

**POLITICAL INSTITUTIONS, JUDICIAL REVIEW, AND PRIVATE PROPERTY:
A COMPARATIVE INSTITUTIONAL ANALYSIS**

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INTRODUCTION

To what extent is constitutional judicial review a necessary institution for protecting property rights? Nearly all American jurists, since Madison, have thought the answer to this question both obvious and incontestible: in the absence of judicial review, federal and state governments would trample private property rights into dust. Recently, however, two scholars – one an economist and the other a legal scholar – have raised important challenges to the received

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wisdom about property rights in the absence of constitutional judicial review.²

In his 1995 book *Regulatory Takings*,³ the economist William Fischel argues that judicial review is not always necessary or desirable for protecting private property rights because private property owners are generally capable of protecting their interests in the political process, particularly at higher (*i.e.*, state and federal) levels of government.⁴ The legal scholar Neil Komesar does not share Fischel's belief in the ability of private property owners to protect their interests in political processes; like most other legal scholars, he views judicial review as a highly desirable institution for protecting property rights against government depredation. In stark contrast to other legal scholars, however, Komesar does not believe that the courts are up to the task. In his 2001 book *Law's Limits*,⁵ Komesar observes that the courts simply do not possess the resources necessary to protect property rights from unwarranted and uncompensated takings.

² Throughout this article, I use the phrase "constitutional judicial review" to denote the power of courts to (a) overturn statutes or (b) require governments to pay compensation for legislative or regulatory impositions on private property rights. In the absence of "constitutional judicial review," courts may still possess the power to interpret and enforce statutes and regulations.

³ WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995).

⁴ Fischel believes that judicial review is more important for protecting property rights against the regulatory activities of lower (*e.g.*, municipal) levels of government, where political processes are more likely to be influenced by majoritarian pressure. *Id.* at 180.

⁵ NEIL K. KOMESAR, *LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS* (2001).

Institutional design features and supply-side constraints significantly limit the judiciary's ability to deal with government interference with private property rights. Consequently, Komesar is forced to conclude, "[e]ven if the regulatory process is highly flawed (and it is), the severe problems in . . . the adjudicative process may mean that the corrupt, excessive, and repressive regulatory process is the best of bad alternatives."⁶

This article (1) adduces theoretical and historical support for Fischel's claim that constitutional judicial review is not a strictly necessary institution for protecting property rights, and (2) provides positive reasons to believe that even if courts are institutionally incapable of fulfilling their constitutionally assigned role of protecting property rights, as Komesar fears, democratic political institutions will substantially protect property rights, even as they regulate them. The evidence may not provide a sufficient basis for drawing firm normative conclusions about the "best" institutional structure for protecting property rights; but it does raise serious questions about institutional choice, which deserve more investigation than they have received to date.

The article proceeds as follows. Section I reviews the tension between democracy and property rights as framed by Madison and more recently by the likes of Holmes, Epstein, and Scalia. Section II introduces Fischel's and Komesar's challenges to the conventional understanding of the "majoritarian difficulty" and its resolution through judicially imposed limitations on exercises of eminent domain and police power regulations. Section III provides

⁶ *Id.* at 106.

theoretical and empirical support to Fischel's normative theory of regulatory takings. The theoretical support comes from positive political-economic theories, according to which political organizations can be expected to provide and enforce private property rights in order to increase social production, secure revenues (taxes) for the government, and garner political and military support sufficient to ward off challengers. The empirical support comes primarily from English constitutional and legal history. In the UK, the institution of constitutional judicial review (American-style) has never existed (and still does not exist after enactment of the 1998 Human Rights Act). Section IV, then, compares the UK's institutions for takings and compensation with those of the US, and finds only marginal differences, suggesting that the UK's political system protects property rights as well, or nearly as well, as the American judicial system. Section V provides additional empirical support for the proposition that democratic political institutions protect private property rights with evidence from several American states, including most recently the adoption of Measure 37 in Oregon. Together, the evidence from the US and UK (a) supports Fischel's theory that judicial review is more important for protecting property rights against the deprivations of local governments than state or federal governments, (b) provides reason to believe that private property rights will not perish even if Komesar is right that the courts, for institutional reasons, cannot adequately protect them, and (c) provides ample reason to repudiate the extreme form of distrust of democratic regulations represented by the judicial opinions of Justice Scalia and the scholarly writings of Richard Epstein.

I. PROPERTY VERSUS DEMOCRACY: THE “MAJORITARIAN DIFFICULTY”

FROM MADISON TO SCALIA (VIA HOLMES AND EPSTEIN)

Jurists since James Madison have presumed that an inherent tension exists between democracy and property. Madison foresaw that property owners would become, in the words of James Ely, a “vulnerable minority,”⁷ subject to majoritarian biases in legislative processes. To prevent the majoritarian abuse of private property, Madison inserted a “takings clause” into the Bill of Rights.⁸

During the twentieth century, the tension between property rights and democracy that concerned Madison escalated with the emergence of the welfare/regulatory state, which increasingly regulated private property for the public, or some faction’s, welfare. As property

⁷ JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 54 (1998).

⁸ US Const. Amend. V. (“nor shall private property be taken for public use, without just compensation”). It is worth noting that the takings clause was not added to the Bill of Rights because of perceived abuses of property rights in the colonies by the British Crown. As William Stoebuck has written, “while the British were scoundrels in a thousand ways, they never abused eminent domain.” William Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L.REV. 553, 594 (1972). According to Richard Epstein, the main motivation for the takings clause might have been colonial expropriations of food and supplies during times of war. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 27 (1985). More practically, the purpose may have been to minimize anti-federalist opposition to the fledgling constitution. *See* ELY, *supra* note 6, at 51-2.

regulation increased, so too did judicial suspicion that legislative bodies were pressing private property rights into public service without just compensation, in violation of the Fifth Amendment's takings clause.

Justice Holmes articulated this suspicion in the Supreme Court's 1922 *Pennsylvania Coal* ruling,⁹ where he wrote that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."¹⁰ Holmes believed that takings were a "natural" consequence of ever-increasing police power regulations – the death by a thousand cuts of the takings clause (as well as the due process and contract clauses¹¹) and private property itself. In *Pennsylvania Coal*, he wrote that when the "seemingly absolute" protection of private property "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."

To prevent this end, Holmes introduced into Supreme Court jurisprudence the doctrine of "regulatory takings." Without denying the government's authority to regulate private property, Holmes noted that if some police-power regulation "goes too far" (in diminishing the value of private property), it will constitute a compensable taking, as if the government had acted pursuant to eminent domain.¹²

⁹ *Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922).

¹⁰ *Id.* at 416.

¹¹ *Id.*

¹² *Id.* at 415. Holmes excepted regulations concerning traditional private nuisances.

By all accounts, Holmes's decision in *Pennsylvania Coal* had little immediate impact either on the extent of government regulation or on subsequent court decisions.¹³ It certainly did not retard the advance of the welfare/regulatory state, in which the Supreme Court generally acquiesced. The Court did not find another "regulatory taking" for 70 years. During the last quarter of the twentieth century, however, conservative and libertarian scholars began calling for greater judicial intervention to limit the ability of democratic institutions to regulate private property rights.

Among the more vociferous libertarian critics of the welfare/regulatory state is Richard Epstein. In his influential 1985 book, *Takings: Private Property and the Power of Eminent Domain*,¹⁴ Epstein argues that the government's power to regulate private property without compensation is no more extensive than the common-law rights of private actors to control nuisances and prevent trespasses.¹⁵ Consequently, most government regulations of private

¹³ See, e.g., FISCHER, *supra* note 2, at 24 ("*Pennsylvania Coal* itself probably had no effect on coal mining or the subsidence problem"). Robert Brauneis, *The Foundation of Our "Regulatory Takings" Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 Yale L.J. 613, 665 ("after being cited in a moderate number of Supreme Court opinions between 1922 and 1935, *Mahon* all but disappeared from the United States Reports for over two decades. In the twenty-two years from 1936 through 1957, *Mahon* appeared in a single obscure dissent by Justice Frankfurter.")

¹⁴ Cited *supra* note 7.

¹⁵ EPSTEIN, *supra* note 7, at 36, 121, 266, and 281.

property constitute compensable takings.

Epstein claims his theory of takings is rooted in “Lockean principles.”¹⁶ This claim is dubious. According to Locke, individuals acquire property rights by virtue of labor or first possession. Once acquired, those rights cannot be extinguished or altered without consent of the owner.¹⁷ So far, this is perfectly consistent with Epstein’s theory of takings. However, Locke defines “consent” broadly in *Of Civil Government* [1690] to include “consent of the majority, giving it either by themselves, or their representatives chosen by them. . . .”¹⁸ In his *Critical Notes on Stillingfleet* [1681], Locke more explicitly recognizes the principle of tacit consent, writing, “what is done in parliament in civil things may be truly said to be the consent of the nation because they are done by their representatives who are empowered to that purpose.”¹⁹ Thus, representative governments possess the tacit consent of the governed, including property owners, to tax and regulate private property in the public interest. On this point, Epstein turns against Locke, claiming that the former’s theory of tacit consent is “defective” and “in powerful tension with the theory of representative government.”²⁰

¹⁶ EPSTEIN, *supra* note 7, at 36.

¹⁷ JOHN LOCKE, *OF CIVIL GOVERNMENT* ¶ 138; EPSTEIN, *supra* note 7, at 10-16.

¹⁸ LOCKE, *supra* note 16, at ¶ 140 (1690); *see also id.* ¶ 142. Locke’s notion of tacit consent provides the basis for the presumption of parliamentary infallibility. *See infra* note 63 and accompanying text.

¹⁹ JOHN LOCKE, *POLITICAL ESSAYS* 373 (M. Goldie, ed. 1997).

²⁰ EPSTEIN, *supra* note 7, at 14.

Epstein must oppose Locke on the issue of tacit consent because, if representative government possesses the consent, tacit or otherwise, of private property owners to regulate their properties, then no legitimate basis exists for judicial review of political restrictions on private property rights. Plainly, Locke did not believe, as Epstein does, that representative governments possess no greater authority than private neighbors to restrict private property. Nor did Locke believe, as Epstein does, that judicial review of legislation was the appropriate solution to legislative depredations of individual rights.²¹ Rather, the appropriate solution, according to Locke, was for the public to remove or replace the legislators:

there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for all power given with trust for the attaining an end, being limited by that end, whenever that end is manifestly neglected, or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security. And thus the community perpetually retains a supreme power of

²¹ See JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 151 (1999).

saving themselves from the attempts and designs of any body, even of their
legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on
designs against the liberties and properties of the subject. . . .²²

The most one can say about the relation between Epstein's theory of takings and Locke's theory of property is that the former is rooted in *some* Lockean principles, but is in "powerful tension" with others.

At its base, Epstein's theory of takings is motivated by a distrust of democratic government that Locke did not share. According to Epstein, "[t]he argument for judicial activism rests on the perception that flaws in the democratic process lead to the deprivation of individual rights, including those of property. . . . Emphasis upon the imperfections of government leads to strict scrutiny and more extensive judicial action."²³

²² LOCKE, *supra* note 16, at ¶ 149.

²³ *Id.* at 30. As both Ronald Coase, *Discussion: The Regulated Industries*, 54 AMER. ECON. REV. 194-95 (1964), and Neil Komesar, *supra* note 4, at 23-6, have pointed out, the imperfections of any one body (such as a legislature) always make another body (such as the judiciary) *appear* superior. The problem is that *all* organizations and institutions, including governments, courts, and markets, are imperfect. Consequently, the imperfections of one cannot automatically justify a preference for another. Comparative institutional analysis is required to determine the institutional/organizational choice that, in the circumstances, fails least.

When Epstein writes about government “imperfections,” he is not referring to Madison’s “majoritarian difficulty” of democratic majorities imposing their will on a vulnerable minority of property owners. Rather, Epstein’s primary concern is with minority factions that assert disproportionate influence over democratic processes. He asserts, for example, that “the takings clause is designed to control rent seeking and political faction.”²⁴ As we shall see in the next section,²⁵ Neil Komesar argues that this is a fatal flaw in Epstein’s theory of takings because just compensation is neither an efficient nor an equitable remedy for problems of majoritarian bias in legislative decisionmaking.

In the last fifteen years of the twentieth century, Epstein’s approach to takings gained many adherents among scholars and judges, including Supreme Court Justice Antonin Scalia.²⁶ In his opinion in the 1992 case of *Lucas v. South Carolina Coastal Council*,²⁷ Justice Scalia resurrected Holmes’s regulatory takings doctrine. In so doing, Justice Scalia opined that

²⁴ *Id.* at 281.

²⁵ See *infra* notes 41-2 and accompanying text.

²⁶ See, e.g., Douglas T. Kendell and Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. Envtl. Aff. L.Rev. 509 (1998)(suggesting that Epstein’s theory of takings is the basis of a intensive effort by conservative Republicans to alter the size and structure of government); Benjamin Allee, *Drawing the Line in Regulatory Takings Law: How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 Fordham L.Rev. 1957, 1993 (2002) (claiming that Justice Scalia has been influenced by Epstein’s theory of the denominator problem in regulatory takings law).

²⁷ 505 US 1003 (1992).

legislatures would always seek to avoid paying compensation for eminent domain takings by casting their actions in police-power terms: “Since . . . a [police power] justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff.”²⁸ Simply put, political institutions cannot be trusted to respect and protect private property rights.

Much has been written over the years about Holmes’s opinion in *Pennsylvania Coal*, Epstein’s theory of takings, and Scalia’s opinion in *Lucas*, but hardly anyone has questioned the underlying premise that constitutional judicial review is essential to protect private property owners from uncompensated takings. Even reputedly “Liberal” judges, such as William Brennan, have assumed that in the absence of the institution of judicial review, democratic bodies would trample on private property rights.²⁹

Recently, however, two scholars, writing from very different perspectives, have raised questions about, respectively, the need and the utility of judicial review for protecting property rights against democratic regulation.

²⁸ *Id.* at 1025 n. 12.

²⁹ See *San Diego Gas & Electric Co. v. City of San Diego et al.*, 450 US 621, 636-661 (1981) (Brennan, J., dissenting).

II. QUESTIONING THE MADISONIAN TRADITION: FISCHEL ON THE VIRTUES OF DEMOCRACY AND KOMESAR ON THE COMPARATIVE FUTILITY OF JUDICIAL REVIEW

As noted in the Introduction, William Fischel believes that private property owners generally are capable of protecting their interests in the political process; they are not a “discrete and insular minority”³⁰ likely to be harmed by majoritarian excesses. In his view, “economic interest groups would be able to form alliances to protect themselves from short-sighted populism.”³¹ This claim is consistent with economic theories of collective action according to which discrete groups can coalesce around an issue of great importance to the group, and exert disproportionate influence on the political process, compared to larger, more diffuse groups, including the “general public.”³² More contentiously, Fischel asserts that “[v]oters and representatives in large jurisdictions also are more likely to be concerned with their reputation for fair dealings, since bad reputations are apt to harm future generations.”³³ This amounts to a claim that governments in larger jurisdictions are inherently more trustworthy with private property rights than governments in smaller jurisdictions. Thus, Fischel repudiates the general

³⁰ *United States v. Carolene Products Co.*, 304 US 144, 153 n. 4 (1938). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

³¹ FISCHEL, *supra* note 2, at 180.

³² See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1971).

³³ FISCHEL, *supra* note 2, at 180.

judicial distrust of legislatures, and the police power, that motivated Justice Holmes's opinion in *Pennsylvania Coal*, Richard Epstein's theory of takings, and Justice Scalia's opinion in *Lucas*.

Fischel concludes that in many circumstances, especially in larger jurisdictions, "political action, which is often disparaged as rent-seeking, is sufficient to protect property without the help of judges."³⁴ He supports this conclusion by noting that the United States ranks near the top of international comparisons of security of property rights, despite the rise of the welfare/regulatory state, with its increasing limitations on land uses, and limited judicial review of government economic regulation since the decline of the *Lochner* era.³⁵ Even if that were not the case, Fischel doubts the ability of judges to do a better (that is, more efficient and effective) job than the political process.³⁶

Neil Komesar does not share Fischel's faith in political processes, but he concurs in Fischel's doubts about the judiciary's capacity to efficiently and effectively protect property rights. As noted in the Introduction, Komesar refers to democratic regulatory "institutions" as "highly flawed..., ... corrupt, excessive, and repressive."³⁷ They suffer from twin "political

³⁴ *Id.* at 324.

³⁵ *Id.* at 140. For more on international rankings for protection of property rights *see infra* notes 124-128 and accompanying text. The significance of such rankings is, of course, debatable. The discussion *infra* treats them as significant only for suggesting that the US and UK have similarly strong reputations for protecting property rights.

³⁶ FISCHEL, *supra* note 2, at 317.

³⁷ *See supra* note 5 and accompanying text.

malfunctions” of majoritarian bias (the tyranny of the majority) and minoritarian bias (disproportionate influence by discrete interest groups, who do not represent the “public interest”).

Uncompensated takings of private property can occur as a consequence of either majoritarian or minoritarian malfunctions. But this fact alone cannot support the conclusion that judicial review is a necessary institution for protecting property rights. Komesar rightly notes that the flaws inherent to one institutional and organizational set (politics + legislatures) cannot be used to justify the selection of another set (law + courts), which may suffer from equal or worse flaws. Comparative institutional analysis is needed to weigh the respective costs and benefits of outcomes under alternative institutional and organizational solutions, each of which is flawed to some extent.³⁸

When it comes to protecting private property rights, Komesar believes that the judicial system may be even more flawed than the political process.³⁹ It is not that the courts are unwilling to protect property rights, but they suffer from various institutional deficiencies, two of which are particularly disabling. First, Komesar believes that fully protecting property rights would outstrip judicial resources; that is, the supply of judicial compensation remedies could not possibly keep pace with the demand for them.⁴⁰ In Komesar’s view, there are simply too few

³⁸ KOMESAR, *supra* note 4, at 23-26. *Also see generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

³⁹ KOMESAR, *supra* note 4, at 84-85.

⁴⁰ *Id.* at 3-4, 26, 35-6, 163.

judges and courtrooms to protect property rights sufficiently. Second, the remedy for takings of private property – just compensation – corrects majoritarian bias (internalizing the costs to the beneficiaries of the government regulation), but not minoritarian bias.⁴¹ To the extent takings occur because of the latter political malfunction, the judicial remedy would not correct the problem – or, more accurately, it would fix the wrong problem.

If a taking occurs because of legislation or regulations that benefit not the general public (the majority) but a certain interest group, requiring the government and, through it, the general public (the taxpayers) to pay compensation would only compound the injustice. This point, Komesar notes,⁴² is where Richard Epstein’s theory of takings goes seriously awry. As noted in the preceding section, Epstein argues that most government regulations constitute compensable takings, and that these takings result primarily from minoritarian malfunctions (rent-seeking).⁴³ However, the remedy of just compensation, as Komesar points out, simply is not appropriate for correcting minoritarian malfunctions.

Komesar concludes that the political system may actually provide greater protection for property rights than the judicial system could possibly provide. He goes so far as to assert that the political/regulatory process may be the “best friend” private property owners have.⁴⁴

⁴¹ *Id.* at 94-7.

⁴² *Id.* at 94-5.

⁴³ Epstein, *supra* note 7, at 281; *see also supra* note 24 and accompanying text.

⁴⁴ KOMESAR, *supra* note 4, at 106. For a more detailed review of Komesar’s thesis, and its bearing on Fischel’s approach to takings law, *see* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on*

III. POLITICAL PROTECTION OF PRIVATE PROPERTY:

POLITICAL-ECONOMIC THEORY AND EVIDENCE FROM THE UNITED KINGDOM

Neil Komesar's conclusion poses a puzzle. How can government be, at once, "the best friend" and the greatest threat to private property? From Epstein's perspective, at least, relying on legislative bodies to protect property rights would be like relying on foxes to guard hen houses. But positive reasons exist, in addition to Komesar's negative reason of the futility of judicial review, for expecting democratic bodies to respect and protect property rights. Those reasons have their basis in political-economic theory; and that theory receives substantial empirical support from the history of property regulation and compensation in the United Kingdom and several American states.

A. The Theoretical Basis for Political Protection of Private Property

The following seven propositions of positive political-economic theory suggest that political institutions would protect property rights to some (albeit uncertain) extent, even in the absence of judicial review: (1) all governments, even dictatorships, require substantial political and military support as well as revenue to survive (assuming viable competitors);⁴⁵ (2) the

Law's Limits, 29 L& SOC. INQUIRY 261 (2004).

⁴⁵ See DOUGLASS C. NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY 22 (1981); Christopher Clague, Philip Keefer, Stephen Knack & Mancur Olson, *Property and Contract Rights in*

government's political/military support and revenue, as well as the overall level of economic growth in society, depend critically on the structure of institutions;⁴⁶ (3) secure property rights are an important component of the state's institutional structure because they provide a necessary basis for capitalization and economic exchange, which lead to economic growth and provide revenues (through taxation) to the government;⁴⁷ (4) property rights are costly to design and enforce;⁴⁸ (5) governments generally are able to define and enforce property rights at lower cost

Autocracies and Democracies, 1 J.ECON. GROWTH 243 (1996) (finding that property and contract rights are significantly associated with a proxy for the time horizons for autocrats (the log of years in power), and, in democracies, with the duration of democratic government.).

⁴⁶ DOUGLASS C. NORTH AND ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 91 (1973); Edward L. Glaeser, Rafael LaPorta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *Do Institutions Cause Growth?*, NBER Working Paper Series, Working Paper 10568 (June 2004).

⁴⁷ See *id.* at 5. Also see generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000); Stephen Knack and Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POLITICS 207 (1995) (finding that institutions that protect property rights are crucial for economic growth and rates of investment as a share of gross domestic product.).

⁴⁸ See generally Ronald Coase, *The Problem of Social Cost* 3 J.L. & Econ. 1 (1960); also see CARL DAHLMAN, *THE OPEN-FIELD SYSTEM AND BEYOND: PROPERTY RIGHTS ANALYSIS OF AN ECONOMIC INSTITUTION* 83 (1980) (nothing that property rights are expensive – sometimes too expensive – to define); TERRY L. ANDERSON AND DONALD J. LEAL, *FREE MARKET ENVIRONMENTALISM* 167 (1991) (“Property rights are costly to define and enforce.”).

than could voluntary groups, especially in expanding markets;⁴⁹ (6) even on the most parsimonious theory of the state, completely self-interested, rent-seeking governments can be expected to establish and enforce property rights to the extent that the governors believe private property rights will increase their political and military support and their revenues, thereby increasing their prospects for survival;⁵⁰ (7) the structure of property rights may or may not

⁴⁹ NORTH AND THOMAS, *supra* note 45, at 7. Thus, “[j]ustice and the enforcement of property rights are simply another example of a public good publicly funded.” *Id.*

⁵⁰ ITAI SENED, *THE POLITICAL INSTITUTION OF PRIVATE PROPERTY* 81 (1997). *See also* NORTH AND THOMAS, *supra* note 45, at 6 (“we pay government to establish and enforce property rights”); NORTH, *supra* note 44, at 33-34 (“The state . . . will encourage and specify efficient property rights only to the extent that they are consistent with the wealth-maximizing objectives of those who run the state”); VI Acts of the Privy Council of England: Colonial Series 591 (W.L. Grant and J. Munro eds., 1908-12), *quoted in* P.J. Marshall, *Parliament and Property Rights*, in *EARLY MODERN CONCEPTIONS OF PROPERTY* 530, 532-33 (J. Brewer and S. Staves eds., 1996) (“‘Experience shows that the possession of property is the best security for a due obedience and submission to government.’”); Clague *et al.*, *supra* note 44 (finding a strong correlation between property and contract rights and an autocrat’s time in power).

Even regimes that are anti-democratic and/or ideologically opposed to private property rights must establish and protect property rights for certain elite groups, such as military officers and financiers, without whose support the regimes would fall. *See, e.g.*, Christoph Buchheim and Jonas Scherner, *The Role of Private Property in the Nazi Economy: The Case of Industry* (unpublished typescript on file with the author and available on the World Wide Web at http://emlab.berkeley.edu/users/webfac/cromer/e211_F04/buchheim.pdf). More to the point, regimes that do not sufficiently protect private property rights tend not to survive for very long. The USSR, for example, survived less than a century. Nominally

maximize either social welfare (efficiency) or social justice (equity).⁵¹

The political-economic propositions listed above – especially proposition (6) – suggest that no contradiction exists between the assumption that governments operate strategically to further their own interests and the prediction that those same governments will substantially

“Communist” China appears to have learned this lesson, as it has moved increasingly in recent years toward a market economy based on private property. *See, e.g.*, TOM BETHELL, *THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES* Ch. 21 (1998). However, private land “ownership” in China remains far less extensive, and is much less well protected, than in countries such as the United States and United Kingdom. *See, e.g.*, Katherine Wilhelm, *Rethinking Property Rights in Urban China*, 9 *UCLA J. INT’L L. & FOR. AFF.* 227, 248-9 (2004) (noting that private property rights in Chinese cities are limited both in time and in scope, and always insecure).

⁵¹ *See* NORTH, *supra* note 44, at 22 (“Property rights that produce sustained economic growth have seldom held sway throughout history. . .”) and at 28 n. 12 (“‘inefficient’ property rights are the rule, not the exception”); NORTH AND THOMAS, *supra* note 45, at 7 (“there is no guarantee that the government will find it to be in its interest to protect those property rights which encourage efficiency (*i.e.*, raise the private rates of return on economic activities towards the social rate) as against those in which the property rights protected may thwart growth altogether. . . . [A] prince may find short-run advantage in selling exclusive monopoly rights which may thwart innovation and factor mobility (and, therefore, growth) because he can obtain more revenue immediately from such a sale than from any other source. . . .”); SENED, *supra* note 49, at 101 (“One reason why governments fail to seize opportunities to enrich society and themselves by creating property rights, and why they often grant property rights that only impoverish society, is that they do not have complete information.”).

protect private property rights.⁵² The puzzle is solved! Government really can be the “best friend” private property owners have, as Neil Komesar suggests,⁵³ while constituting at the same time a threat to private property rights through expropriation and regulation. According to the political economist Itai Sened, “[t]he key to the solution of this puzzle is to realize the fact that governments’ involvement in the grant and enforcement of rights reflects their dependence on the support of their citizens. Most of the benefits that government officials obtain are extracted from the citizens. Governments depend on popular support and tax revenues to remain in power. Their sensitivity to the interests of the common citizen is thus crucial for their own survival and prosperity.”⁵⁴ To the extent that the “interests of the common citizen” include private property, it follows that sensitivity to the property rights of the common citizen is crucial to a government’s political survival and prosperity.

However, as proposition (7) suggests, the political institution and protection of private property may be neither efficient nor equitable. It is entirely possible, even probable, that governments, particularly in non-democratic countries, might protect some property rights (or the rights of some owners) more than others. If so, the institution of constitutional (judicial) protections may be warranted to enhance efficiency, equity, or both.

⁵² See *id.* at 5.

⁵³ See *supra* note 43 and accompanying text.

⁵⁴ SENED, *supra* note 49, at 5.

B. Takings and Compensation in Practice in the UK

The United Kingdom provides several hundred years' worth of historical evidence in support of the theory that political institutions substantially protect private property rights, even in the absence of constitutional requirements of just compensation and judicial review of legislation. As in the US, Parliament virtually always provides compensation when it takes title to private property, but it only rarely compensates for regulatory impositions on private property rights.

1. The "Convention" of Compensation for Expropriation (Taking Title) in the UK

In the UK, as in the US, governments have "followed the practice of expropriating land for certain purposes for several centuries."⁵⁵ But there is an important difference. When a government expropriates title to land in the US, it *must* pay "just compensation" according to the takings clause of the Fifth Amendment to the Constitution. In the United Kingdom, however, there is no constitutional right of compensation for governmental takings. The courts do not possess the authority to require Parliament to pay; nor do they determine what constitutes adequate compensation.⁵⁶ Nevertheless, Parliament virtually always pays compensation when it

⁵⁵ Stoeckel, *supra* note 7, at 561.

⁵⁶ BEVERLY J. POOLEY, THE EVOLUTION OF BRITISH PLANNING LEGISLATION 17 (1982) ("There is . . . no constitutional requirement in Britain that compensation should be paid, and the amount of

takes title to private property. For centuries, compensation for takings has been a *convention* of parliamentary practice.

The distinction between constitutional *law* and *convention* is fundamental:

The ‘unwritten’ British constitution includes a great many statutes, but any British statute can be repealed by another. The passing and repeal of Acts of Parliament is ultimately a question of political power, exercised (subject ultimately to revolution, as in 1689) in accordance not only with existing statutes but also with constitutional conventions. These are not law (which is why they are called ‘conventions’) but are tacitly observed in constitutional practice in order to avoid anarchy or revolution, the system in effect being one of self-regulation. One of the conventions is that the courts do not enforce or change these conventions. They are instead enforced by political observance and changed by imperceptible evolution except when a relevant statute is passed.⁵⁷

In the UK, government authority to expropriate land or impress it into public service stems from two distinct sources: the Crown’s prerogative powers – specifically, the power of

compensation has always been a matter of executive, and not judicial, determination.).

⁵⁷ Professor K Davies, *Eminent domain and the jury*, 150 NEW L.J. 1079 (14 July 2000). *See also* F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 342 (H.L.A. Fisher ed., 1908).

“purveyance”(to impress private property into public service) and Parliament’s supreme and plenary authority to govern the country. Under the Crown’s prerogative power:

the king or his ministers might make use of private land and to some extent even destroy the substance of it, all without compensation. For instance, the king might . . . dig in private land for saltpeter to make gunpowder for defense of the realm. Or he might, through his commissioners of sewers, rebuild and repair ancient drains, ditches, and streams for draining the land to the sea. This came from his power to guard against the sea and to regulate navigation. From this same power, he might build and repair lighthouses, build dikes, and grant port franchises. To carry out his prerogative to coin money, he had power to work all gold and silver mines. Fortifications could be built without compensation on private land, these being, of course, for defense of the realm. Also without compensating, the king’s officers could raze private buildings and protect his subjects against a conflagration.⁵⁸

One prerogative power the Crown never possessed, even before the Glorious Revolution of 1688-89, was the authority to take legal title to private land.⁵⁹ This power resides in

⁵⁸ Stoebeck, *supra* note 7, at 563.

⁵⁹ See *Case of the Isle of Ely*, 10 Coke, 141, 77 Eng. Rep. 1139 (1610) (holding that the king could not, but Parliament could, empower sewer commissioners to expropriate privately owned lands

Parliament alone.⁶⁰ As the “supreme” or “sovereign” governmental authority in the United Kingdom (since the Constitutional Settlement that followed the Glorious Revolution of 1689),⁶¹ Parliament exercises plenary authority over the country. It is “omnicompetent and might legislate over any matter that might come before it.”⁶² Moreover, Parliamentary acts are presumed to represent the will of the entire nation because “everie Englishman is entended to bee there [in Parliament] present . . . and the consent of Parliament is taken to be eevrie mans consent.”⁶³

This presumption of universal consent gives rise to the doctrine of Parliamentary infallibility,⁶⁴ which disables the courts from voiding Parliamentary acts (although judges retain

needed for new drainage works). Also *see* Stoeck, *supra* note 7, at 564; Davies, *supra* note 56.

⁶⁰ *See* WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 140 (1979 [1765]).

⁶¹ POOLEY, *supra* note 55, at 31 (referring to Parliament as “supreme”); MALCOLM GRANT, URBAN PLANNING LAW 19 (1982) (referring to “the sovereignty of Parliament”). For an excellent review of the history and theory of parliamentary sovereignty, *see* GOLDSWORTHY, *supra* note 20.

⁶² Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1266 (2002).

⁶³ SIR THOMAS SMITH, DE REPUBLICA ANGLORUM 49 (L. Alston ed. 1906 [1583]), *quoted in* Harrington, *supra* note 61, at 1265.

⁶⁴ *Id.* Also *see* SIR JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE 41 (S.B. Chrimes ed. & trans. 1949) (noting that Parliamentary enactments have “the assent of the whole realm, so they cannot be injurious to the people nor fail to secure their advantage.”). Fortescue (c. 1395-1477) served as Lord Chancellor and as a Chief Justice of England. Note the consistency of Smith’s and Fortescue’s statements

the authority to interpret and enforce statutes).⁶⁵ As Chief Justice Cockburn and Justice Blackburn wrote in the 1872 case of *Ex parte Canon Selwyn*, “There is no judicial body in the country by which the validity of an act of parliament can be questioned. An act of the legislature is superior in authority to any court of law. . . and no court could pronounce a judgment as to the validity of an act of parliament.”⁶⁶ Nor does the Crown, by convention, intervene to veto or even voice concerns about legislation.⁶⁷ Consequently, as Blackstone wrote, “[s]o long . . . as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.”⁶⁸ The only real constraint on Parliament’s plenary authority is self-regulation in

with John Locke’s later theory of “tacit consent,” discussed *supra* notes 22-23 and accompanying text.

⁶⁵ See Davies, *supra* note 56; Harrington, *supra* note 61, at 1266; Pooley, *supra* note 55, at 33 (“All that a court can do with an act of Parliament is to see that it has been validly passed and then to interpret and apply it. . . . [I]f an individual is aggrieved by a ministerial act, provided that the Minister has acted within the powers given to him by Parliament, the individual has no means of attack other than the political.”);

⁶⁶ 36 J.P. 54 (1872), *quoted in* GOLDSWORTHY, *supra* note 20, at 227. *Also see* *Belfast Corporation v. O.D. Cars Ltd.*, [1960] NI 60 (14 Dec. 1959) (“Matters of policy which are determined by the Government and carried out in detail by the aid of an experienced administrative staff cannot be confided to the judiciary.”).

⁶⁷ See Davies, *supra* note 56.

⁶⁸ BLACKSTONE, *supra* note 59, at 157. This is not entirely accurately. As Maitland has explained, *supra* note 56, at 387, Parliament does not have the power to bind future Parliaments. In other words, one Parliament cannot enact a law that cannot be repealed by another.

view of possible electoral replacement, revolution, or anarchy.⁶⁹

Parliament's authority to take or regulate private property, with or without compensation, is no more limited than its authority to legislate on any other matter of concern. On the presumption that Parliament represents the interests of all the UK's citizens, its decision to either tax or take property from any subject has the implicit legal consent of the entire realm, including those from whom property is taken.⁷⁰ Parliament, thus, "has an absolute power as to the possession of all temporal things within this realm, in whose hands soever they be . . . to take them from one man, and give them to another without any cause of consideration, that it binds

⁶⁹ See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 76-7, 79 (10th ed. 1964); Davies *supra* note 56; Pooley, *supra* note 55, at 31 (noting that, even though Parliament is "supreme," "there are many conventions which the government must observe, and a violation of these conventions would result at best in political annihilation of the offending government at the next election and at worst in revolution.").

⁷⁰ Harrington, *supra* note 61, at 1265. Also see S.R. GARDINER, THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 114 (3d ed. 1906) (Parliament was thought "fittest for the preservation of that fundamental propriety which the subject has in his lands and goods, because each subject's vote is included in whatsoever is there done."). Note, once again, how the presumption of consent satisfies, in theory, John Locke's condition that "The Supream Power cannot take from any Man any part of his Property without his own consent." LOCKE, *supra* note 22, at ¶ 138. See also *supra* notes 22-25 and accompanying text; GOLDSWORTHY, *supra* note 20, at 69 ("The fiction that the consent of Parliament was tantamount to the consent of every subject meant that property rights could be transferred or altered by the King in Parliament, but not by the King alone.").

the law of conscience.”⁷¹ As Philip Nichols has written, “if an injury to property is expressly authorized by act of Parliament, the courts of justice can give no redress, no matter how grossly the provisions of the Magna Carta have been violated.”⁷²

Given Parliament’s plenary authority over property rights and compensation for takings, “the use of eminent domain was limited only by those restraints the legislature imposed on itself.”⁷³ In other words, Parliament is deemed trustworthy *as a matter of law* with private property rights.

As early as the fifteenth century, Parliament enacted laws authorizing the expropriation of land. A 1427 statute, for example, allowed the commissioners of sewers to take land for locating new sewers, ditches, gutters, walls, bridges, and causeways for draining the lowlands in Lincoln County.⁷⁴ This statute did not explicitly require compensation for any land taken for these purposes, perhaps because such takings were in furtherance of the king’s prerogative powers relating to navigation. By the early sixteenth century, however, it had become *conventional* (though never constitutionally required) for Parliament to pay compensation for

⁷¹ Christopher St. German, *A Treatise Concerning the Division Between Spirituality and Temporality*, in 9 THE COMPLETE WORKS OF ST. THOMAS MORE 177-212 (J.B. Trapp ed., 1979 [1532]), quoted in Harrington, *supra* note 61, at 1266.

⁷² PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN 1.22[1] (J.L. Sackman ed., 1997).

⁷³ Harrington, *supra* note 61, at 1269.

⁷⁴ Stat. 6 Hen. 6, c. 5 (1427), described in Stoebe, *supra* note 7, at 565.

expropriating private property.⁷⁵ This convention evolved from statutes expressly requiring compensation. A 1514 statute, for example, authorized the City of Canterbury to improve a river, but expressly required the City to compensate anyone whose mill, bridge, or dam had to be removed as part of the river improvement project.⁷⁶

Even statutes in which Parliament expressly denied compensation for takings tacitly acknowledged the emergence of a compensation convention. A 1512 statute, for example, authorized the taking of land along the Cornish coast for fortifications with an express denial of compensation.⁷⁷ In discussing this statute, William Stoebuck appreciates that Parliament had good reason to deny compensation because “the act was in aid of the king’s prerogative to build

⁷⁵ See Stoebuck, *supra* note 7, at 578. Even into the sixteenth century, however, Parliament sometimes expressly declined to pay compensation, for example, when it authorized road builders to take gravel or soil from private lands to repair the king’s highways. See 9 Hen. 5, c. 2, c. 11 (1421); 5 Eliz. c. 13 (1562-63). See also Harrington, *supra* note 61, at 1262 n. 62. Parliament also declined to compensate the Church when, in the sixteenth century, it authorized King Henry VIII to expropriate the land holdings of more than 800 monastic and clerical establishments. This massive expropriation did not lead to public outcry because the King left the lands’ tenants in possession. By taking title, Parliament merely transferred “tax” revenues from the Church to the King. See RICHARD PIPES, PROPERTY AND FREEDOM: THE STORY OF HOW THROUGH THE CENTURIES PRIVATE OWNERSHIP HAS PROMOTED LIBERTY AND THE RULE OF LAW 134 (1999). Also see GOLDSWORTHY, *supra* note 20, at 58 (noting that “the Reformation Parliament frequently overrode title to property).

⁷⁶ Stat. 6 Hen. 8, c. 17 (1514-1515), described in Stoebuck, *supra* note 7, at 566.

⁷⁷ Stat. 4 Hen. 8, c. 1 (1512).

fortifications;” but he also finds significant the fact that Parliament deemed it “necessary to *explicitly* deny compensation, hinting that someone in 1512 might otherwise have expected it.”⁷⁸

In the seventeenth and eighteenth centuries, the convention of paying compensation for expropriated land was so well established that “[n]o statute of that era has been found denying compensation for a taking.”⁷⁹ Even during the great enclosure movement from the fifteenth century to the middle of the nineteenth century, when Parliament transferred millions of acres of common lands into private ownership, it always offered compensation to those who were dispossessed of vested rights in the common lands.⁸⁰ In his *Commentaries on the Laws of*

⁷⁸ Stoebuck, *supra* note 7, at 566 (emphasis added).

⁷⁹ *Id.* at 579.

⁸⁰ See, e.g., Frank A. Sharman, *An Introduction to the Enclosure Acts*, 10 J. LEGAL HIST. 45, 47-48 (1989); Robert C. Ellickson, *Property in Land*, 102 Yale L.J. 1315, 1392 (1993). The level of compensation was highly variable. G.E. MINGAY, *PARLIAMENTARY ENCLOSURE IN ENGLAND: AN INTRODUCTION TO ITS CAUSES, INCIDENCE AND IMPACT 1750-1850* 126-32 (1997). Enclosure acts typically did not offer compensation to tenants and laborers who relied on the commons for their livelihood, but did not possess *vested* rights in the common lands. As G.E. Mingay has written, “a strict line was drawn between those who could legitimately prove a common right and those who could not. *Id.* at 129. See also W.A. Armstrong, *Labour I: Rural Population Growth, Systems of Employment, and Incomes*, in 6 THE AGRARIAN HISTORY OF ENGLAND AND WALES 1750-1850, at 641, 721-28 (G.E. Mingay ed., Joan Thirsk gen. ed., 1989). Hence, E.P. Thompson’s reference to the enclosure movement as “a plain enough case of class robbery.” E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 218 (1963). See also E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975). Not all enclosures were accomplished through Parliamentary Acts; much common land was

England (1765-1769), William Blackstone wrote:

the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. . . . All the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.⁸¹

Blackstone understated Parliament's eminent domain power as a mere authority to force sales. In fact, Parliament could, in Blackstone's time and still today, choose to take property rights without paying any compensation. More importantly, however, the quote from Blackstone suggests just how rare uncompensated takings were in practice. Even when Parliament abolished slavery in all its colonies in 1833, the emancipation statute provided compensation for slave owners.⁸²

enclosed pursuant to private agreements among the various owners of vested rights in the commons.

⁸¹ BLACKSTONE, *supra* note 59, at 135.

⁸² MAITLAND, *supra* note 56, at 339. So, too, it is worth noting, did the 1862 DC Emancipation Act, ch. 54, 12 Stat. 376 (1862). That law ended slavery in the District of Columbia, offering up to \$300 compensation to former slave owners. For a transcript, see <http://www.archives.gov/exhibits>

Eventually, the convention whereby Parliament would pay compensation for outright takings of land and other private property evolved into a common law *presumption* favoring (but not requiring) compensation. That common law presumption persists to this day. In the 1960 case of *Belfast Corporation v. O.D. Cars Ltd.*,⁸³ Viscount Simonds wrote: “[i]t is, no doubt, the law that the intention to take away property without compensation is not to be imputed to the legislature unless it is expressed in unequivocal terms.”⁸⁴ The evolution of the compensation *convention* into a common law *presumption* did not, however, prefigure any judicial assertion of authority over Parliamentary takings. Viscount Simonds went on to write in *Belfast Corporation* that “[m]atters of policy which are determined by the Government and carried out in detail by the aid of an experienced administrative staff cannot be confided to the judiciary.”⁸⁵ The judiciary will not impute Parliamentary intent to deny compensation, unless such intent is plainly manifest in the statute, but neither will the courts deny or overrule Parliament’s expressed intent.

/featured_documents/dc_emancipation_act/transcription.html.

⁸³ [1960] NI 60 (14 Dec. 1959).

⁸⁴ See also *Attorney-General v. De Keyser’s Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.) at 542. (“unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.”).

⁸⁵ [1960] NI 60 (14 Dec. 1959).

2. No Compensation for “Regulatory Takings” in the UK

Prior to the twentieth century at least, few feared that Parliament would take property or “go too far” in regulating it without compensation mainly because “property interests were well-represented within its ranks.”⁸⁶ During the twentieth century, however, the representation and power of property interests in Parliament declined, particularly with the waning of the House of Lords. As Beverley J. Pooley has written, that “body which lives under the constant threat of extinction cannot exert great political pressure.”⁸⁷ There is no evidence, however, that uncompensated expropriations of title increased during the twentieth century. The traditional convention concerning compensation for expropriations remains in full effect. On the other hand, the extent of uncompensated government *regulation* of private property has increased dramatically since the middle of the nineteenth century.

In contrast to the experience of the United States, increased property regulation in the United Kingdom has not led to the introduction of new constitutional and legal forms, such as regulatory takings.⁸⁸ Instead, the UK continues to rely on its historical conventions, including the

⁸⁶ MAITLAND, *supra* note 56, at 494, notes that as late as the eighteenth century, members of the House of Commons had to be landowners. See *also* Harrington, *supra* note 61, at 1265.

⁸⁷ Pooley, *supra* note 55, at 29 n. 47.

⁸⁸ *But see Belfast Corporation v. O.D. Cars Ltd.*, [1960] NI 60 (14 Dec. 1959) (Viscount Simonds: “The day may come when it will be necessary to consider the relevance to the constitution of Northern Ireland of the observation of Holmes J. in [Pennsylvania Coal]: ‘The general rule at least is,

convention that no compensation is required or presumed when the government merely regulates (without taking title to) private property.

Lord Radcliffe explained this convention in the case of *Belfast Corporation v. O.D. Cars Ltd.*:⁸⁹

Side by side with this [presumption that compensation will be paid for outright takings of private property], and developing with increasing range and authority during the second half of the nineteenth century came the great movement for the regulation of life in cities and towns in the interests of public health and amenity. It is not an adequate description of the powers involved, so far at any rate as the United Kingdom is concerned, to speak of them as “police powers.” They went far beyond that. . . . Achieved by one means or the other, there is no doubt at all that the effect of them was to impose obligations and restrictions upon the owner of town land which impaired his right of development, prohibited or restricted his rights of user and, in some cases, imposed monetary changes upon him or compelled him to expend money on altering his property. Generally speaking,

that, while ‘property may be regulated to a certain extent, if regulation goes too ‘far it will be recognized as a taking.’ If the question is one of degree, I am clearly of the opinion that the day did not arrive with section 10(2) of the Act of 1931.”). If that day ever does arrive, it would fundamentally alter Britain’s entire legal system.

⁸⁹ [1960] NI 60 (14 Dec. 1959).

though not without exception, these obligations and restrictions were treated as not requiring compensation, though, of course, in a sense they expropriated certain rights of property.

A perusal of the Public Health Act, 1875, will be sufficient to make the point. It shows how extensive interference could be, even at that date. Only in a few special cases is compensation provided for the consequence of interference. No one, so far as I know, spoke of this as a “taking of property” or treated the general principle of “no taking without compensation” as applicable to the case. . . . What is important, I think, is to recognize that though interference with rights of development and user had come to be a recognized element of the regulation and planning of towns in the interest of public health and amenity, the consequent control, impairment or diminution of those rights was not treated as a “taking” of property nor, when compensation was provided, was it provided on the basis that property or property rights had been “taken,” but on the basis that property, itself retained, had been injuriously affected.

As Parliament can take title to private property without paying compensation, so it can regulate private property without paying compensation. The difference is that, when Parliament takes title, it is presumed to intend to pay compensation, unless the statute expressly denies compensation. Mere regulation of property in the UK carries no such presumption. To the

contrary, there appears to be a presumption that parliamentary regulations of private property are *not* compensable unless Parliament expressly awards compensation. And as Lord Radcliffe points out in *Belfast Corporation*, since the middle of the nineteenth century, Parliament increasingly has regulated private property without compensation.

