware of the potential spillover effects and interrelationships between the two realms of property law. I mentioned in the Introduction the way in which the Court, in deciding the key takings cases of *Loretto*[167] and *College Savings Bank*,[168] referred to its private law jurisprudence in defining the "treasured" right to exclude as a mainstay of constitutional property. Hence, although takings cases touch on the distinctive government power to coercively take or regulate property, the way in which the bundle of rights is defined in such cases has bearing--conceptual and practical--on the way in which we basically understand "property" in seemingly parallel conflicts among private stakeholders.

Thus, for example, the power of eminent domain, i.e., the coercive taking of possession and title in privately owned land, is allegedly unique to government.[169] However, conflicts about the limits of the power, such as the *Kelo*-type contested application of the "public use" requirement for "economic development"-- meaning in fact the condemning and transferring of land to private entities--have obvious implications to the scope of property rights and the type of legal protection that a person is entitled to against potential incursions by others. Beyond the oft-made point that politically-powerful private actors would be motivated to circumvent the market and turn to the government as merely a vehicle to facilitate a coerced private transaction,[170] the delineation of the power of eminent domain for such non-quintessential "public uses" may have implications on the way in which persons understand the laws of trespass, building encroachments, servitudes, adverse possession, etc. If the Court in *Loretto* defines the constitutional property rights against uncompensated permanent government invasion based also on private law doctrines, might not jurisprudential connections be drawn between the expansion of the power of eminent domain for "economic development" and a potential erosion of the traditional property rule protection against private invasions (i.e., injunction) and a switch toward liability rule protection (i.e., compensation)? This is not to say that such a private law switch is necessarily wrong.[171] But the point here is that the potential interconnectivity is not something that courts can ignore, especially when they have drawn their own private/public parallels in past cases.

The same can be said about cross-effects in other takings doctrines. Take, for example, the famous "nuisance exception" to takings, as articulated in late nineteenth and early twentieth century cases such as *Hadacheck v. Sebastian*[172] and *Miller v. Schoene*,[173] according to which diminution in property value caused by nuisance-control measures never requires compensation.[174] In the 1992 *Lucas v. South Carolina Coastal Council*

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[167] *See supra* note 18.
[168] *See supra* note 19.
[169] This, in addition to entities such as common carriers that are specifically authorized by statute to do so. *See* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1710-11 (2007).
[170] *See, e.g.*, Kelly, *supra* note 165, at 34-41.
[171] Numerous commentators have advocated for such a switch for quite some time now. *See, e.g.*, IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 1–38 (2005).
[172] 239 U.S. 394 (1915)
[173] 276 U.S. 272 (1928).
[174] *See generally* MERRILL & SMITH, *supra* note 27, at 1323-28. Interestingly, in subsequent cases to those mentioned in supra notes 172-173, the Court had to deal with the potential interconnectivity between the non-compensated shutting-down of noxious uses and tax aspects of such devaluated assets. In a

case,[175] the Court limited the rule only to those "noxious uses" that constitute common law nuisances--hence not only referring to private law, but also directly relying on it for the purpose of reconstructing the doctrine.[176]

One can also think about the alleged similarity between the *Washington Legal Foundation* cases[177] and the law of unjust enrichment that deals, inter alia, with scenarios in which one person benefits from another person's property and the owner demands to be restituted for such benefits although she suffered no direct economic harm.[178] Again, although the formal legal fields are distinctive, the conceptual question whether a non-owner may use property without receiving the owner's consent even if the latter does not suffer direct economic loss is one that crosses boundaries between public and private law.

Hence, in such takings cases, although the courts are dealing with the use of distinctive governmental powers, the judiciary must and does take into consideration the broader-based effects that such doctrines have on the entire system of property law.

Taxes are different. Taxation does seem to be a unique government power that has no apparent or intuitive parallel in the private law of property. It may be annoying or socially contestable, but it does not have a substantial bearing on the entire property system the way that various takings cases do. This characteristic allows courts to view taxation as a genuinely distinctive sphere of government activity that must not be inherently conjoined with the Takings doctrine, but can rather be classified and evaluated in its own terms.

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prohibition-era case, the Court refused to validate an obsolescence tax deduction to a brewery, reasoning that "It seems to us plain… that when a business is extinguished as noxious under the Constitution, the owners cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due. It seems to us no less plain that Congress cannot be taken to have intended such a partial compensation to be provided for by the words 'exhaustion' or 'obsolescence.' Neither word is apt to describe termination by law as an evil of a business otherwise flourishing, and neither becomes more applicable because the death is lingering rather than instantaneous. It is incredible that Congress by an Act approved on February 24, 1919, should have meant to enable parties to cut down their taxes on such grounds because of an amendment to the Constitution that it had submitted to the legislatures of the States in 1917 and that had been ratified by the legislatures of a sufficient number of States the month before the present Act was passed." Clarke v. Haberle Crystal Springs Brewing Co., 280 U.S. 384, 386-87 (1930). Note, however, that in the 1931 case of V. Loewers Gambrinus Brewery Co. v. Anderson, 282 U.S. 638 (1931), the Court allowed a deduction of obsolescence of the plaintiff's buildings resulting from the imminence and taking effect of the prohibitory laws, distinguishing what it deemed to be "a part of operating expenses necessary to carry on a manufacturing business" from the loss of goodwill argued by the plaintiff in *Heberle*, supra. It seems, therefore, that the Court has been willing to accept those types of tax relief that did not appear to stand out as an explicit, highly visible measure of in-kind compensation which might have been grasped in professional and popular mind as a circumvention of the alcohol prohibition Constitutional decree.

