

# **POLITICAL INSTITUTIONS, JUDICIAL REVIEW, AND PRIVATE PROPERTY**

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## **INTRODUCTION**

Is constitutional judicial review necessary to protect private property rights? Nearly all American jurists, since James 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. However, neither theory nor history supports this presumption. According to positive political-economic theory, political institutions should substantially protect private property rights, even in the absence of constitutional judicial review. That theory receives strong empirical support from the constitutional history of the United Kingdom and recent legislative measures enacted in several of the United States.

This paper explores the theory and evidence of political protection of private property, and finds that political institutions do, in fact, substantially protect private property rights even in

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the absence of constitutional judicial review. As a consequence, constitutional judicial review may have significantly less social utility for protecting property rights than many legal scholars presume. This conclusion belies the kind of extreme distrust of democratic institutions represented, for example, by the judicial opinions of Justice Scalia and the scholarly writings of Richard Epstein.

Section I of this article reviews the tension between democracy and property rights as framed by Madison and, more recently, by Holmes, Epstein, and Scalia. Sections II and III, then, question the presumption that democratic political institutions cannot be trusted to protect private property rights on the basis of, respectively, political theory and historical evidence. Section II briefly canvasses well-established propositions of positive political-economy, which predict that political institutions will create 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 political challengers. Section III presents evidence from English constitutional history, which demonstrates that private property rights can survive – even thrive – in the absence of constitutional judicial review. The UK’s unwritten constitution never has provided for constitutional judicial review (not even after Parliament’s enactment of the 1998 Human Rights Act). Yet, Parliament substantially protects private property rights, even as it regulates those rights. Section V, then, compares the UK’s political/legislative system for protecting private property with the US’s legal/judicial system, and finds only marginal differences, suggesting that private property rights are as well, or nearly as well, protected in the UK as in the US. Section VI provides even more empirical support for the proposition that democratic political/legislative institutions protect private property rights with evidence from several American states, including the State of Oregon’s recent adoption of Measure 37, which

requires the State to either compensate landowners affected by land-use regulations or exempt their lands from regulation. The evidence adduced in the article does not prove that the optimal level of constitutional judicial review to protect private property is zero, although it may be significantly lower than many jurists have presumed. The evidence does, however, suggest that the extreme judicial and scholarly distrust of democratic political institutions represented in, respectively, the judicial opinions of Justice Scalia and the scholarly writings of Richard Epstein, is unwarranted.

**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,”<sup>2</sup> 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.<sup>3</sup>

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<sup>2</sup> JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 54 (1998).

<sup>3</sup> 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

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 public’s – welfare. As property 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,<sup>4</sup> 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.”<sup>5</sup> Holmes believed that takings were a “natural” consequence of ever-increasing police power regulations – the death by a thousand cuts of the takings clause, the due process clause, the contract clause,<sup>6</sup> 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

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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 2, at 51-2.

<sup>4</sup> *Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922).

<sup>5</sup> *Id.* at 416.

<sup>6</sup> *Id.*

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 invented, virtually out of whole cloth,<sup>7</sup> the doctrine of regulatory takings.” Without denying state or federal government 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.<sup>8</sup>

Holmes’s decision in *Pennsylvania Coal* had little immediate impact either on the extent of government regulation or on subsequent court decisions.<sup>9</sup> It certainly did not impede the rapid

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<sup>7</sup> See DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION (2002) (arguing that there is no basis in the text or original understanding of the Fifth Amendment’s taking clause for regulatory takings generally or for Holmes’s diminution in value test); FRED P. BOSSELMAN, DAVID L. CALLIES, & JOHN BANTA, THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS 124 (1973) (describing Justice Holmes’s opinion in *Pennsylvania Coal* as a “rewriting” of the Constitution).

<sup>8</sup> 260 US 393, 415 (1922). Holmes excepted regulations concerning traditional private nuisances.

<sup>9</sup> See, e.g., WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 24 (1995) (“*Pennsylvania Coal* itself probably had no effect on coal mining or the subsidence problem”). Robert Brauneis, *The Foundation of Our "Regulatory Takings"*

development of the welfare/regulatory state, in which the Supreme Court increasingly acquiesced. In fact, the Court did not find another “regulatory taking” for 70 years. In 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 most 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*,<sup>10</sup> 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.<sup>11</sup> Consequently, most government regulations of private property constitute compensable takings.

Epstein claims his theory of takings has roots in “Lockean principles.”<sup>12</sup> 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

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*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.”)

<sup>10</sup> Cited *supra* note 3.

<sup>11</sup> EPSTEIN, *supra* note 3, at 36, 121, 266, and 281.

<sup>12</sup> *Id.* at 36.

owner.<sup>13</sup> So far, this is perfectly consistent with Epstein’s theory of takings. However, Locke defines “consent” far more broadly than does Epstein. In *Of Civil Government* [1690], Locke defines that term to include “consent of the majority, giving it either by themselves, or their representatives chosen by them. . . .”<sup>14</sup> In *Critical Notes on Stillingfleet* [1681], Locke even more explicitly embraces the principle of tacit consent, noting that “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.”<sup>15</sup> Thus, according to Locke’s theory of property, representative governments possess the tacit consent of the governed, including property owners, to tax, regulate, and even take 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.”<sup>16</sup> Epstein must oppose Locke on the issue of tacit consent because, if representative governments possess the consent of private property owners to regulate their properties, then no legitimate basis exists for judicial review of political restrictions on private property rights.

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<sup>13</sup> JOHN LOCKE, OF CIVIL GOVERNMENT ¶ 138; EPSTEIN, *supra* note 3, at 10-16.

<sup>14</sup> LOCKE, *supra* note 13, 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 53.

<sup>15</sup> JOHN LOCKE, POLITICAL ESSAYS 373 (M. Goldie, ed. 1997).

<sup>16</sup> EPSTEIN, *supra* note 3, at 14. Contrary to Epstein’s assertion, Locke’s theory of tacit consent is entirely consistent with the theory of representative government that emerged, and remains dominant to this day, in the United Kingdom. *See infra* Sec. III.

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 an appropriate solution to legislative deprivations of individual rights.<sup>17</sup> 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 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. . . .<sup>18</sup>

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<sup>17</sup> See JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 151 (1999).

<sup>18</sup> LOCKE, *supra* note 13, at ¶ 149.

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 an extreme distrust of democratic government that Locke did not share. Epstein’s distrust of representative government is implicit throughout *Takings*, and explicit at one point where he writes that “[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.”<sup>19</sup>

What does Epstein mean by government “imperfections”? Interestingly, Epstein is not primarily concerned with Madison’s “majoritarian difficulty” – the democratic majority

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<sup>19</sup> *Id.* at 30. As Ronald Coase and Neil Komesar have each 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. *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Ronald H. Coase, *Discussion: The Regulated Industries*, 54 AMER. ECON. REV. 194 (1964); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); NEIL K. KOMESAR, LAW’S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS (2001).

imposing its will on a vulnerable minority of property owners. Rather, Epstein's primary concern is with minority factions asserting disproportionate influence over democratic processes. He asserts, for example, that "the takings clause is designed to control rent seeking and political faction."<sup>20</sup> This seems inaccurate as an historical matter; at least, it's not what Madison believed the takings clause was designed to do. Moreover, as Neil Komesar has demonstrated,<sup>21</sup> Epstein's theory that the takings clause is designed to prevent "minoritarian bias" is fatally flawed because just compensation is neither an efficient nor an equitable remedy for problems of minoritarian bias in legislative decisionmaking.

In the last decade and a half of the twentieth century, Epstein's approach to takings gained numerous adherents, including among the judiciary.<sup>22</sup> For example, in his opinion for the Supreme Court in *Lucas v. South Carolina Coastal Council*,<sup>23</sup> Justice Antonin Scalia advanced a theory of takings remarkably similar to Epstein's. Like Professor Epstein, Justice Scalia

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<sup>20</sup> Epstein, *supra* note 3, 281.

<sup>21</sup> KOMESAR, LAW'S LIMITS, *supra* note 19, at 94-5.

<sup>22</sup> 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).

<sup>23</sup> 505 US 1003 (1992).

expressed extreme distrust of legislative motives in regulating private property, opining that 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.”<sup>24</sup> On this eminently cynical view of democratic regulation, constitutional judicial review is necessary to protect private property because political bodies simply cannot be trusted to do so. On the contrary, political/legislative organizations constitute the primary threat to private property rights.

Much has been written over the years about Holmes’s opinion in *Pennsylvania Coal*,<sup>25</sup> Epstein’s theory of takings,<sup>26</sup> and Scalia’s opinion in *Lucas*,<sup>27</sup> but hardly anyone has questioned

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<sup>24</sup> *Id.* at 1025 n. 12.

<sup>25</sup> William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813 (1998); Richard A. Epstein, *Response: Pennsylvania Coal v. Mahon: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875 (1998); BOSSELMAN, CALLIES & BANTA, *supra* note 7, at 124; Carol Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S.CAL. L.REV. 561 (1984); COLE, *supra* note 7, at 160-162.

<sup>26</sup> *See, e.g.*, Margaret Jane Radin, *Problems for the Theory of Absolute Property Rights*, in MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 98 (1993); KOMESAR, *LAW’S LIMITS*, *supra* note 19, at 93-104; *Symposium on Richard Epstein’s Takings: Private Property and the Power of Eminent Domain*, 41 U.MIAMI L.REV. 1 (1986).

<sup>27</sup> *See, e.g.*, COLE, *supra* note 7, at 162-163; *A Colloquium on Lucas*, 23 ENVTL. L. 901 (1993); *Symposium: Lucas v. South Carolina Coastal Council*, 45 STAN. L.REV. 1369 (1993).

the underlying premise that constitutional judicial review is essential to protect private property owners from uncompensated takings. Even notoriously “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.<sup>28</sup>

Judicial and scholarly theories about the necessity of constitutional judicial review to protect private property rights are not consistent, however, with political-economic theories, according to which representative democratic bodies can be expected to protect property rights. Neither are the judicial and scholarly theories consistent with the history of legislative protection of property rights in the United Kingdom and, more recently, in several American states.

## **II. THE POSITIVE POLITICAL-ECONOMY OF PRIVATE PROPERTY**

Contrary to the assumptions of most jurists, positive reasons exist for expecting democratic/legislative bodies to respect and protect property rights. Those reasons have their basis in positive political-economic theory.

The following seven widely-accepted 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

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<sup>28</sup> See *San Diego Gas & Electric Co. v. City of San Diego et al.*, 450 US 621, 636-661 (1981) (Brennan, J., dissenting).

competitors);<sup>29</sup> (2) the 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;<sup>30</sup> (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;<sup>31</sup> (4) property rights are costly to design and enforce;<sup>32</sup> (5) governments generally are able to define and enforce property rights at lower cost than could voluntary groups, especially in expanding markets;<sup>33</sup> (6) even on

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<sup>29</sup> 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 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.).

<sup>30</sup> DOUGLASS C. NORTH AND ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* 91 (1973).

<sup>31</sup> 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.).

<sup>32</sup> See Coase, *supra* note 19.

<sup>33</sup> NORTH AND THOMAS, *supra* note 30, at 7. Thus, “[j]ustice and the enforcement of

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;<sup>34</sup> (7) the structure of property rights may or may not maximize either social welfare (efficiency) or social justice (equity).<sup>35</sup>

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property rights are simply another example of a public good publicly funded.” *Id.*

<sup>34</sup> ITAI SENED, *THE POLITICAL INSTITUTION OF PRIVATE PROPERTY* 81 (1997). *See also* NORTH AND THOMAS, *supra* note 30, at 6 (“we pay government to establish and enforce property rights”); NORTH, *supra* note 29, 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.”); Christopher Clague, Philip Keefer, Stephen Knack, and Mancur Olson, *Property and Contract Rights in Autocracies and Democracies*, 1 *J.ECON. GROWTH* 243 (1996) (finding a strong correlation between property and contract rights and an autocrat’s time in power).

<sup>35</sup> *See* NORTH, *supra* note 29, 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 30, at 7 (“there is no guarantee that the government will find it to be in its interest to protect those property rights

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 protect private property rights.<sup>36</sup> As the political economist Itai Sened has written, “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.”<sup>37</sup> It follows that sensitivity to the property rights of the common citizen is crucial to a government’s political survival and prosperity.

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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 34, 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.”).

<sup>36</sup> *See id.* at 5.

<sup>37</sup> SENED, *supra* note 34, at 5.

### **III. THE POLITICAL/LEGISLATIVE PROTECTION OF PRIVATE PROPERTY IN THE UK**

The United Kingdom provides several hundred years' worth of historical evidence in support of political-economic predictions that political institutions will substantially protect private property rights, even in the absence of constitutional just compensation requirements and judicial review of legislation. Unlike American legislatures, the UK's Parliament is under no constitutional obligation to compensate private property owners for outright takings of property; nor are its legislative measures subject to constitutional judicial review. Nevertheless, like American legislative bodies, Parliament virtually always provides compensation when it takes title to private property; but it rarely compensates for mere regulatory impositions on private property rights.

#### **A. 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.”<sup>38</sup> But there is an important difference. When a governmental body expropriates title to land in the US, it *must* pay “just compensation” under the takings clause of the Fifth Amendment to the Constitution. In the United Kingdom, by contrast, 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

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<sup>38</sup> Stoebuck, *supra* note 3, at 561.

adequate compensation.<sup>39</sup> Nevertheless, Parliament virtually always pays compensation when it 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.<sup>40</sup>

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

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<sup>39</sup> 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 compensation has always been a matter of executive, and not judicial, determination.”).

<sup>40</sup> Professor K Davies, *Eminent domain and the jury*, 150 *NEW L.J.* 1079 (14 July 2000).

“purveyance”) and Parliament’s supreme and plenary authority to govern the country. Under the Crown’s prerogative powers:

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.<sup>41</sup>

One prerogative power the Crown never possessed, even before the Glorious Revolution of 1688-89, was the authority to take title to private land.<sup>42</sup> This power resides in Parliament

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<sup>41</sup> Stoebuck, *supra* note 3, at 563.

<sup>42</sup> *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 needed for new drainage works). Also *see* