Protecting Private Property with Constitutional Judicial Review:

A Social Welfare Analysis

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Abstract

American jurists traditionally have assumed that constitutional judicial review of government regulatory law and practice is both necessary and sufficient to protect private property rights. Recently, however, a few legal scholars and economists have begun to question both its necessity and sufficiency. Evidence from the US and the UK suggests that political institutions not only regulate or expropriate private property rights but also protect those rights, even in the absence of constitutional judicial review—the power of courts to overturn legislation or require compensation for expropriation. This article proposes that constitutional judicial review of government regulation should be subject to a social welfare analysis to determine when and if such review is efficacious. A model is proposed in which there is a desired level of property rights protection. Judicial review is a cost that will on net either add to, or subtract from, general social welfare. It will be shown that under realistic conditions, reflected in real instances, that the optimal level of judicial review would not necessarily be that which provides a maximal level of property rights protection, but rather one where the benefits of review clearly outweigh the costs.

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1. Introduction

In "Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis," Cole (forthcoming 2007) shows that political institutions have protected property rights quite well in the United Kingdom, even though that country's courts lack the power of constitutional judicial review, that is, the power to overturn acts of Parliament or force Parliament to pay compensation when it expropriates or regulates private property rights.[1] This finding would surprise most American jurists, who tend to presume, often quite casually, that, in the absence of vigilant judicial protection under the Fifth Amendment's Takings Clause, property rights in the US would quickly be ground into dust by rampant legislators and regulators. In other words, they presume that constitutional judicial review is a strictly necessary institution without which private property rights would not long survive. And without well-protected private property rights, both liberty and economic productivity would be lost. This view has been articulated by jurists as diverse as James Madison (Ely 1998, p.54), Oliver Wendell Holmes (*Pennsylvania Coal Co. v. Mahon*, 260 US 393, 415-6 (1922)), and Antonin Scalia (*Lucas v. South Carolina Coastal Council*, 505 US 1003, 1025 n.12 (1992)).

[1] "Constitutional judicial review" is a subset of "judicial review." The broader category would also include the power of courts to interpret and enforce legislation against administrative agencies and individuals.

The long history of political protection of private property rights in the United Kingdom cuts strongly against the notion that constitutional judicial review is in fact strictly necessary to protect the institution of private property. Moreover, recent theories of positive political economy provide reasons for believing that democratic political/legislative institutions, especially at higher levels of government, can be expected to protect the rights of private property owners, who are far from constituting a "vulnerable minority" (Cole forthcoming 2007). The implication of those theories and the historical evidence from the UK is that the institution of constitutional judicial review may have less marginal social utility than jurists commonly suppose.

Other scholars, both from economic and legal perspectives, have started to question the necessity, the sufficiency or the efficiency of judicial review. Economist William Fischel (1995), for example, has argued that private property owners often are able to protect their own interests through their use of political processes, without recourse to the courts. Legal scholar, Neil Komesar (2001), meanwhile has questioned not the theoretical value of judicial review (which he endorses) but rather the practical ability of the courts to evaluate thoroughly the larger issues of property rights protection in reviewing the net impacts of legislative action. Komesar makes an efficiency argument that judicial institutions may fail so badly that a second best alternative of a "corrupt, excessive, and repressive [legislative] regulatory process" may actually cause property owners less harm (p. 106).

Though critics of constitutional judicial review for protecting private property rights have made valuable arguments against its necessity, none have subjected the concept of judicial review to a general welfare analysis. Theoretically there will be

benefits from judicial review, but the process is itself costly. Do the social benefits from judicial review—presumably in more clearly defined and enforced property rights—always (or ever) outweigh the costs? Note that the costs entail not only the transaction costs of the legal system but also the prospect that judicial rulings will overturn legislative action and lead to greater uncertainty about property rights and enforcement. Simply put, it has not yet been established in the literature under what conditions the benefits of judicial review actually make it the least bad alternative.