During the twentieth century, the UK's Parliament, no less than the US's Congress, regulated private property to protect public health and safety, as well as the natural environment. By far, the most significant regulatory impositions on private property in the UK resulted from "town and country planning." First instituted in 1909, the British planning system is far more extensive and intrusive than the most comprehensive zoning regulations to be found in the US. The UK's 1947 Town and Country Planning Act nationalized all land development rights,⁹⁰ so that the government could completely control the future development of the country. The Act prohibited development of privately owned lands except as permitted by local government planning agencies, providing only limited compensation for landowners whose development

⁹⁰ See J.B. CULLINGWORTH, TOWN AND COUNTRY PLANNING IN ENGLAND AND WALES 150 (1964). Some authors distinguish between nationalization of "rights" and nationalization of "title." Nationalization of title gives rise to compensation pursuant to the traditional compensation convention, but nationalization of rights does not. See Malcolm Grant, *Compensation and Betterment*, in BRITISH PLANNING: 50 YEARS OF URBAN AND REGIONAL POLICY 62 (B. Cullingworth ed., 1999) ("there is in Britain no compensation for the loss of development rights, only for the physical taking of land (i.e. for the acquisition of title)").

rights were taken or significantly reduced.⁹¹ As Malcolm Grant has explained:

The Act imposed first a general prohibition against any development without permission. . . . Next the Act adopted the general principle that no compensation should have to be paid if planning permission were refused, except in certain limited cases. Instead, landowners were left with a claim against a global sum of £300 million in respect of any loss of development value caused by the Act. It was a limited scheme, and its purpose was more to inject confidence into the market by meeting hardship cases than to provide an objectively measured level of compensation for loss of development rights. Admitted claims for loss were met at the rate of 16 shillings in the pound (80 pence) prior to the winding up of the fund in 1953, and the government had secured its objective: the nationalization of development rights in land.⁹²

Professor Grant notes that Parliament provided very limited exceptions to the no-compensation rule, for instance in cases where denial of planning permission dashed reasonable and legitimate development expectations (*e.g.*, to increase the size of an existing building by 10 percent).⁹³ In addition, the 1947 Act allowed landowners to force compulsory purchase by the government

⁹¹ GRANT, *supra* note 60, at 23.

⁹² *Id.* at 63.

⁹³ Parliament repealed this exception in the 1991 Town and Country Act. *See id.* at 63, n.3.

(akin to the American rule of inverse condemnation), if the lack of development rights left their land without any “reasonably beneficial use.”⁹⁴ Landowners also might receive compensation if planning authorities ordered an existing use of land discontinued or reneged on a previously granted planning permission.⁹⁵ Even where Parliament provided for compensation, however, the amount of compensation was based only on existing uses, never on potential use following development.⁹⁶

Generally speaking, the 1947 Town and Country Planning Act took away landowners’ substantive legal rights to develop land and replaced them with a small set of “procedural rights: principally the right to have a planning application determined in accordance with the development plan and other material considerations, and the right to appeal to the Secretary of State against a local authority’s refusal of permission or conditions imposed by them.”⁹⁷ These procedural rights created a limited role for the courts in town and country planning to ensure that local governments did not exceed the authority Parliament gave them under the Act.

⁹⁴ *Id.* Note the similarity to the US Supreme Court’s decision in *Lucas*, 505 US 1003 (1992), holding that government must compensate when a police power (non-nuisance) regulation deprives the landowner of any beneficial uses for the land.

⁹⁵ In the UK, the development right vests immediately upon the granting of permission; therefore, compensation is due if permission is subsequently revoked. Grant, *supra* note 89, at 454-55.

⁹⁶ There is, however, an exception, allowing payment of an *ex gratia* supplement, when necessary to avoid undue hardship. See CULLINGWORTH, *supra* note 89, at 157. Such *ex gratia* supplements do *not* constitute compensation because they are not received as of right.

⁹⁷ *Id.*

In the landmark case of *Pyx Granite v. Minister of Housing and Local Government*,⁹⁸ the court ruled that even though the 1947 Act expressly authorized local authorities to impose “such conditions as they think fit,” any conditions must: (1) reasonably and fairly relate to the development being permitted; (2) have a planning purpose; and (3) not be manifestly unreasonable. Still, the courts have no authority, independent of the statute, to require compensation for a denial of planning permission. As Malcolm Grant has written, “the tradition of judicial non-intervention has remained, and the courts have remained largely unmoved by pleas for greater openness and more visible fair play in decision making. Change has had to come instead through political and legislative action.”⁹⁹

The UK’s tradition of judicial non-intervention remains intact even after the Human Rights Act, which Parliament enacted in 1998 to meet the UK’s obligations under the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 1 of the First Protocol to the UK’s Human Rights Act concerns The Protection of Property:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general

⁹⁸ [1958] 1 QB 554, reversed on other grounds [1960] A.C. 260. For a more recent case, restating the *Pyx Granite* court’s interpretation of the 1947 Town and Country Planning Act, see *Newbury District Council v. Secretary of State for the Environment*, [1981] A.C. 578, [1980] 1 All ER 731.

⁹⁹ GRANT, *supra* note 60, at 560.

principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.¹⁰⁰

The effect of this provision on relations between Parliament and the courts is not obvious.¹⁰¹ The text refers to rights of “peaceful enjoyment” of property and protection against government deprivation, but expressly authorizes government impairment of property rights “in the public interest,” in accordance with “general principles of international law,” and “in the general interest.” Nothing in the text plainly subjects parliamentary legislation to judicial review. Other sections of the Act make clear, however, that in case of a conflict between an act of Parliament and the European Convention for the Protection of Human Rights and Fundamental

¹⁰⁰ See <http://www.hmso.gov.uk/acts/acts1998/80042--e.htm#sch1ptII>.

¹⁰¹ “The deep constitutional significance of the [Human Rights Act] on fundamental principles of legality and the rule of law will only be felt over time. As for Parliamentary sovereignty, formally this remains intact. Nonetheless, the strong likelihood is that the [Human Rights Act] is effectively entrenched for practical constitutional purposes.” Dominic McGoldrick, *The United Kingdom’s Human Rights Act 1998 in Theory and Practice*, 50 INT’L & COMP. L.Q. 901 (2001).

Freedoms, Parliament's will prevails.¹⁰² Thus, parliamentary sovereignty remains intact.¹⁰³ The Human Rights Act itself, as an act of Parliament, is subject to parliamentary repeal, amendment, or exception.¹⁰⁴ On the other hand, the Human Rights Act expressly authorizes and obligates the courts to assess whether government land-use controls are, or are not, in the "general interest."¹⁰⁵

¹⁰² See David Jenkins, *From Unwritten to Written: Transformation in the British Common-Law Constitution*, 36 VAND. J. TRANSNAT'L L. 863, 948 (2003) (discussing section 3(2) of the 1998 Human Rights Act); Jonathan L. Black-Branch, *Parliamentary Supremacy or Political Expediency?: The Constitutional Position of the Human Rights Act Under British Law*, 23 STAT. L.REV. 59 (2002) ("the Human Rights Act is intended to provide a new basis for judicial interpretation of all legislation, but 'not a basis for striking down any part of it'."). In fact, the most the courts can do is declare legislation (or some part of legislation) to be incompatible with the Human Rights Act. Then, it is up to Parliament to decide whether or not to amend the offending legislation. According to Lord Woolf, former Chief Justice of England, every time the courts have declared some legislation to be incompatible with the Human Rights Act – about 20 occasions so far – Parliament has amended the offending legislation to bring it into compliance with the Human Rights Act. Conversation with Lord Woolf, Nov. 8, 2005.

¹⁰³ See *R v. Director of Public Prosecutions, ex parte Kebeline*, [2000] 2 AC 326, [1999] 4 All ER 801, [1999] 3 WLR 972, [2000] 1 Cr App Rep 275, [2000] Crim LR 486 (Lord Steyn: "it is crystal clear that the carefully and subtly drafted 1998 Act preserves the principle of parliamentary sovereignty.").

¹⁰⁴ See McGoldrick, *supra* note 100.

¹⁰⁵ See, e.g., *R. (on the application of Brennon) v. Bromsgrove District Council*, [2003] EWHC 752 (Admin), [2003] P&CR 430, CO/3422/2002, (Transcript: Smith Bernal) (upholding a tree preservation order under the 1990 Town and Country Planning Act against a challenge under the 1998 Human Rights Act, based on the court's finding that the legislation properly balanced the property rights of individuals and the "general interest of the community."). Also see Michael Purdue, *The Changing*

This provision, itself, constitutes a politically instituted protection for private property rights. Nevertheless, the courts have so far declined to use Article 1 of the First Protocol to impose substantive limitations on government land-use planners.¹⁰⁶

IV. COMPARING US AND UK INSTITUTIONS FOR TAKINGS AND COMPENSATION

The UK's 1947 Town and Country Planning Act (as amended) may appear radical to American eyes, but it is useful to bear in mind its social and historical contexts. The United

Role of the Courts in Planning, in *BRITISH PLANNING: 50 YEARS OF URBAN AND REGIONAL POLICY* 166 (B. Cullingworth ed., 1999).

¹⁰⁶ Another section of the Human Rights Act – Schedule 1, Part 1, Article 6, on the Right to a Fair Trial – has led the courts to impose additional, *procedural* obligations on government land-use planners (but not on Parliament itself). *See R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases*, [2001] UKHL 23, [2001] 2 All ER 929. *See also Bryan v. United Kingdom*, [1996], 28 EG 137, [1996] 2 EGLR 123 (a decision preceding the 1998 Human Rights Act, in which the European Court of Human Rights required UK courts to afford greater judicial review of land planning decisions to ensure a fair trial, as required under Art. 6 of the European Convention on Human Rights). *But see R. v. Lambert*, [2001] UKHL 37, [2002] 2 AC 545, paragraphs 79-81 (noting that although courts have new interpretive obligations under the Human Rights Act, they do not have the authority to “amend” statutes; in any case involving a statute that is incompatible with the terms of the Human Rights Act or the European Convention, the courts must accede to Parliament’s expressed will). *See also Jenkins*, *supra* note 101, at 948.

Kingdom is a relatively small and crowded country with a long history of public interest in private land uses. As Neil Alison Roberts has written (of England):

Land has a different character where you have 56 million people in an area less than the size of Wisconsin and where the ‘frontier’, if it existed at all, was closed in the time of William the Conqueror. In a nation where feudalism originally presupposed a ‘public’ character to private use of land there has always been a realisation that the allocation of this particular unique resource has far-ranging effects. In one sense the whole history of the common law of property in England, whether it be that horrible morass known as future interests, or the comparably more recent innovations in covenants running with the land and actions for nuisance, can be seen as a legal recognition of the social character of this particular resource. This development has accentuated the need for special legal apparatus to deal with both land’s use *vis-à-vis* the interests of neighbours and its use over time.¹⁰⁷

From an historical perspective, the 1947 Act, with its rule of no compensation, was a “product of its time.” World War II had just ended, and much of London and other urban areas

¹⁰⁷ NEIL ALISON ROBERTS, THE REFORM OF PLANNING LAW: A STUDY OF THE LEGAL, POLITICAL AND ADMINISTRATIVE REFORM OF THE BRITISH LAND-USE PLANNING SYSTEM 5 (1976).

of England were in rubble. “The postwar government acted with the knowledge that the electors would not easily understand or forgive a spate of speculating and profiteering in land.”¹⁰⁸

Such considerations might have justified the Town and Country Planning Act 60 years ago, but the Act (as amended) continues very much in force today, as “the foundation stone of the British planning system.”¹⁰⁹ In 2005, no land development occurs in England without planning permission; there is no rightful expectation of planning permission; and, generally speaking, compensation need not be paid if planning permission is denied.

Putting aside historical, cultural, and ideological differences between the US and the UK, how radical, really, is the UK’s planning system? As a practical matter, how much less protection, if any, does it offer private landowners than America’s constitutionally-based judicial doctrine of regulatory takings?

In 1982, Beverley J. Pooley wrote that the difference between institutional structures for protecting property rights in the UK and US was insignificant:

“[I]t may be thought, as indeed it is often stated, that Parliament is supreme.