[175] 505 U.S. 1003, 1029-31 (1992).

[176] Accordingly, future challenges to regulatory measures, such as whether the *Lucas* rule applies to regulation of "noxious uses" that do not constitute a common law nuisance but nevertheless do not wipe out all "economically viable use" of the property, are bound to consider developments in private nuisance law, and may very well *influence* private nuisance law regarding both the cause of action and remedy chosen.

[177] Philips v. Washington Legal Foundation, 524 U.S. 156 (1998); *Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003).

[178] *See generally* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004). For such a cross-filed analysis in the context of land use, see Lehavi, Intergovernmental, *supra* note 179, at 984-87.

Once again, the argument that I make here is not a normative one, by which courts should not be allowed to scrutinize tax legislation in appropriate cases, but rather a jurisprudential-analytic claim: the genuine distinctiveness of taxation from private property conflicts serves as yet another ground for separating this sphere of government action from the grasp of the complicated-as-it-is takings jurisprudence and the public/private entanglement that is an inherent part of it.

3. Taxation as an Empowerment of Property Rights

Counterintuitive as it might seem at first glance, some forms of taxation, as opposed to other types of governmental intervention with private property, may be rather viewed as validating, entrenching, and solidifying property rights in assets. The argument here goes beyond the often-contested general claim that the financial contribution of taxpayers is more than offset by the level of overall public benefits provided directly or indirectly to the taxpayer, including through the preservation of a public system of law and order. The extent to which this "tax benefit" theory is valid and can further justify progressive taxation remains deeply contested, though empirically heavily under-researched.[179]

My thesis is different and argues for a link between the payment of taxes and the empowerment of property rights in the *specific assets* that are the subject of taxation. In so doing, I focus my attention on what is perhaps the tax that shows the closest link between tax and property rights: the property tax. Although it has been almost neglected in the taxing/taking debate--that tends to focus on progressive income taxation--the study of property tax can provide important insights for purposes of the taxonomy discussion.

a. Why the Property Tax is so Contested …

The property tax in the U.S. is within the province of state and chiefly local governments. Although the state authorizes the imposition of the tax and at times sets certain limits on local decisionmaking (such as on the maximum tax rate or on the overall growth rate of annual tax levies),[180] the various local-level governments enjoy the overwhelming majority of property tax revenues,[181] and rely heavily on this tax as the most important source of own-revenue, second only to state aid as a general-revenue resource.[182]

Although the property tax scheme changes among the different states and localities, land and buildings typically form the major part of the property tax base, alongside a few items of personal property.[183] The tax base for a specific piece of property is its assessed

[179] *See* Kades, *supra* note 129, at 220-23.
[180] *See* Mark Haveman & Terri A. Sexston, *Property Tax Assessment Limits: Lessons from Thirty Years of Experience* (Policy Focus Report, Lincoln Institute of Land Policy, 2008), at http://www.lincolninst.edu/pubs/dl/1412_733_PFR%20Property%20Tax%20Limits.pdf.
[181] These localities--counties, municipalities, townships, school districts, and special districts--enjoy 96.5% of all property tax revenues. RONALD FISHER, STATE AND LOCAL PUBLIC FINANCE 319 (3d ed. 2007).
[182] *Id.* at 319-20; JOAN YOUNGMAN, LEGAL ISSUES IN PROPERTY VALUATION AND TAXATION: CASES AND MATERIALS 3-6 (2d ed. 2006). The distribution of the property tax among the various types of local governments that have overlapping jurisdiction and taxing power is a highly complicated, state-specific issue that need not be addressed here. *See* Lehavi, *Intergovernmental, supra* note 83, at 948-49 (2006).
[183] Such movables include certain equipment, inventories, and vehicles. YOUNGMAN, *supra* note 182, at 6-9.

value ("taxable value"), derived from an estimate of the property's market value according to a set of formal procedures and formulas established by state law.[184] The tax rate is calculated as a certain fraction of the assessed value. The tax rate typically differs among different sorts of assets, with commercial or industrial properties usually subjected to higher tax rates than are residential properties.[185] The property tax levy for a specific asset is thus calculated by multiplying its assessed tax base by the applicable tax rate.

Beyond its inherent link to local governance, the property tax has certain features that distinguish it from other taxes: *high degree of visibility*, since it is not withheld at source but is rather paid directly by the taxpayer in periodic lump sum payments; *relative inelasticity*, especially because assessed property values respond more slowly to economic activity than do incomes; and *high administrative costs*, since the assessment of the value has to be formally determined (unlike taxes based on flows such as income or sales tax) and is hence a source of frequent assessment disputes.[186]

The property tax is often considered to be "unpopular" among taxpayers.[187] Probably most famously, in 1978, after several years of major annual increases in property tax bills following the rapid rise in real estate prices, voters in California approved Proposition 13 that broadly limited the growth of property taxes.[188] Proposition 13 stated, inter alia, that (1) the assessed value of all properties would be set back to their 1975-76 values; (2) the property tax rate would not exceed one percent of the assessed value; and (3) the assessed value of any property can increase at no more than two percent per year, unless there is change of ownership, in which case the property is reassessed at its new market value.[189] In the years that followed, many states similarly imposed limits on property tax.[190] Interestingly, in 2006-2007, after a steep price increase for a decade and just prior to the current plunge in the real estate market, lawmakers in 27 states introduced tax relief measures to address taxpayer discontent over increased tax burdens.[191]

Despite the alleged discontent with property taxation and the broad disparities between and within different jurisdictions, the Court broadly defers to the legislatures in the face of constitutional attacks no less than it does with respect to other taxes. In *Nordlinger v.*

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[184] The assessed value is set by law or government practice at some specific percentage of market value, called the "assessment ratio rule." This means that the assessed value in itself may often be lower than the full market value of property. FISHER, *supra* note 181, at 321.
[185] YOUNGMAN, *supra* note 182, at 15-21.
[186] Richard M. Bird & Enid Slack, *Introduction and Overview, in* INTERNATIONAL HANDBOOK OF LAND PROPERTY TAXATION 12-13 (Richard M. Bird & Enid Slack eds., 2004).
[187] Periodic surveys show that the local property tax is voted by Americans as one the two most "unfair" taxes, alongside the federal income tax. Richard L. Cole & John Kinkaid, *Public Opinion and American Federalism: Perspectives on Taxes, Spending and Trust*, SPECTRUM: J. of STATE GOV., Summer 2001, 14.
[188] *See* CAL. CONST. art. XIIIA, § 1.
[189] *Id. See* Haveman & Sexston, *supra* note 180, at 5; Arthur O'Sullivan, *Limits on Local Property Taxation: The United States Experience*, *in* PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 177, 177–78 (Wallace E. Oates ed., 2001).
[190] Overall, in 19 states and in the District of Columbia, the legislature sets limits on increases in the assessment of specific properties. Sixteen of these jurisdictions also place limits on the overall growth of tax revenues or cap the tax rate cap. Haveman & Sexston, *supra* note 189, at 15.
[191] *Id.* at 8.

Hahn,[192] the Court rejected an equal protection claim made by taxpayers who purchased properties in California after the coming into effect of Proposition 13 and were thus required to pay substantially higher property taxes than their neighbors, on otherwise comparable properties. Even though the Court itself admitted that "the differences in the tax burdens are staggering,"[193] it emphasized that the standard of review "is especially deferential in the context of classifications made by complex tax laws."[194] It saw "no difficulty in ascertaining at lease two rational or reasonable considerations of difference" in the California tax burden scheme, the first being that "the State has a legitimate interest in local neighborhood preservation, continuity, and stability," and the second is the State's legitimacy in concluding that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner."[195]

Nordlinger has been depicted as representing the "zenith of the power to tax."[196] My intention here is not to delve into the question of whether *Nordlinger* was rightly or wrongly decided on the merits of its equal protection claim, but rather to point to what critics of the taking/taxing taxonomy may view as probably the most artificial categorical distinction between the two realms.[197] Whether one views such a highly-differential treatment of property owners as normatively justified or not, what conceptual difference is there between this case and other instances in which landowners claim to have been forced to sacrifice a grossly uneven share of their private assets to promote the public welfare? On the face of it, the property tax seems to be the tax that most *resembles* other types of governmental intervention with property and should thus be judged accordingly.

My argument is that although a "pointblank comparison" may indeed leave one to wonder whether such a distinction is genuine or merely a self-perpetuating fallacy, a property system analysis reveals implicit and explicit groundings for the different view of exertion of property taxation vis-à-vis the taking of property rights in the asset that is subject to taxation. Slanted and disliked as the property tax may often seem, it is in fact part and parcel of the unique way in which the American property system is structured as far as both individual entitlements and collective governance through property.

b. … and is yet a Signifier of Formal Rights and Markets

The existence of an individually-assessed, market-based property tax system that is levied on property owners is far from self-evident. It is in fact probably one of the most identifying features of the American-type formal, market-oriented property system. Accordingly, property taxation is typified by major differences not only between developed countries vis-à-vis developing and transitional ones, but also among various

[192] 505 U.S. 1 (1992).
[193] *Id.* at 6.
[194] *Id.* at 11.
[195] *Id.* at 12-13.
[196] Martinez, *supra* note 128, at 140.
[197] Peñalver considers *Nodrlinger* as justified and well-grounded, and then calls to view regulatory taking cases in a similar manner, based on the criterions of nonfungibility and singling-out. Peñalver, *supra* note 140, at 2202-05, 2212-28.

"Westernized" countries.[198] My focus is not so much on the quantitative differences in tax revenues (the property tax in OECD countries is on average about 2% of the GDP as opposed to less than 0.7% in developing and transitional countries, with Australia, Canada and the U.S. collecting more property taxes than in Germany or Britain),[199] but rather on the institutional and organizational features of the establishment, organization, and enforcement of property taxation. The characteristics of the property tax mechanism both reflect and further entrench the fundamentals of a certain property legal system.

Consider the legal and administrative prerequisites for a property tax system that is shouldered on property owners and based on individual assessment of properties and the imposition of an *ad valorem* tax set at a certain fraction of the assessed market value.

4. Formalism of Rights in Property Taxation

First, one requires a comprehensive formal recording system of property rights in land. Briefly, the American system of land title record is one of *recordation of deeds*.[200] Although the official recordation of a land transaction is not itself binding on third parties, it nevertheless makes public such a "constructive notice" and endows the recorder legal priority over subsequent parties seeking to register a conflicting transaction. Together with the possibility of initiating a "quiet title" action to clear away fears of earlier-though-not-registered conflicting claims, and the instrument of private title assurance, the American system provides stable and secure formal property rights.[201]

Beyond the issue of clearly identifying ownership, the major administrative challenge for setting up a property tax mechanism is to construct a comprehensive, reliable, and constantly-updated system of public information on the attributes of each individual parcel: its exact size and geographical boundaries, its legally authorized land uses and other pertinent planning or zoning data, the nature and scope of buildings and other fixtures located on the land, and so forth. Tracking and documenting these features within some sort of a cadastral system[202] is essential not only for resolving potential property disputes among neighbors, or for allowing government to carry out its land use and planning policies, but is also the basis for an efficient, fair, and enforceable property tax system.[203] All of these traits have a direct bearing on value, and without them, any type of individual-based assessment of the property for tax purposes is virtually impracticable.

The challenges of developing and transitional countries in this context may shed light on what may be considered as self-evident in the American setting. Irrespective of the

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[198] *See generally* INTERNATIONAL HANDBOOK OF LAND PROPERTY TAXATION, *supra* note 186.
[199] Roy Bahl & Jorge Martinez-Vazquez, *The Determinants of Revenue Performance*, *in* MAKING THE PROPERTY TAX WORK, *supra* note 154, at 35.
[200] The more prevalent system worldwide is that of *registration of rights*. In a rights registration system, the public registry contains information not about claims but about state-endorsed rights, such that the registration requires a previous complete purge of property rights. Arruñada, *supra* note 36, at 421.
[201] *Id.* at 414-20; For the U.S. title recording system, see MERRILL & SMITH, *supra* note 27, at 917-946.
[202] Although cadastral systems substantially diverge among different countries, and the term itself is sparsely used in the U.S., their informational essence follows generally similar principles. *See Special Issue, Cadastral System II,* 26 COMPUTERS, ENVIRONMENT & URBAN SYSTEMS 355 (2002).
[203] *See* Gerhard Navratil & Andrew U. Frank, *Processes in a Cadastre*, 28 COMPUTERS, ENVIRONMENT & URBAN SYSTEMS 471, 471-73 (2004).

question as to whether a sweeping "Western" formalization of property rights is in fact constructive for such countries, or can otherwise claim normative superiority over alternative forms of resource control, it seems clear enough that the under-utilization of property taxation in many of these countries stems primarily from the lack of a comprehensive system of rights formalization and cadastral information that is paramount to the construction of an individual, parcel-based property tax system.

Thus, whereas De Soto depicts countries such as the Philippines, Peru or Haiti as dominated by extra-legal land holdings,[204] he seeks to refute the conception that those who take cover in such sectors do so to avoid paying taxes. He argues that the costs imposed on those who act extra-legally generally outweigh the amount of potential taxes paid, and thus points the finger at the "bad legal and administrative system" that denies persons in such countries broad-based access to legally-protected property rights.[205]

Other writers, who are more ambivalent about an essential positive link between formal property rights and individual prosperity, nevertheless stress the significant interconnectivity between property taxation and a societal validation of claims to assets. Attempts to establish a viable system of property taxation, even at the face of incomplete formality of rights, absence of a comprehensive cadastre, or yet-to-develop property markets, regard property taxation as distinct from other sources of revenue in that it serves to promote individual or group stability and security in the control over assets.[206] The comparison to emerging or struggling systems of property taxation may thus shed light on the way in which property taxation is considered in the U.S. to be inherent to a formal legally-entrenched property system in which, despite all the political murmurs and alleged unpopularity, the prevailing notion is one of: "I'm taxed, therefore I own."

5. The Dominance of Markets

A value-based (ad valorem) taxation system relies at its core on the existence of a vibrant, transparent, and privately-dominated property market, one in which actual market, arm-length transactions serve as the best indicator for the "true" market value of properties, even if the formal assessment procedure later adds certain interventionist or restricting factors to arrive at the "assessed value" for property tax purposes.

As Joan Youngman notes, the thousands of taxing jurisdictions in the U.S. exhibit just about every possible approach to property taxation, with some states such as California, Michigan, Oregon, or Florida allegedly moving away in the last decade from accurate market-based assessments.[207] But at the same time, one can quite safely generalize that the American system, especially as compared to other legal systems, is still very much reliant on property markets as the foundational stone for the design of property taxation. To start with, even in the aftermath of Proposition 13, most states do not impose statutory

[204] DE SOTO, *supra* note 106, at 32-35.
[205] *Id.* at 153-59.
[206] *See, e.g.*, Martin O. Smolka & Claudia M. De Cesare, *Property Taxation and Informality: Challenges for Latin America*, 18(3) LAND LINES 14, 18 (July 2006).
[207] Joan Youngman, *The Property Tax in Development and in Transition, in* MAKING THE PROPERTY TAX WORK, *supra* note 154, at 19, 23-24. See also text accompanying *supra* notes 187-191.

limits of market-based assessment, thus maintaining market evaluation of assets for tax purposes as the rule rather than the exception.[208] Yet even within those jurisdictions that have adopted restrictive measures, it would be wrong to simply conclude that market values have no bearing on the way governments construct their public finance policy or that property taxation is otherwise considered to be alienated to property market values. The formulas that are set by legislatures in these different states do take market values as the basis for assessing market value, even if these are somewhat "modified" during the assessment process (typically by capping the annual growth rate of the assessed value).

No better proof can be provided for this ongoing interconnectivity than the recent turn of events following the sharp downturn of real estate prices through the U.S. since 2007. Property owners throughout all states (including in California, for that matter) have been appealing to their local governments to reassess their home values, and official reassessments that have been made since then have indeed resulted in often-dramatic downward assessed values, tax bills, and overall property tax revenues.[209] Thus, the caps that have been placed during eras of steep rises in market values may have exhibited the genuine liquidity problem stemming from the rapid increases in the property tax burden relative to residents' incomes for yet-unrealized "paper gains" in real estate prices, as well as the all-too-familiar human tendency to exploit the political process to try shifting the burden unto others (as is the case with Proposition 13's "welcome stranger" provision, reassessing property values at the new market price in the case of transfer).[210] But even during times of market tides, the connection was never broken. Property taxation is thus still inherently intertwined, in the eyes of both governments and residents, with the workings of property markets.

It is in this sense that property taxes are viewed as fundamentally different from takings and other types of government interventions with private property. Even if implicitly, the design and administration of property taxation validates the concept of a market-driven property system and can thus be seen as an integral part of it. Contested and highly visible as it is, the perseverance of the property tax system as an *ad valorem* market-based mechanism and the broad judicial deference to these attributes cannot be viewed as a mere coincidence.

In contrast, takings and especially cases of eminent domain generally represent a *deviation* from the principles of property markets. The coercive transfer of property rights from an individual owner to the government, even if specifically essential to promote general welfare, is conceived as a challenge or as a constitutionally-mandated exception to the normal state of affairs by which properties are voluntarily transferred through markets. Moreover, although constitutional Due Compensation is based on calculating

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[208] *See* text accompanying *supra* notes 190-191.

[209] *See, e.g.*, Michel Mansur, *Kansas Property Assessments Begin to Reflect Real-Estate Market Downturn*, Kansas City Star, June 19, 2008, B1; Jennifer Steinhauer, *Taxes Reassessed in Housing Slump as Prices Decline*, N.Y. Times, Dec. 23, 2007, A1; Jill P. Capuzzo, *Homeowners Fight Back as Markets Cool off*, N.Y. Times, June 15, 2008, Real Estate Sect., 1; Richard Halstead, *Thousands in Marin Asking for Property Tax Cuts*, Marin Ind. J. (Cal), June 13, 2008; Neil Gonzales, *Money for Schools Hit by Property Value Drop*, Inside Bay Area (Cal.), Mar. 27, 2008.

[210] *See* text accompanying *supra* notes 192-195.

"fair market value" at the time of the taking, as I noted above,[211] it cannot practically guarantee that the condemned would be subjectively indifferent to the taking as would be the case in a genuine market transaction,[212] and moreover, it inherently denies property owners future value appreciations stemming from the government action. This tension has obviously been the source of tremendous public conflict, as the vivid examples of Susette Kelo and her counterparts in other high-profile takings cases demonstrate,[213] and of numerous calls for legal reform.[214] It thus seems clear that takings instances do and will remain a break-away from the ordinary workings of the market, in a manner that further helps to explain the fundamental difference between taking and taxing when viewed through the prism of the American property system in its entirety.

6. Property Taxation as a Vehicle for Local Resource Governance

There is yet another prominent aspect in which the structure of property taxation in the U.S. works to strengthen property rights and other private interests as an inherent part of the very same mechanism that imposes a financial burden on property owners.

As mentioned, the American property tax is almost exclusively the province of local governments.[215] Although the basic economic features of real estate taxes do seem to be "natural" to local governance (due to immobility of land, the more intimate acquaintance of the locality with real estate values, and so forth), it is not self-evident that property taxes would be set, administered, and collected by local governments, even within the group of market economies. In Britain, for example, national government has taken over decisionmaking and administration of non-domestic property taxation and distributes the proceeds to localities according to their population. It also sets the assessment and rate principles for the new residential property tax (the Council Tax).[216] Property taxation is also very much centrally coordinated in other Western countries such as in Germany, in which the principles of the federal land tax law govern this otherwise municipal tax.[217]

The overreaching localization of the property tax in the U.S. thus has to do with much more than administrative feasibility. It represents the pillars of intergovernmental organization, politics, economy, and ideology. As William Fischel argues: "People view their property taxes as different from other taxes… They are part of their own city's or town's property."[218] Although this popular conception has its downside in that residents of wealthy localities are often hostile to interlocal transfers of tax revenues through regional or state mechanisms,[219] it nevertheless captures the unique way in which owning

[211] *See* text accompanying *supra* notes 145-147.
[212] *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 510-11 (1979).
[213] Lehavi & Licht, *supra* note 169, at 1708-09, 1714-17.
[214] Wyman, *supra* note 147, at 256-61 (surveying the different calls for reform in the aftermath of *Kelo*).
[215] *See* text accompanying *supra* notes 180-182.
[216] Youngman, *supra* note 207, at 20-23.
[217] German land tax law is also peculiar in that a "standard tax" is set by the state tax administration and applies uniformly to all local governments within the state. Paul Bernd Spahn, *Land Taxation in Germany, in* INTERNATIONAL HANDBOOK OF LAND PROPERTY TAXATION, *supra* note 186, at 98, 98-99.
[218] WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLITICS 120 (2001).
[219] *Id.* at 121-28.

real property and paying real property taxes combine to create a collective mechanism that is viewed as entrenching both individual and collective control of resources. The very same polls that point to the alleged "unpopularity" of property taxes also indicate that the American public regards their local governments as providing them with the most for their tax money, as compared to other levels of government.[220] One need not go here into a debate of whether incorporated municipalities are or should be considered as genuine "corporations" in the sense that local property owners may be viewed as "shareholders," although municipalities are formally located nowadays at the public end of the public/private corporate spectrum.[221] Even if we wholly deny any formal property or property-like right to individual residents in the collective assets of their local government, property taxation is still considered to be an uncontestable part and parcel of what it means to be a "homevoter," as Fischel puts it.[222]

The central point that I wish to make is that although the assessed value of properties, tax rate, internal tax burden sharing, or interlocal tax equalization schemes may all be a source of harsh political and legal conflict, the act of paying property taxes is not considered *in itself* a "taking" of property, but rather a mechanism which inheres in property ownership and in local governance and control of resources. Property taxation is indeed conceptually different from other types of governmental interventions with property that are suspected, both intuitively and doctrinally, as a deprivation of property rights and are accordingly reviewed under the various tests of the Takings Clause.

The conflicts that do arise with respect to property taxes are therefore more appropriately reviewed under other sets of potential claims that more closely capture the essence of property taxation. Thus, for example, to the extent that one group of taxpayers (e.g., new homebuyers in California) claims that the assessment process or the tax rate levied on it is unequal to that of similarly-situated groups, the equal protection clause is indeed the jurisprudential route to follow, as was the case in *Nordlinger*.[223] The same goes for due process claims, including substantive due process ones that focus on the reasonability of the public decisionmaking, i.e., whether government power was exercised "without any reasonable justification in the service of a legitimate governmental objective"[224] so as to root out arbitrary and capricious decisions that abuse what is otherwise a legitimate power that is not *in itself* considered an infringement on independently-protected rights.[225] In other words, nothing in the conceptual distinction of taxings and takings means that taxation must always be awarded unconditional deference. What it does mean, however, is that the way in which taxation is constructed and embedded within the

[220] Cole & Kincaid, *supra* note 187, at 14-15.
[221] See GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (26-53 (1999) (depicting the evolution of the American city's corporate status).
[222] FISCHEL, *supra* note 218.
[223] Nordlinger v. Hahn, 505 U.S. 1 (1992).
[224] County of Sacramento v. Lewis, 523 U.S 833, 846 (1988).
[225] This distinction that was made in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), according to which the due process based "substantially advances" formula asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose" and is thus conceptually and doctrinally different from the question of whether private property has been "taken." *Id.* at 552.

broader system of property calls for a *different kind* of constitutional review that more adequately addresses the typical concerns over taxation.

III. The Virtues and Vices of Taxonomy in Property

The discussion of the taxing/taking taxonomy is evidently embedded in the broader enterprise of mapping out the different legal fields pertaining to property rights and interests. Although a comprehensive analysis is outside the scope of the Article, I wish to make here two essential points: one about the general nature of legal taxonomies in law and property law in particular, and the other about the tradeoff in adhering to the current doctrinal delineation of governmental interventions with private property.

To start with, the enterprise of legal taxonomy need not be understood as necessarily yielding to formalist or positivist conceptions of law, one in which law purports to be capable of dividing the legal world into neat distinctive categories that simply reflect "objective" legal reality.[226] Taxonomies and legal categories are analytically and jurisprudentially essential to maintaining a reasonable level of clarity and certainty in organizing the world around us, developing legal expectations, and understanding the normative and policy considerations with respect to different actors, resources, and legal relationships. And yet, no legal taxonomy can be portrayed as wholly detached from the institutional and normative foundations that stand at its basis.[227] Even the allegedly most basic distinctions in law, such as between private and public law, are not "natural" in the sense that these must follow a single formula or that they run across different legal systems irrespective of the governing normative and institutional principles in each one of them. The challenge that a legal system thus faces is to find the appropriate balance between the essentiality of creating a comprehensive taxonomy of legal orderings, while at the same time avoiding the pitfalls of enshrining legal categories as inherently superior to the underlying institutional and normative tenets of the legal system as a whole.[228]

Property law faces particularly intriguing challenges in creating and maintaining such a workable division. As a field of law which sets up the ways in which society orders resources and human relationships around them, property is typified by the fact that entitlements and obligations in regard to resources regularly implicate numerous parties not only as a matter of abstract analysis, but also in social and economic practice.[229] Thus, although property is so laden with values and constant moral, political, and societal inquiries,[230] excessive ad hocery aimed at attaining resource-specific efficiency, justice, or some other underlying normative goal comes with its own high price tag, since it undermines the broad and relatively straightforward signals that property should send about its core attributes to the large numbers of legal actors implicated by its rules.[231]

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[226] *See* Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law, in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETER BIRKS 147, 147-49 (Charles Rickett & Ross Grantham eds., 2008) (criticizing formalism and positivism, and offering a legal realism conception of taxonomy).
[227] *Id.* at 154-60.
[228] Lehavi, Mixing, supra note 104, at 209-11.
[229] Lehavi, Puzzle, *supra* note 14, at 2000-07.
[230] MERRILL & SMITH, *supra* note 27, at 243-392 (discussing the various "values subject to ownership").
[231] Lehavi, The Puzzle, *supra* note 14, at 2014-21.

The taxonomy of property is further required to correct potentially inaccurate intuitive perceptions that we may have about the meaning of "property." Thus, for example, as I have shown elsewhere, a careful analysis of property configurations demonstrates that the options of constructing property regimes do not narrow down to "pure" private property, common property, or public property regimes, but that there exists a multitude of property mixtures combining different private, common, public, or even open-access elements.[232] The identification of such property hybrids, typifying many real-life regimes instructing the legal relationships in regard to various resources, also plays an important public policy role in that it allows evaluating the relative advantages and disadvantages of various property options, including property "mixtures."[233] In this sense as well, the enterprise of engaging in legal taxonomy serves in itself an important normative purpose of designing and redesigning property arrangements to better address society's goals and values, without at the same time ending up in chaotic nominalism that wholly undermines legal line-drawing.

One more note is in place here about the nature of legal taxonomy, particularly in property law. A point that is often overlooked in the jurisprudential debate over the enterprise of legal taxonomy is that the link between the number of legal categories and the simplicity of the legal system is not straightforward. The question is not only how many different types of legal categories we have, and how easy it is for us to classify a particular event or situation as falling within a specific category, but also what is the type of legal norm that applies to each category, i.e., whether the norm is designed as a clear-cut "rule" that sets out a straightforward, relatively rigid decree, or rather as a "standard," a broadly phrased provision that requires a case-by-case judicial analysis.[234] This means that even what might seem at first glance to be a very orderly division of the world into legal categories can turn out to be an ad-hocish "mess" if each legal category is governed by a broad and vague standard that may more than offset the alleged tidiness of having carved-out distinctive categories for different types of disputes. As I will show briefly, this is an issue of tremendous importance in takings law, within which the different categories can be governed by either "per se" rules or by highly complicated and "muddy" standards, mostly in the case of regulatory interventions with property. It is thus essential to realize that "taxonomy" is not synonymous with "simplicity" or "rigidity."

I now move to evaluate the taxing/taking taxonomy as part of the overall arch of American law that deals with the various kinds of governmental intervention with private property. As mentioned in the Introduction, this body of law is often criticized as ad-hocish, "muddy," and unpredictable, but at the same time, when courts do try to parse this field into distinctive categories that are each governed by a different set of provisions, such taxonomy is then disparaged as analytically or normatively indefensible.

My purpose here is to demonstrate that although no taxonomy, carefully designed as it is, can ever be perfect in the sense that it would create hermetic factual and normative borders that would never encounter some level of intra- or inter-category difficulty,

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[232] *See generally* Lehavi, Mixing, *supra* note 104.
[233] *Id.* at 202-11.
[234] *See* text accompanying *supra* note 43.

overlapping, or inconsistency, such a delineation should be weighed for its overall systematic efficacy in giving a substantially coherent sense to what is undoubtedly a very muddy world, one in which there are so many different instances in which government affects in some way or another the rights, interests, and expectations of persons. Moreover, such an evaluation should be based not only on discerning an internal logic between different instances of government deprivations, but also on the interrelationship between the takings law taxonomy and the broader founding principles of property law.

Hence, in taking the example of land, beyond the taxing/taking division, one may observe quite a few other categorical delineations that typify American takings law.

Consider, *first*, the distinction between permanent physical invasion and regulatory intervention. As *Loretto*[235] demonstrates, the "per se" taking rule in the former instance applies not only to full-scale eminent domain, but also to an allegedly trivial invasion such as the laying of television cable, although the pure economic effect was not only negligible but even one that the Court later considered as one of positive value.[236] Needless to say, a critique evaluating the legal implications of a government act based on the scope and distribution of economic consequences could argue there is little sense in such type of line-drawing, especially as compared to economically much more significant instances of regulatory takings that are nevertheless governed by other legal rules.[237]

Second, for regulatory takings, the Court in *Lucas*[238] famously applies a per se takings rule for a regulation that deprives owners of "all economically beneficial or productive use of the land,"[239] as opposed to the three-prong ad hoc test applying in general to adversely affecting regulation, as developed in *Penn Central Transportation Co. v. City of New York*.[240] This distinction too has been criticized. Thus, for example, as Justice Stevens famously stated in his dissent in *Lucas*: "[T]he Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."[241]

Third, consider the opposite direction per se non-taking rule in the regulatory takings context: the "nuisance exception," according to which diminution in property value caused by nuisance control measures never requires compensation.[242] This rule too did not evade criticism. Michal Heller and James Krier argue, for example, that this distinction unjustly burdens property owners who undertook certain activities that had been previously legally allowed and that generated a stream of revenues, but that at a later stage came to be considered as "noxious" due to a change of taste by government.[243]

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[235] Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419, 435-36 (1982).
[236] *See* quote in text accompanying *supra* note 54.
[237] *See, e.g.*, John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U L. REV. 465, 529 (1985) (viewing the *Loretto* rule as "anachronistic" and "aberrational").
[238] 505 U.S. 1003 (1992).
[239] *Id.* at 1015-16.
[240] 438 U.S. 104 (1978).
[241] *Loretto*, at 1064 (Stevens. J., dissenting).
[242] *See* text accompanying *supra* notes 172-176.
[243] Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1009-13 (1999).

Fourth, land use law seems to draw a broad distinction between existing uses that enjoy nearly overall immunity against new land use regulation, whereas the frustration of future uses, even if financially more significant at times, is subject to much more deference by reviewing courts applying the *Penn Central* test. Thus, for example, the "vested rights" doctrine examines the extent to which the implementation of a real estate project is sufficiently far along, and in such case awards the owner protection against a subsequently enacted regulation as if the existing use were already intact.[244] A closely related doctrine is that of "amortization," under which for government to eliminate a pre-existing use that does not conform to the new zoning scheme without having to pay compensation, it must allow the affected property owner to continue his use for long enough to amortize his investment.[245] In criticizing this prevailing distinction, Chris Serkin argues that neither the Takings Clause nor the Due Process Clause provides for such a categorical differentiation, and that normatively speaking, one cannot view existing uses as worthy of a categorically stronger protection over other types of uses and property interests adversely affected by land use regulation.[246]

In "pointblank" inspection, all of these distinctions may indeed be debatable, especially given the possibility of numerous cases on the margin. Obviously, we should not enshrine or consecrate existing categories just because they are currently there or seem to be convenient rules of thumb. The real question, however, is whether the carving out of a certain category and a corresponding legal rule are deemed to be overall efficient and fair when considering both the entire spectrum of instances involving governmental intervention with private property *and* the broader institutional and normative principles of American property law, and specifically its focus on formal rights and market propensity. This is not merely a theoretical inquiry but one that has clear empirical and practical implications: How much do we actually stand to lose from having such differentiations within takings law, and do better mechanisms for delineating and maintaining a workable taxonomy while refraining from absurdities exist?

A detailed analysis of the broader taxonomy in takings law cannot obviously be made here, but an illustrative example for each one of the realms of analysis, i.e., the existence of legal mechanisms to maintain the taxonomy while avoiding absurdities, and the conformity of the taxonomy to the broader principles of American property law, may clarify why I consider the overall taxonomic enterprise of taking law to be sustainable.

First, the application of per se rules, aimed primarily at casting several anchors in the stormy waters of takings jurisprudence, has been criticized for inappropriately tackling borderline cases, but I submit that these rules are generally able to resort to mitigating mechanisms to deal with such peculiarities. Thus, the *Loretto* per se rule does seem to overall efficiently cater to dominant perceptions about the special gravity of physically invading someone's land on a permanent basis, while at the same time avoiding the

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[244] *See generally* VICKI L. BEEN & ROBERT C. ELLICKSON, LAND USE CONTROLS: CASES AND MATERIALS 202-209 (3d ed. 2005).
[245] *Id.* at 197-202.
[246] Serkin thus calls to apply to existing uses the broader tests deriving from the Substantive Due Process Clause or from the *Penn Central* regulatory takings three-prong test. Christopher Serkin, Existing Uses: The Prohibition against Retroactive Land Use Regulation (working paper, Aug. 2008) (on file with author).

absurdities of what is truly an idiosyncratic case in terms of pure economic impact by setting the amount of compensation at the nominal rate of 1$.[247] This way of handling idiosyncrasy thus helps to preserve the category's paradigm, i.e., eminent domain cases that involve both permanent physical invasion and substantial economic damage.

Second, the broad differentiation in the legal protection against the frustration of existing uses vis-à-vis future uses, which may be criticized when one merely views the pure economic consequences of allegedly comparable land use regulations, has independent merits that touch on the formal rights orientation of American property law. As discussed above,[248] it largely stems from the attempt to resolve the complexity of the right to use, bearing in mind both the apparent centrality of the liberty to use one's own property and the broad justification for limiting such uses to mitigate conflicts between simultaneous but conflicting uses and to promote broader public needs. The line that has been drawn in defining this aspect of the bundle of rights is to legally prioritize the protection of an already existing use as a more firmly recognized "strand" of property in balancing between autonomy, stability, and forward-looking social dynamism.[249] And as is the case with other categories, the way in which such lines are drawn nevertheless tries to avoid potential absurdities. The "vested rights" tests or the amortization periods set for existing uses respect such rights without unduly inhibiting societal progress, whereas on the other hand, under the *Penn Central* test, government cannot wholly disregard "investment-backed expectations" regarding future uses whenever these have established themselves objectively--way beyond mere speculation or anticipation that is inevitably contingent upon exogenous or yet unknown circumstances--and are thus more appropriately viewed as being normatively and jurisprudentially linked to formal *rights*, not merely value.

The bottom line, therefore, is that the enterprise of legally delineating the field of governmental interventions with private property, and the taxing/taking taxonomy within it, is of tremendous importance not only for creating a reasonable level of order and security in an otherwise highly complicated area of law, but also as a vehicle to implement and the same time participate in reassessing and further developing the fundamental principles of American property law.

Conclusion

American property law is nowadays located at a crucial crossroad. Its longtime foundational premises and convictions are now being vigorously reexamined in the face of the domestic and global economic crisis. Government action that might have sounded farfetched only a few years ago--such as the partial or full nationalization of financial institutions, wholesale intervention in the content of private loan agreements, a safety net for private savings, or dramatically harsher regulation on securities, credit, or mortgage markets--question the underlying features of American property law, including the protection of rights rather than mere economic value and the strong propensity toward markets as the chief vehicle to implement property rights. Whether the government

[247] *See* text accompanying *supra* notes 46-51.
[248] *See* text accompanying *supra* notes 60-63.
[249] For retroactivity in property law, see MERRILL & SMITH, *supra* note 27, at 560-561, 1197-98.

measures taken in the months and years to come will create a major longstanding upheaval in American property law remains to be seen.

At this point in time, however, it is important to identify the intricate and subtle ways in which the systematic features of American property law implicate, even if often in somewhat implicit ways, the various fields and doctrines in property and property-related matters. As this Article made clear, the taxing/taking taxonomy, or any other delineation drawn in regard to government intervention in property rights, is not carved out in stone as an essentialist conclusion of property law. It is part and parcel of the understanding of a given legal system about what constitutes the bundle of rights in certain resources and what elements of it deserve constitutional protection, so that a change in the paradigms of property law will undoubtedly affect the taxonomy of property law and takings law in particular. As we await future developments in property law, we thus must keep in mind both the innumerable ways in which the currently prevailing convictions shape the landscapes of property law, and how this entire array of doctrines could change upon a societal reconstruction of the institution of property.