This paper looks primarily at the efficiency characteristics of constitutional judicial review for protecting private property, and examines the institution from a theoretical standpoint the welfare costs and benefits that judicial review entails. Like Komesar, we are concerned with second best alternatives—presumably, as Coase suggested (1964, p. 195), to choose the institutional arrangement that fails least. In some instances, it would seem plausible that constitutional judicial review would be the most efficient or, more to the point, the least inefficient solution to the problem of establishing and enforcing property rights. At the same time, it may be that in other cases, especially among countries with long established formal and informal institutions of property rights protection, that the benefits from constitutional judicial review, as Fischel argues and the empirical record supports, are limited and the process itself, unnecessary and costly. In those cases, the least inefficient solution may be to limit or even abandon the use of constitutional judicial review. (As a practical matter, in the U.S. this would require constitutional repeal of the Fifth Amendment's Taking Clause. Since repeal itself would entail substantial transaction costs, a further analysis would be needed to determine that

the cost of continuing to live with, and abide by, the Fifth Amendment's Taking Clause exceeded the cost of repealing that clause.)

The paper proceeds as follows: In the next section, we sketch a model of social welfare incorporating constitutional judicial review and in section three, we consider under what conditions the benefits of constitutional judicial review of government regulations and expropriations of private property are on net a social cost or benefit. In section four, we review some empirical examples especially from the UK that raise questions the necessity of constitutional judicial review in a system with well established formal and informal norms of property rights. A concluding section discusses the instances in which judicial review might be efficiency enhancing and suggests avenues for future research.

2. Analytic Framework, a Social Cost Approach

The economic literature has for many years grappled with the problem of modeling social welfare. When it is represented in functional form, it usually takes on a character such as $W = \sum a_i W_i(U_i)$ where social welfare (W) is a weighted sum each individual's utility ordering. As Arrow (1950) pointed out long ago, a social welfare function faces an insuperable aggregation problem in that interpersonal utility, which is in each case an ordinal ranking, cannot be sensibly aggregated (Craven 1992). Still, such functions (or "functionals" as they are sometimes referred to) are often used to at least explicate the direction of social welfare maximization.

For our purposes, we have chosen a simpler functional argument. In Coase's (1960) "The Problem of Social Cost," he chose to simplify the welfare goal as a vaguely

expressed maximization of "the social product" generally thought to be the total, or the optimal, output. We follow this basic approach with a Coasean social product function as a proxy for social welfare. This does not truly circumvent the problems inherent in social welfare models since output will depend on demand functions that stem from implicit interpersonal utility calculations, and thus the aggregation problem remains. But this form allows for a clear means of weighing some potential efficiency aspects of constitutional judicial review or other aspects of the institutional matrix that effect the costs of transactions.

We will assume therefore a social welfare function in which the goal is wealth creation and the goal of society is to maximize the social product (Π). This function is a summation across producers within society and represents efficient production. The functional form is:

$$\Pi = \sum PY(\mathbf{x}) - [C(\mathbf{x}) + T(x, \alpha(J), J)] \qquad (1)$$

In this equation, the social product depends on the value of output—a price level (P) and total output (Y) which is a function of a vector of inputs, **x**. Effectively Y(**x**) represents a general production function in which (**x**) includes inputs broadly defined to take in all resources that are required of the transformation process. All producers are assumed to seek to maximize profits, and the sum of the output levels of all producers equals the social product. The level of social product, of course, depends on costs, and output will be assumed to expand until marginal benefits are equal to marginal costs.

Thus, the cost component $C(\mathbf{x}) + T(x, \alpha(J), J)$ is the crucial element that determines the level of social product. This component consists of two elements, C and T. The former represents transformational costs—the costs of factors of production that

go into generating social product. It is a function of a vector of input (**x**) and will be rising as production increases. The second cost term T represents transaction costs. In the world of the so-called "Coase Theorem," T would be set equal to zero. But given the reality of exchange relations, contracts, monitoring, measurement, property rights and so on, T will always be positive. Indeed, without these transactional aspects of exchange, production does not occur and no benefits can be realized.

Consequently, transaction costs are also a function of a vector of inputs that go into generating the social product. And like the transformational variable, T is positively related to **x**.

But transaction costs are also a function of the institutional matrix. Most importantly, transaction costs are affected by the nature of property rights, which are conditioned by the degree to which the legal system defines those rights, and facilitates or impedes exchange. The cost of establishing and securing private property rights is designated here by what we are terming the institutional variable α. In general, it is assumed that α is positively related to T. That is, the process of defining and enforcing property rights though the judicial, executive or the legislature branches of government entails costs. The more effort that is expended in doing so, the more costs are imposed. However, the costs will vary according to the nature of the legal system and other features of the institutional environment. We assume that costs are high when it is difficult to delineate property relations or to enforce property rights and therefore transaction costs rise generally. A very high value for $T(\alpha)$ (a highly uncertain environment for exchange) means total costs will be high and the social product low. A low value of $T(\alpha)$ would mean that transaction costs related to property rights are low and

so the cost of exchange is low. Very well defined property rights would in fact reduce the cost of production and exchange, while poorly defined rights would mean that transaction costs are high and are adding substantial costs to exchange. (In theory T(α) could be so high that no exchange would be possible.)

While we assume for simplicity that transaction costs rise with efforts to increase the security of private property rights, it is clear that some changes in the rules and their enforcement will actually lower costs. For purposes of this analysis, we are assuming only that one institutional factor will act to lower the cost of securing private property, and that is constitutional judicial review.[2] Further, it is assumed that α is functionally and negatively related to constitutional judicial review (J). That is, as J rises, there is more clarity in the definition and security of property rights, and so the cost of exchange falls (except if the judiciary were corrupt, self-interested or incompetent as we discuss in the next section). It is assumed that $\alpha > 0$ in all cases. If α were in fact equal to zero, all costs related to property rights would be zero and judicial review would be irrelevant. Where no judicial review exists, of course, $\alpha(J) = 0$.

It is further assumed in (1) that transaction costs (T) are themselves affected by constitutional judicial review (J). The process itself (litigation, enforcement, etc.) creates social costs and the uncertainty created by potential litigation and redistribution of rights creates positive costs for all market participants. Indeed, it can be said that if judicial review were costless, it would always be beneficial (that is it would always lower α and thus transaction costs). But of course it is not costless and as courts introduce more

[2] Clearly this is a simplification and other institutional factors can lower the cost of securing property rights. Indeed, one could easily have a function for α containing several arguments that would bear on the cost of exchange.

judicial review, transaction costs rise (though α, and transaction costs overall, may either fall or rise as a consequence).

In this model, the standard maximization assumption applies. That is, the marginal benefit—here the value of the marginal product of output—must equal the marginal cost of those resources. Since a price level is a given, the marginal benefit will be determined by the quantity of output. We assume diminishing returns and therefore the marginal product increases at a diminishing rate, and so social product is increased the lower the level at which the value of the marginal product equals marginal costs.

Marginal costs can be expressed as a sum:

$$\frac{dC}{dx} + \frac{dT}{dx} + \frac{dT}{d\alpha} + \frac{dT}{dJ} = \text{MC} \qquad (2)$$

The key innovation in this structure is the potential role of constitutional judicial review. To understand the role of constitutional judicial review, T must be differentiated with respect to J, which yields:

$$\frac{dT}{dJ} = \frac{\partial T}{\partial \alpha} \bullet \frac{\partial \alpha}{\partial J} + \frac{\partial T}{\partial J} \qquad (3)$$

This equation suggests, as we argue below, that constitutional judicial review of government regulation and expropriation of private property has ambiguous effects on social cost and hence on social product. First, as property rights are delineated and protected, transaction costs $\frac{\partial T}{\partial \alpha}$ rise. We can assume, therefore, that the effect of changing or securing property rights is to raise the marginal social cost of transactions. However, it is further assumed that, in general, constitutional judicial review lowers α because it clarifies and protects private property rights. In that case, $\frac{\partial \alpha}{\partial J}$ would be

negative, implying that the first term on the right side of the equation is negative. In other words, constitutional judicial review should lower the marginal costs of transactions overall.

But the second term, $\frac{\partial T}{\partial J}$, certainly is positive. Constitutional judicial review imposes transaction costs of its own. As noted, there are litigation and enforcement costs. Moreover, there is some uncertainty as to whether or not judicial review will resolve issues connected to the security of rights. As the process of judicial review unfolds, property rights remain uncertain or mutable with respect to government action until a rule has been litigated, and possibly even after litigation if the courts failed to adequately define or protect them. Producers and property holders generally need to expend resources on, among other things, legal services and information. Lingering uncertainty may raise costs over time as the prospect, indeed just the possibility, of additional litigation requires added expenditures of resources on legal, financial, and other services.

But what of the sum of the terms? The standard assumption among legal scholars is that the reduction in costs through the sure enforcement of property rights because of judicial review will lower transaction costs generally. That is, judicial review will reduce α and this is assumed to exceed the cost of the process. But since courts through judicial review inherently have the power to overturn laws that redistribute property rights (or to raise the cost of transactions by requiring compensation) producers generally will have to take into account the implicit and explicit costs of the review process. On that basis, constitutional judicial review could clearly cost more than it creates in benefits, lowering the social product. In that event, so far from being necessary to property rights protection and economic efficiency, it would be a burden.

Put more simply, constitutional judicial review is efficiency enhancing overall only when the following condition is met:

$$\left|\frac{\partial T}{\partial \alpha} \bullet \frac{\partial \alpha}{\partial J}\right| > \frac{\partial T}{\partial J} \qquad (4)$$

In other words, constitutional judicial review only raises the social product when the absolute value of the reduction in marginal costs from the further definition and protection of private property rights exceeds the marginal cost of providing constitutional judicial review.

3. Hypothetical Applications

The question then is: when in fact does judicial review lower social costs and when does it raise them? We consider three general possibilities: the standard case, the "corrupt" judiciary case, and the well-defined property rights economy.

a. The standard case

The assumption among US legal scholars and jurists is essentially that judicial review inevitably lowers α by a far greater percentage than it raises costs. The literature suggests that property rights would be trampled even though the US has a representative government made up of many property holders (e.g., Ely 1998; Epstein 1985). Those who claim that judicial review is a necessary condition for the maintenance of effective property rights are arguing in the terms laid out above that, in the absence of constitutional judicial review, the value of α would be very high, leading to correspondingly high costs of production and exchange.

Yet, the ability of constitutional judicial review to lower costs to a great degree depends on the existence of an independent judiciary and reliable enforcement mechanisms. This leads to a curious outcome: Judicial review should have its greatest net benefit where there is a potentially predatory government and ill-defined property rights, but this predatory government has to be one that does not interfere either with an independent judiciary or the enforcement arms of the law. It would work best, therefore, in an environment where predators are restrained to a considerable degree whether there is constitutional judicial review or not.

b. "Corrupt" judiciary

The assumption of the standard case is that the judiciary acts in the public interest and that judges use judicial review to clearly define and strengthen property rights institutions. But there is no reason to believe that the judiciary always acts in the best interest of society. Indeed, Public Choice theory makes a convincing case that judges as well as legislators typically act in their own interest (Mueller 1989). Where the judiciary is known to be corrupt or corruptible, the outcome of judicial review is unlikely to lower the costs of exchange. The same outcome may be true when the judiciary is not corrupt but simply self-interested, incompetent or merely inadequate to the task of processing the information needed to determine the optimal level of protection for private property rights.

Equation 4 presumes that the term $\frac{\partial \alpha}{\partial J}$ is negative: judicial review facilitates exchange and so lowers transaction costs. But a corrupt judiciary could use constitutional

judicial review to make exchange more costly and lead to a $\frac{\partial \alpha}{\partial J} > 0$. In this instance, constitutional judicial review adds doubly to transaction costs: Both through the cost of the process and now also from the result. This would of course raise transaction costs and lower the social product.

A corrupt judiciary is, of course, not just a hypothetical problem. There is no inherent reason to assume, even in rule-of-law states, that the judiciary will never act out of self-interest or pursuant to some agenda other than social welfare (i.e., expansion of the social product).

c. Well-defined property rights

Consider a country with a long tradition of rule of law, property rights protection, social norms that validate property ownership, contract enforcement, clear property titles and other features of an economic and social system that is receptive to economic exchange. In this context, the efficiency of judicial review is most ambiguous.

Suppose, for example, that constitutional judicial review always will redefine or enforce property rights in such a way as to make exchange more certain. But in this instance, exchange already is highly certain. The amount by which the value of α falls with respect to J cannot be large since the magnitude of α is already small. True, the risk of predatory behavior by the legislature remains, but if this does not conform with informal institutions or within formal legal traditions, it seems the potential for predation is low and unlikely to be reduced to zero even if constitutional judicial review is introduced. In other words, the gain from judicial review, even if we assume it to be

positive, may fall short of the costs. The condition expressed in equation 4 will not be met.

Indeed, as we discuss in the next section there are cases in which there is no constitutional judicial review of legislation but where political institutions have long respected and protected private property rights.

4. Empirical Examples

As noted in Cole (forthcoming 2007), courts in the United Kingdom do not possess what we call the power of constitutional judicial review. That is, they lack the authority to either overturn legislation or require Parliament to pay compensation when it enacts legislation that expropriates, or negatively affects the value of, private property. Since the Glorious Revolution of 1688-89, Parliament has been the supreme governing body, exercising plenary authority in the UK. If Parliament decided tomorrow to revoke the Magna Carta, pass a bill of attainder against the Queen, or expropriate without compensation all property owned by the Church of England, the courts would be powerless to prevent it. The only real constraint on Parliament's authority is self-regulation in view of British culture and history, possible electoral replacement, revolution, or anarchy. Not a very comforting thought to Americans used to judicial protection of constitutional rights. But Parliament's self-restraint happens to be remarkable.

Admittedly, Parliament is unlikely to revoke Magna Carta, seize the Queen's person, or expropriate the Church of England's property. More to the point, however, Parliament only rarely expropriates *anyone's* private property by eminent domain; and

when it does take title, Parliament virtually always pays compensation, even though no court in the land can force it to do so (Cole forthcoming 2007). Generally speaking, Parliament acts *as if* its power to expropriate were limited by constitutional judicial review. Like legislatures in the United States, which are constrained by the Fifth Amendment's Taking Clause, Parliament usually *regulates* the use of private property without paying compensation. But when Parliament's regulations deprive privately owned lands of virtually all economic value or it simply takes away title, Parliament invariably compensates. For example, in the Town and County Planning Act of 1947, as amended in 1990, Parliament provided for landowners to be compensated if the denial of planning permission left their land without any "reasonable beneficial use" (Cole forthcoming 2007). This provision has much the same effect as the US Supreme Court's ruling in *Lucas v. South Carolina Coastal Council*, 505 US 1003 (1992). The UK's Town and County Planning Act also allows for consideration of landowners' reasonable and legitimate "development expectations," which is analogous to the "reasonable, investment-backed expectations" test the US Supreme Court enunciated in *Penn Central Transportation Co. v. City of New York*, 438 US 104 (1978). Apparently, the UK has managed to achieve a similar outcome, but without incurring any of the costs associated with instituting and exercising constitutional judicial review.

The reasons for Parliament's self-restraint are, no doubt, rooted in the customs and conventions—the informal institutions—of English legal history, which may (or may not) differ markedly from those of US legal history. But Parliament's self-restraint is also explained to some extent by recent theories of positive political economy, which should apply equally to legislative bodies in the US. According to one such theory, even a self-

interested, rent-seeking government can be expected to define, distribute, and enforce private property rights to extent that the governors believe that private land ownership will increase their political and military support and revenues, thereby increasing their prospects for survival (Cole forthcoming 2007; Sened 1997, p. 81; North and Thomas 1973, p. 7; North 1981, pp. 33-4).

Whatever the reasons for its remarkable—and to many American jurists, incomprehensible—self-restraint, the fact remains that Parliament very substantially protects private property rights in the UK even without the constraints of constitutional judicial review. Indeed, according to the Heritage Foundation's annual *Index of Economic Freedom*, the UK regularly receives the highest ranking for protecting property rights (1.0), the same score the US usually receives. According to another ranking (Gwartney and Lawson 2004), the UK ranks fifth in the world, 11 positions ahead of the US, for "Legal Structure and Security of Property Rights." Whatever the merits of such rankings, it seems clear that the UK has a positive reputation for protecting private property rights, despite lacking constitutional judicial review. Consequently, according to the model set out in the last section, if constitutional judicial review were instituted in the UK any positive impact on α would likely be relative small, smaller perhaps than the cost of $\frac{\partial T}{\partial J}$. In other words, constitutional judicial review in the UK could fail the condition specified for efficiency (social welfare) in equation 4.

It is worth noting that the UK is not the only example of a country that relies predominantly on political institutions to protect private property rights. The same is true for some other commonwealth countries (Allen 2000). Even in the U.S., where property rights are constitutionally protected, it would be inaccurate to assume that property rights

are enforced only by the courts. Legislative bodies also protect property rights. Consider, for example, the aftermath of the U.S. Supreme Court's widely unpopular decision in *Kelo v. City of New London*, ___ U.S. ___, 125 S.Ct. 2655 (2005). In *Kelo* the Court ruled (not for the first time) that eminent domain takings for the purpose of economic development could satisfy the Public Use Clause of the Fifth Amendment. The majority's decision was based on several precedents extending back for more than 100 years (Cole forthcoming 2006). However, Justice O'Connor, in dissent, argued vehemently that the Court in *Kelo* had undermined all private property rights in the United States by leaving it "vulnerable to being taken and transferred to another private owner, so long as it might be upgraded" (*Kelo*, 125 S.Ct. at 2671, O'Connor, J. dissenting).

The Court's ruling in *Kelo* led to a surprising (to legal scholars at least) public backlash, as property-rights advocates, the news media, and state and federal legislators (on both sides of the aisle) lashed out against the Court's failure to uphold the institution private property (Cole forthcoming 2006). As a direct consequence, virtually every state legislature in the United States considered, and several actually enacted, new laws at least purporting to constrain the power of eminent domain. As of this writing, more than 400 separate legislative proposals to limit eminent domain are awaiting action in state legislative bodies (e.g., http://maps.castlecoalition.org/legislation.html). The vast majority of these measures will never be enacted into law, but some will be enacted, and of those at least a few are likely to impose substantial limits on the power of eminent domain. Indeed, some of the measures already enacted in the wake of *Kelo* impose constraints that are significantly more protective of private property rights than any the dissenters in *Kelo* (with the exception of Justice Thomas, who would limit eminent

domain takings to those where the government will maintain the land in public ownership and for actual public use) would have imposed.

To cite one example: Indiana's new eminent domain law (H.B. 1010), enacted in March 2006, responds directly to *Kelo* by imposing a restrictive definition of "public use," which excludes "economic development, including an increase in a tax base, tax revenues, employment, or general economic health." Indiana further limits the use of eminent domain to "public nuisances," "fire hazards," "structures unfit for human habitation," and "unimproved or vacant" lands. Sites that do not fall into one or another of these categories cannot be condemned. And for sites that still can be taken, H.R. 1010: requires takers to make "good faith" efforts to purchase the property before resorting to eminent domain; allows landowners who fight against eminent domain to seek reasonable attorneys fees; and provides for super-compensation (i.e., above market value). In the case of agricultural lands, the government must pay 125% of fair market value; and for occupied residential properties, the government must pay 150% of fair market value. In sum, Indiana's new eminent domain statute very substantially restricts the use of eminent domain in that state. It constitutes *legislative* protection of property rights against legislative or administrative incursion; it provides evidence in support of the positive political economic theories of property discussed earlier; and it all but rules out the need for constitutional judicial review to protect private property rights in the State of Indiana.

Indiana's new eminent domain statute may not be representative. Statutes enacted in other states may be more or less protective of private property rights. But the fact remains that, in the wake of *Kelo*, political bodies are responding to the perceived demand for more protection of private property. To the extent state legislatures are

responsive and protect private property rights, the question arises as to the need for constitutional judicial review to achieve the same purpose. As suggested by the model elaborated in the last section, constitutional judicial review can provide incrementally greater protection for private property rights on top of the protection already provided by the political system, but only at some positive cost. The question, as always, concerns the marginal costs and benefits of providing further increments of protection for property rights through the institution of constitutional judicial review.

5. Discussion and Conclusion

There is undoubtedly a substantial amount of anecdotal evidence on the costs and benefits of constitutional judicial review in different countries. Comparisons might be made between countries with and without constitutional judicial review at similar levels of development. In those countries with constitutional judicial review but with judiciaries considered corrupt, it would be instructive to analyze the consequences of constitutional rulings with respect to property rights.

More quantitative tests may be possible as well. Asset valuations, legal costs, title insurance rates across countries, might provide more or less accurate ways of estimating the effects on transaction costs from constitutional judicial review, and provide estimates of values for the variables in this paper's model.

The model might also be expanded beyond constitutional judicial review to include other variables that would affect the value of α. Here the variable J is a limited

subset of the legal factors that might raise or lower the costs of exchange. For example, in the US and elsewhere, courts rule on property cases concerning nuisance and trespass that can have important effects on the definition and enforcement of property rights. Similarly, courts rule routinely in cases that strengthen or reduce the cost of contracting and hence the costs of deferred exchange. But this paper focuses exclusively on the issue of constitutional judicial review and its effects on property rights for two reasons: first, because it has a role in establishing and securing those rights, and second, because of the claim among many legal scholars that judicial review holds *the* central place in that process.

Our model and evidence provide reasons to doubt whether constitutional judicial review is as important as those scholars have asserted, and most American jurists casually assume. It would seem that the underlying institutions, and the place of property rights among those institutions, are at least as important. Constitutional judicial review without a basic social and legal prominence for property rights protection may not guarantee that such review will secure rights, and may not be efficiency enhancing. Basic respect for property rights within the legal and social tradition may also make constitutional judicial a (comparatively) inefficient institution. Arguably, it may obviate the need for constitutional judicial review at all.

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