However, this is true in theory only. In practice, there are many conventions which the government must observe, and a violation of these conditions would result at best in political annihilation of the offending government at the next

¹⁰⁸ Grant, *supra* note 89, at 64.

¹⁰⁹ *Id.*

election and at worst in revolution. It is submitted that in practice, so far as the sanction behind governmental restraint is concerned, the same forces are operative in any situation, whether the government is working under a written constitution or not. A government can only do those things which the people will allow it to do, and whether the restraints are judicial in their nature, as in the United States, or political, as in Britain, is, in the final analysis, a matter of small moment.¹¹⁰

Judicially enforced doctrines of regulatory takings may provide marginally greater protection to private property rights than the UK's political system of compensation conventions, town and country planning, and compulsory purchase acts.¹¹¹ But Professor Pooley implicitly raises the important question of whether the marginal difference between property rights protection in the US and the UK is significant enough to warrant the institution of judicial review, along with its attendant social costs. In other words, is the game worth the candle? I cannot pretend to offer a complete answer to that question. The requisite empirical information about comparative rates and costs of expropriations, comparative rates and costs of regulations, comparative rates and costs of compensation awards, and comparative administrative costs simply does not exist.

¹¹⁰ POOLEY, *supra* note 55, at 31.

¹¹¹ See David Callies, *An American Perspective on UK Planning*, in *BRITISH PLANNING: 50 YEARS OF URBAN AND REGIONAL POLICY* 264 (B. Cullingworth ed., 1999).

For starters, though, we might consider whether many (or any) cases of regulatory takings in the US would have been resolved differently under the UK's politically based system of property rights protection. Consider, for example, the *Nollan*¹¹² and *Dolan* cases,¹¹³ in which the US Supreme Court established a substantive due process-like rule for government-imposed conditions on land-use permits. When the government conditions the grant of a building or other land-use permit there must be an "essential nexus" between those conditions and a legitimate governmental purpose, the conditions must substantially further that legitimate governmental purpose, and the burden imposed on the permittee must be roughly proportional to the public harm stemming from that permittee's development activity.

It is entirely possible that *Nollan* and *Dolan* would have come out just the same under the UK's 1947 Town and Country Planning Act, as interpreted by the court in *Pyx Granite*.¹¹⁴ With respect to the *Dolan* case in particular, Malcolm Grant has concluded that (a) British planners could not legally have imposed on Mrs. Dolan the conditions that the City of Tigard in fact imposed on her development; and (b) local planners' conditions would have been subject to review within the administrative system, including the possibility of a full public hearing with expert witnesses and legal representation.¹¹⁵

¹¹² *Nollan v. California Coastal Commission*, 483 US 825 (1987).

¹¹³ *Dolan v. City of Tigard*, 512 US 374 (1994).

¹¹⁴ See *supra* note 97 and accompanying text.

¹¹⁵ Malcolm Grant, *If Tigard Were an English City: Exactions Law in England Following the Tesco Case*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN*

What about the *Lucas* case, in which the U.S. Supreme Court ruled that the State of South Carolina had to pay compensation when its regulation denied the plaintiff the right to develop his land?¹¹⁶ Had *Lucas* arisen in England, under the 1947 Town and Country Planning Act, the plaintiff almost certainly would have been entitled to force compulsory purchase by the government (for a price reflecting existing use value) because denial of planning permission would have left his land without a “reasonably beneficial use.”¹¹⁷ The Town and County Planning Act also allows for consideration of landowners’ reasonable and legitimate “development expectations,”¹¹⁸ which is analogous to the “reasonable, investment-backed expectations” test the U.S. Supreme Court established in *Penn Central Transportation Co. v. City of New York*.¹¹⁹

More generally, in neither the US nor the UK are landowners entitled to compensation for the effects of the vast majority of regulatory impositions;¹²⁰ and in both countries, as a

AND *LUCAS* 332, 350 (D. Callies ed., 1996)

¹¹⁶ See *supra* notes 26-27 and accompanying text.

¹¹⁷ See *supra* note 93 and accompanying text.

¹¹⁸ See *supra* note 92 and accompanying text.

¹¹⁹ 438 U.S. 104 (1978).

¹²⁰ In other words, in both the UK and the US, the social costs of private land development are “borne by private land developers rather than public agencies.” David L. Callies and Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees, and Development Agreements*, 23 URB. LAW. 221, 221 (1991).

practical matter, landowners always are compensated when the government actually takes title, although the UK uses a lower measure of compensation (existing use value) than the US (“fair market” value).¹²¹

This is not to argue that the UK system of positive planning is either very good or better than the various American land-use planning systems *as a matter of policy*.¹²² It is likely that the UK system entails greater social costs.¹²³ Housing shortages, for example, are a regular feature of British life because of the time and expense required to obtain planning permission and the scarcity of land available for development.¹²⁴ Such shortages are relatively rare and localized

¹²¹ *In Takings*, Richard Epstein, *supra* note 7, at 184, supports his claim that governments should have to pay more than fair market value to compensate for takings by asserting that, in the UK, parliament at one time required the government to pay a 10 percent bonus for compulsory purchases. This is true, but misleading, as the bonus was added to use value compensation rather than fair market value compensation.

¹²² In the US, land-use planning is a state and local government regime, and planning regimes vary substantially from state to state. *See Callies, supra* note 110.

¹²³ *See* Paul Cheshire and Stephen Sheppard, *The Welfare Economics of Land Use Regulation*, 52 J.Urban Econ. 242 (2002) (finding that the UK’s Town and Country Planning System imposes substantial net social costs).

¹²⁴ According to the 2004 “Barker Review” of housing supply in the UK, between 1995 and 2001 housing prices in the UK rose by nearly 8 percent, but the rate of new housing construction declined by more than 15 percent. Kate Barker, Review of Housing Supply: Delivering Stability: Securing Our Future Housing Needs: Final Report – Recommendations 13, Chart 1.1 (March 2004). In the late 1980s, 46 percent of the UK’s population could afford to buy a property; by the 1990s that percentage had fallen to

phenomena in the US (especially since the demise of rent control in large cities). However, the larger point remains: private property rights are substantially protected in the UK by the political process, with the judicial role limited to interpretation and enforcement of Parliament's statutes. Private property rights might be marginally better protected in the US, but the value of that marginal difference remains contestable (especially given the dearth of empirical data). The difference in outcomes under the UK and US systems could well be minor across the run of cases.

This conclusion is broadly consistent with the way the world seems to view both the United States and the United Kingdom as veritable models of property rights protection. Even "Conservative" observers, like the Heritage Foundation, give both countries high marks for protecting private property. Each year, Heritage publishes an *Index of Economic Freedom*, which ranks countries as a "tool for policymakers and investors."¹²⁵ The rankings are based on 50 variables grouped into the following 10 categories: trade policy; fiscal burden of government; government intervention in the economy; monetary policy; capital flows and foreign investment;

37. The Barker Review concludes that land-use regulations have played a significant role in housing shortages by reducing the amount of land available for development and increasing the cost of land development. *Id.* at 6. *Also see* ROBERTS, *supra* note 106, at 190 (noting the opposition to "green belts" – areas around cities which are not to be developed – on grounds that those areas deprived people of inexpensive land for housing).

¹²⁵ HERITAGE FOUNDATION, 2004 INDEX OF ECONOMIC FREEDOM 1 (2004), available on the World Wide Web at: <http://www.heritage.org/research/features/index/index.html>.

banking and finance; wages and prices; *property rights*; regulation; and informal market activity. Our present concern is only with the property rights category, on which the United States and the United Kingdom both consistently receive the highest ranking (1.0).¹²⁶ In its most recent assessment of property rights protections in the UK, Heritage has little to say:

Property rights in the United Kingdom are well-secured. The Economist Intelligence Unit reports that “contractual agreements are generally secure in the U.K. There is no discrimination against foreign companies in court. The judiciary is of high quality when dealing with commercial cases.

The Heritage Foundation has more to say about, and is more critical of, the treatment of property rights in the US:

The United States does very well in most measures of property rights protection, including an independent judiciary, a sound commercial code and other laws for the resolution of property disputes between private parties, and the recognition of foreign arbitration and court rulings. However, the concerns outlined in the 2003 *Index* linger. Uncompensated government expropriations of property remain

¹²⁶ On the overall index, the UK ranks 7th, three places ahead of the US. *See id.* at 9.

highly unlikely, but local governments' abuse of eminent domain power with the seizure of private land (with some compensation) and its transfer to another party for a non-public or quasi-public use has become more common – despite some successful legal challenges to that practice. An even more serious problem is that governments at all levels impose numerous regulatory and land-use controls that diminish the value and enjoyment of private property. Examples include extensive “growth controls”; unreasonable zoning hurdles; facility permitting regimes; and far-reaching environmental, wetlands, and habitat restrictions on the use and development of real estate. Thus, the protections for private property are undermined by a vast bureaucracy that has the power to interfere substantially with many property rights. The level of protection for property in the United States may eventually turn on whether the courts place clear limits on bureaucratic power or require cost-effective remedies for property owners whose rights have been effected. . . .¹²⁷

Read together, these assessments may say more about the Heritage Foundation and the quality of its *Index*, than they say about the relative protections afforded private property in the UK and the US (perhaps Heritage researchers need to spend more time in the UK). However, other indices of property rights reach similar conclusions.¹²⁸ The US and the UK are both perceived to have,

¹²⁷ *Id.* at 404-05.

¹²⁸ *See, e.g.*, JAMES GWARTNEY AND ROBERT LAWSON, ECONOMIC FREEDOM IN THE WORLD:

relatively speaking, highly effective institutional structures for protecting property rights.

V. POLITICAL PROTECTION OF PRIVATE PROPERTY IN THE US

In the US, property rights are protected by the courts, as we have seen, but not only by the courts. The federal Congress and state legislatures also protect property rights in very important, though often underappreciated, ways, as positive political-economic theory would predict.

According to a 1995 Congressional Research Service Report on Property Rights, long before there was an established “property-rights movement” in the US, Congress endeavored to avoid unsettling the economic expectations of property owners when it enacted regulatory statutes:

In dozens of laws . . . Congress has barred the application of regulatory restrictions to “valid existing rights” – an effort to leave the settled economic

2004 ANNUAL REPORT 15, 164-165(2004)(ranking the UK fifth in the world (9.0 out of 10 possible points)and the US sixteenth in the world (8.2 out of 10 possible points for “Legal Structure and Security of Property Rights”). Again, the point is not to endorse the idea of “ranking” countries according to any particular index; but the fact that the US and UK are equally ranked in terms of protecting property rights does seem significant given the vastly different approaches to protecting such rights in those two countries.

expectations of property owners undisturbed (and to avert takings liability).

Illustrations of the grandfathering of valid existing rights include SMCRA [the Surface Mining Control and Reclamation Act of 1977], the Wilderness Act [of 1964], and the Wild and Scenic Rivers Act [of 1968]. Other times, Congress has instructed that property owners are entitled to “just compensation” or compensation based on some other formula – in some cases where the Constitution likely would demand compensation as well, in some cases not.

In formal condemnations too, Congress has long been codifying its concerns about property owners. Beginning in the 1960s, Congress took to routinely attaching preconditions and limits on the authority of federal agencies to condemn land. The reasoning was plain enough. Though the Constitution demands condemnees be paid for land itself, it does not defray attendant costs, loss of business, and emotional disruption of having one’s land taken. For this reason, Congress on occasion has prohibited agencies from condemning after a specified maximum acreage has been taken, or until all reasonable efforts to acquire land by negotiation have failed, or as long as the land continues to be used as it was on the date a conservation area was created, or until Congress has specifically approved the condemnation in question.

Recognizing that incidental losses to the condemnee can be high, yet are not constitutionally compensable, Congress in 1970 enacted the Uniform

Relocation Act (URA). The Act instructs that federal programs (or federally assisted state programs) be planned to minimize adverse impacts on persons displaced by acquisition of their property for such programs. Further, the Act mandates compensation for displaced persons for various incidental losses (moving expenses, reestablishing a displaced business, etc.), recognizing the constitutional noncompensability of such items.¹²⁹

In recent years, Congress has considered, but rejected, takings bills that would provide even more protection for private property rights than the Supreme Court's regulatory takings jurisprudence currently affords.¹³⁰ In 1995, the US House of Representatives passed H.R. 925, the Private Property Protection Act, which would have compensated landowners for federal regulatory actions under the Clean Water Act, Endangered Species Act, and Food Security Act of 1985 that diminished property values by 20 percent or more.¹³¹ That same year, the Senate Judiciary Committee reported out S. 605, the Omnibus Property Rights Act of 1995, which would have required compensation for federal regulations that diminished private property

¹²⁹ Robert Meltz, The Property Rights Issue, CRS Report for Congress 95-200, January 20, 1995, available on the World Wide Web at: <http://www.ncseonline.org/nle/crsreports/economics/on-11.cfm?&CFID=15288066&CFTOKEN=5479515>

¹³⁰ *See id.*

¹³¹ H.R. 925, 104th Cong. (1995).

values by 33 percent or more.¹³² However, that bill did not pass, and the 104th Congress ultimately enacted no takings legislation.¹³³

It is worth wondering whether Congress might have enacted some such statute had the Supreme Court never interpreted the takings clause to apply to government regulations (in addition to outright takings of title by the government) in the first place. Is this a case of Supreme Court activism “crowding out” potentially more effective and efficient federal legislative action to protect property rights?¹³⁴ Such counterfactual questions are impossible to answer with confidence, but they are nonetheless worth considering.

¹³² S. 605, 104th Cong. (1995).

¹³³ See Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 ECOL. L.Q. 187, 189 (1997).

¹³⁴ The theory of “crowding out” originally comes from the public finance literature. It refers to a situation in which government borrowing, under an expansionary fiscal policy, crowds out more productive private finance by raising interest rates. The result is reduced economic growth. The notion of “crowding out” has been applied to all manner of issues, including, for example, the idea that formal legal rules can “crowd out” potentially more efficient social norms. See, e.g., Sim B. Sitkin and Nancy L. Roth, *Explaining the limited effectiveness of legalistic “remedies” for trust/distrust*, 4 ORGANIZATION SCIENCE 367, 376 (1993)(“legalistic remedies can erode the interpersonal foundations of a relationship they are intended to bolster because they replace reliance on an individual’s ‘good will’ with objective, formal requirements.”). For an application of “crowding out” theory to landmark statutes, see Richard A. Posner, *An Economic Analysis of Law* 59 (6th ed. 2002).

Congress is not the only “political” branch of government that protects property rights. In 1988, President Reagan signed Executive Order No. 12,630,¹³⁵ which required federal executive branch agencies to assess whether their actions or proposed actions constitute takings under standards promulgated by the Attorney General. Those standards were supposed to reflect current Supreme Court jurisprudence under the Fifth Amendment’s takings clause.¹³⁶ According to a 1993 report by the US General Accounting Office, executive branch agency implementation of, and compliance with, E.O. No. 12,630 has been lax.¹³⁷ However, the assessment-based approach of President Reagan’s executive order influenced a great deal of subsequent takings legislation enacted in the states.

During the 1990s, virtually every state in the US considered “takings” legislation of one form or another. Most bills were rejected; but 21 state legislatures adopted one of two general types of takings statutes.¹³⁸ Many states adopted *assessment* statutes, which require the Attorney General or a relevant state agency to review proposed regulations for their impacts on property rights (*i.e.*, takings impact assessments). Only five states, by contrast, have adopted *compensation* statutes, providing property owners with a cause of action against state agencies

¹³⁵ Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), *reprinted in* 5 U.S.C. 601.

¹³⁶ *See* Cordes, *supra* note 132, at 190 n. 18.

¹³⁷ U.S. General Accounting Office, *Regulatory Takings: Implementation of Executive Order on Government Actions Affecting Private Property Use*, GAO-03-1015 (Sept. 2003).

¹³⁸ Larry Morandi, *Evaluating the Effects of State Takings Legislation*, 23 STATE LEGIS. REP. (Jan. 1998), available on the World Wide Web at: <http://www.ncsl.org/programs/esnr/lr232.htm>

for regulatory impositions that reduce the value of their properties.¹³⁹ It is unclear to what extent, if at all, takings impact assessments would actually protect private property rights. Consequently, I will focus here only on the compensation statutes, which at least offer the potential of greater protection.¹⁴⁰

As of 1998, four states – Florida, Louisiana, Mississippi, and Texas – provided statutory compensation for regulatory takings in cases where the regulation reduces land value by a set amount or more. Mississippi was the first state to adopt a regulatory takings compensation law in 1994 (subsequently amended in 1995). The Mississippi Agricultural and Forestry Act¹⁴¹ authorizes owners of agricultural or forest lands to sue the state or one of its agencies (including local governments) for regulatory impositions that reduce the value of their lands by more than 40 percent. The government can avoid a regulatory takings claim by rescinding the offending regulation, but the government is liable to pay damages while the regulation is in effect. The Act exempts from compensability state and local government actions intended to prevent “real and

¹³⁹ At least 25 states have *considered* compensation bills. *See* Cordes, *supra* note 132, at 212. Some of those compensation bills would have required compensation for any diminution in value at all. *See id.* at 212 n. 152. The first four states to actually adopt legislation requiring compensation for regulatory takings were Florida, Louisiana, Mississippi, and Texas. Their compensation statutes are discussed in the text.

¹⁴⁰ The discussion below builds on the analyses of Morandi, *supra* note 137, and Cordes, *supra* note 132.

¹⁴¹ Miss. Code Ann. 49-33-1 *et seq.*

substantial threats to the public health and safety.”¹⁴²

In Louisiana, the 1995 Right to Farm and Forest Act¹⁴³ grants a cause of action to owners of agricultural or forest lands to sue state or local government agencies for regulatory impositions that reduce the value of their property by 20 percent or more. The remedy is full compensation for the reduced value, or the landowner can force the government to purchase the property at fair market value. The government can avoid paying compensation, however, by rescinding the action resulting in the regulatory taking. As in Mississippi, the Louisiana takings statute exempts state and local regulations designed to prevent imminent threats to public health and safety.¹⁴⁴

Texas’s compensation statute, unlike the Mississippi and Louisiana acts, applies not only to agricultural and forest lands but to all real property. The 1995 Private Real Property Rights Preservation Act¹⁴⁵ defines a “taking” to include any state government action that reduces the value of real property by 25 percent or more. If a court finds such a diminution in value, the government has the choice of rescinding its action or paying full compensation. Similar to the Mississippi and Louisiana statutes, the Texas law exempts actions, taken in good faith, to prevent “a grave and immediate threat to life or property.”¹⁴⁶ In addition, state and local actions

¹⁴² Miss. Code Ann. 49-33-7(I).

¹⁴³ La. Rev. Stat. Ann. 3:3601 *et seq.*

¹⁴⁴ La. Rev Stat. Ann. 3:3602(12)(h).

¹⁴⁵ Tex. Gov’t Code Ann. 2007.001 *et seq.*

¹⁴⁶ Tex. Gov’t Code Ann. 2007.003(b)(7).

in compliance with federal mandates and actions regulating common-law nuisances are exempted, as are all municipal (city) regulations.

Florida enacted its takings statute – the Bert J. Harris, Jr., Private Property Rights Protection Act¹⁴⁷ – just a few months after Texas enacted its law. Like the Texas statute, but in contrast to the Louisiana and Mississippi statutes, the Florida law covers all kinds of real property. But unlike all three of those other states, the Florida statute sets no percentage diminution in property value that landowners must realize before claiming compensation for a regulatory taking. Instead, the law applies whenever government action “inordinately burdens” the use of private property.¹⁴⁸ It defines that phrase in terms familiar to anyone who has studied the Supreme Court’s regulatory takings jurisprudence. A landowner is “inordinately burdened” if she is “permanently unable to attain the reasonable, investment-backed expectations” for the property, or if she “bears permanently a disproportionate share of a burden imposed for the good of the public, which in fairness should be borne by the public at large.”¹⁴⁹ Although the Florida

¹⁴⁷ Fla. Stat. Ann. 70.001 *et seq.*

¹⁴⁸ Fla. Stat. Ann. 70.001(2).

¹⁴⁹ Fla. Stat. Ann. 70.001(3). *Compare Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978) (noting the significance, in takings claims, of “the extent to which the regulation has interfered with distinct investment-backed expectations”); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting that the “Fifth Amendment’s guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

legislature used the words of the Supreme Court in describing its cause of action for regulatory takings, it expressed its intention that its statute should apply more liberally than the Supreme Court's takings rules.¹⁵⁰ Finally, like the Texas statute, the Florida takings law exempts state actions to regulate common-law nuisances.

Three aspects of these state takings laws are striking. First, they purport to substantially “expand the scope of compensable takings” by adopting thresholds for compensation that are far lower than the US Supreme Court requires.¹⁵¹ Second, very few lawsuits have been brought under any of these statutes,¹⁵² including four in Texas,¹⁵³ six in Florida,¹⁵⁴ one in Louisiana,¹⁵⁵

¹⁵⁰ See Fla. Stat. Ann. 70.001(9) (providing that a cause of action might exist for “government actions that may not rise to the level of a taking under the State Constitution or the United States Constitution.”).

¹⁵¹ Cordes, *supra* note 132, at 220.

¹⁵² This does not necessarily mean there have been no claims leading to settlements, but the amount of litigation has been extremely low.

¹⁵³ *Bragg v. Edwards Aquifer Authority*, 71 S.W.3d 729 (Tex. 2002)(holding that State well-permitting rules fall with the exceptions to the Property Rights Act “for actions taken under a political subdivision’s statutory authority to prevent waste or protect rights of owners of interest in groundwater.”); *McMillan v. Northwest Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337 (Tex. App. 1999) (holding that municipal utility district “stand by” fees did not constitute a taking, and fell outside the scope of the state’s Property Rights Act); *TNRCC v. Accord Agriculture, Inc.*, Not reported in S.W.2d, 1999 WL 699825 (holding that the Property Rights Act did not protect property owners neighboring regulated swine farm)(“not designated for publication”); *Medearis v. Brazoria County Drainage District No. 4*, Dist.Ct. Brazoria County, 149th Judicial Dist. Tex. (1995)(No. 95-M-2313)(holding that regulation

and none in Mississippi. The Florida and Texas cases have not yet led to any actual compensation awards to property owners.¹⁵⁶ It is not clear, however, whether (and to what

requiring

minimization of water runoff during development violated the Property Rights Act and constituted a compensable taking; the case is still pending for determination of damages).

¹⁵⁴ *Royal World Metropolitan v. City of Miami Beach*, 863 So.2d 320 (Fla. Dist. Ct. App. 2003) (reversing summary judgment against plaintiff and concluding that the Act waives sovereign immunity for claims of compensation for “inordinate burdens” imposed by public ordinances on private property rights); *Sosa v. City of W. Palm Beach*, 762 So.2d 981 (Fla. Dist. Ct. App. 2000)(plaintiff’s claim dismissed for failure to comply with statutory prerequisites to filing a claim under the Act); *Osceola County v. Best Diversified*, 830 So.2d 139 (Fla. Dist. Ct. 2002)(dismissing appeal, for lack of jurisdiction, against trial court ruling finding state and county environmental regulations “inordinately burdened” plaintiff’s property, and constituted an inverse condemnation requiring compensation); *Hanna v. Environmental Protection Comm’n*, 735 So.2d 544 (Fla.Dist.Ct. 1999)(affirming dismissal of plaintiff property owner’s inverse condemnation action for failure to exhaust administrative remedies); *Scott v. Polk County*, 793 So.2d 85 (Fla.Dist.Ct. 2001)(quashing trial court order dismissing appellant’s claim of due process violations stemming from a zoning decision); *Seminole County v. Pinter Enters., Inc.*, 184 F.Supp.2d 1203 (M.D.Fla. 2000)(remanding case based on Bert J. Harris, Jr. Private Property Rights Protection Act to state courts, which had been improperly removed to federal court).

¹⁵⁵ *Matthew Trosclair et al., v. Matrana’s Produce, Inc.*, 717 So.2d 1257 (La. 1998)(reversing trial court decision exempting appellee company from regulatory controls under the 1995 Right to Farm and Forest Act).

¹⁵⁶ As noted, however, a few cases are still pending compensation awards. Moreover, at least 30 cases proceeded to dispute resolution under the Florida statute. *See Morandi, supra* note 137.

extent) the existence of these takings statutes has induced state and local governments to reduce regulatory impositions in order to avoid liability for compensation;¹⁵⁷ nor is it clear whether (and to what extent) state and local governments are settling claims prior to litigation.

Clearer evidence comes from the State of Oregon, which has a long history of intensive land-use planning and regulation.¹⁵⁸ In a 2004 public referendum, Oregon voters approved the nation's most radical anti-regulatory statute, Measure 37, by a 60 to 40 margin.¹⁵⁹ Measure 37 applies to all land use regulations, including those predating the Measure's enactment, that restrict the use of private real property in any way that affects its fair market value. The government body responsible for an infringing regulation must either compensate the property owner for the lost property value or exempt the property from the regulation. The Measure provides exceptions for regulations of common-law nuisances, public health and safety regulations, including pollution control regulations, and state and local regulations required to comply with federal laws. But it provides no exceptions for traditional zoning regulations.

¹⁵⁷ According to one legal scholar I have spoken with, Florida's takings statute has had a significant chilling effect on land-use regulation in that state. Conversation with Professor Danaya Wright of the University of Florida School of Law, Nov. 11, 2005.

¹⁵⁸ See, e.g., JAN G. LAITOS, DANIEL H. COLE, MARY CHRISTINA WOOD, AND SANDRA B. ZELLMER, NATURAL RESOURCES LAW ____ - ____ (forthcoming 2006).

¹⁵⁹ Measure 37 is reprinted on the World Wide Web at: http://www.sos.state.or.us/lections/nov22004/guide/meas/m37_text.html

The effects of Measure 37 already are being felt. Almost immediately after the measure took effect on December 2, 2004, 220 claims were filed for regulatory exemption or compensation.¹⁶⁰ Thousands more are expected to follow. Assuming Measure 37 is implemented and enforced as written,¹⁶¹ it will neutralize the State's system of land-use regulation and quite literally alter the Oregon landscape. Cities and counties, which cannot afford to pay compensation because of budgetary constraints will be forced, instead, to exempt all properties with legitimate claims.

Whether or not Measure 37 constitutes good public policy, it patently demonstrates that (a) political, as well as constitutional, constraints limit the public regulation of private property rights; and (b) the political limitations are potentially much stronger and farther reaching than existing constitutional constraints.

It is worth noting, however, that Measure 37 and all the other state takings statutes discussed in this section were enacted *after* the Supreme Court's 1992 decision in *Lucas*. An

¹⁶⁰ Laura Oppenheimer, *Measure 37 exposes nerves: The new property rights law moves from theory to reality as commissioners weigh claims in a tense Yamhill County hearing*, Oregonian, Feb. 2, 2005.

¹⁶¹ On October 14, 2005, Oregon's Circuit Court for Marion County ruled that Measure 37 violated the State's constitution for encroaching too far on the State's police power. *MacPherson v. Department of Administrative Services*, Case No. 00C15769, Oct. 14, 2005, available on the World Wide Web at http://www.oregon.gov/LCD/docs/measure37/macpherson_opinion.pdf. It remains to be seen whether this decision will be upheld on appeal.

intriguing question arises: Could *Lucas* have served as a source of information (institutional learning) for state legislators and an impetus to legislation? If so, then the “crowding out” hypothesis, mentioned earlier, becomes less plausible.¹⁶² Cross-institutional (and organizational) dynamics could be a significant (if somewhat confounding) factor in comparative institutional analysis.

CONCLUSION

In *Law’s Limits*, Neil Komesar demonstrated that the institution of judicial review is *insufficient* to protect property rights.¹⁶³ In *Regulatory Takings*, William Fischel argued that the institution of judicial review is not strictly *necessary* for that purpose (at least not at state and federal levels of representative government).¹⁶⁴ The evidence, limited though it is, and the analysis in this article generally support Fischel’s conclusion, and provide reason for property owners to be optimistic in spite of Komesar’s conclusion.

Even if judicial review is neither necessary nor sufficient for protecting property rights, it may still have marginal utility for protecting private property. That, ultimately, is a question of policy and, as such, amenable to cost-benefit analysis. Does the marginal social cost of regulatory takings law outweigh the marginal social benefit? What would be the respective cost

¹⁶² See *supra* note 133 and accompanying text.

¹⁶³ See *supra* notes 36-43 and accompanying text.

¹⁶⁴ See *supra* notes 29-42 and accompanying text.

and benefit of alternative constitutional, legal, political, or market-based institutions, such as insurance,¹⁶⁵ for protecting, to a greater or lesser extent, private property rights? Not all of the variables in this analysis would be objective. Reasonable minds would differ over the appropriate variables to consider and the valuations of non-market variables. The outcome of the cost-benefit analysis would depend heavily on the selection and valuation of those variables.¹⁶⁶

In the UK, the courts and Parliament seem to concur that, at present, property rights are sufficiently well protected without constitutional judicial review. At least, political malfunctions have not yet been so severe as to lead the UK courts to adopt a regulatory takings doctrine *a la* the US. Perhaps the marginal costs of institutional change still exceed the *perceived* marginal

¹⁶⁵ See, e.g., Steve P. Calandrillo, *Eminent Domain Economics: Should “Just Compensation” Be Abolished, and Would “Takings Insurance” Work Instead?*, 64 OHIO ST. L.J. 451 (2003) (arguing that system of private insurance against expropriation and regulatory devaluation would be as effective and more efficient than the constitutional compensation system). In fact, “expropriation” insurance already exists to protect certain types of commercial investments in risky political environments. Such insurance is provided not only by private insurers, but by the U.S. government, through the Overseas Private Investment Corporation. See <http://www.opic.gov/Insurance/Products/expropriation.htm>. Just how well such insurance systems work, or would work in the US domestically, is questionable. They might create perverse incentives for governments to take properties that are insured against expropriation, instead of potentially more suitable but uninsured lands, simply to avoid resistance to the assertion of eminent domain. I am grateful to Richard Posner for raising this most interesting point.

¹⁶⁶ In a subsequent article, Peter Grossman and I plan to offer a more elaborate model of the marginal social utility of constitutional judicial review.

benefits of constitutional judicial review. In the US, meanwhile, the Supreme Court *appears* to be retreating to some extent from the high-water mark of regulatory takings law, represented by *Lucas* and other decisions.¹⁶⁷ There is no reason to believe, however, that the Court will repudiate entirely its regulatory takings doctrine and return to a passive role of deference to legislative determinations of compensable takings and non-compensable regulations – the *status quo* prior to *Pennsylvania Coal* – any time soon.

Is one institutional structure of property rights protection obviously and objectively “better” than the other?

It is tempting to conclude that the UK’s political system of property rights protection and the US’s reliance on judicial protection of property are both appropriate to the institutional structures of their respective governments. The UK is a unitary state, in which local governments possess virtually no independent regulatory authority; they exercise only that authority Parliament expressly grants them, including the authority to permit or deny land development

¹⁶⁷ Other cases reflecting the “high water mark” of regulatory takings law include *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998); *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); and *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999). The retreat, such as it is, is evident in recent cases such as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 US 302 (2002) and *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). For thorough analyses of these cases, and the trends they reflect, see Laura Underkuffler, *Tahoe’s Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. ____ (forthcoming 2005).

activities.

On Fischel's analysis, that structure should reduce the likelihood of systematic majoritarian bias against private property owners in government processes. Government in the US, by contrast, is based on a federal system, in which local governments possess substantial independent regulatory authority, increasing the potential for majoritarian bias against private property owners. Arguably, that difference alone warrants the increased reliance on judicial review of regulatory decisionmaking in the US, if only with respect to local governments.

The problem with this line of argument is that it substantially overstates the real difference between local government authority in the US and UK. Even if, in theory, local governments in the US have more independent regulatory authority than their counterparts in the UK, that distinction marks little practical difference because: (1) Parliament has, by law, delegated to local governments substantial authority to decide what land development activities may take place; and (2) local governments in the UK have substantial latitude to interpret parliamentary delegations of authority, which gives them additional *de facto* regulatory power. Consequently, local governments in the UK wield a great deal of regulatory authority, even if that authority derives ultimately from Parliament. When those local governments act, there is no reason to believe that they are immune to the kind of majoritarian bias that besets local land-use regulation in the US. In sum, local governments in the US and UK are similarly situated with respect to land-use regulation.

Meanwhile, the decisions of local governments in both countries are, in fact, subject to substantial judicial oversight. Although courts in the UK do not have constitutional authority to review Parliament's statutes, they are empowered to review local government actions to ensure that those actions conform to parliamentary directives.¹⁶⁸ Consequently, the differential treatment of land-use regulations in the US and the UK cannot be explained by the relative powers of their respective local governments. In both countries, local governments exercise substantial regulatory authority over the use of privately owned lands, and their land-use decisions are subject to judicial review (statutory in the UK; statutory plus constitutional in the US). A far bigger difference is found in the treatment of *national* land-use regulations. In the US, congressional enactments affecting property rights are subject to constitutional judicial review; in the UK, parliamentary enactments are not.

Interestingly, the UK's structure of land-use regulation and protection conforms pretty closely to William Fischel's normative model:¹⁶⁹ national legislation is subject to virtually no *constitutional* judicial review, but local government decisions are subject to substantial *statutory* judicial review, to ensure conformity with parliamentary directives. Consequently, it provides a natural test of Fischel's model, according to which the UK's institutional structure should protect private property rights sufficiently. Does it provide sufficient protection in fact? As noted earlier, the answer to that question remains under-determined by the available evidence. It is obvious,

¹⁶⁸ See *supra* note 64 and accompanying text (noting that courts in the UK retain the authority to interpret and enforce statutes).

¹⁶⁹ See *supra* notes 29-34 and accompanying text.

however, that the absence of constitutional judicial review in the UK has not led to the demise of private property as an institution in that country. On all accounts, property rights in the UK are very well protected, even if not quite so well as in the US.

At the very least, the available evidence (a) cautions scholars and jurists to avoid casual presumptions about the social utility or value of constitutional judicial review for protecting property rights, and (b) suggests that the extreme variety of distrust of democratically enacted regulations reflected, for example, in the scholarly writings of Richard Epstein and Justice Scalia's opinion in the *Lucas* case may be unwarranted. At least in the UK, democratic institutions, especially at higher levels of government, not only expropriate and regulate private property rights but also substantially protect those rights, even in the absence of constitutional judicial review. To the extent the UK's experience suggests that judicial distrust of democratic regulation of private property is unwarranted, it calls into question the legitimacy of the American judicial doctrine of "regulatory takings," which is based explicitly on such distrust.

Finally, it is worth wondering whether the analysis in this article might be extended to rights other than those of property. After all, in the UK the courts do not prevent Parliament from regulating speech rights or voting rights any more than they prevent Parliament from regulating private property rights. Yet, those other rights also seem to be reasonably well protected in England, Scotland, and Wales by Parliament. There seems little reason to suppose, however, that the marginal utility of constitutional judicial review would necessarily be the same for protecting different kinds or categories of rights. It might or might not be the case, for example,

that constitutional judicial review is more important for protecting the right of free speech than rights of property because, unlike property owners, some groups that desire to exercise speech rights might not be well-represented in the political process. It is clear, in any case, that the US and UK constitutional and legal systems provide a great deal of fertile ground for further comparative institutional analyses.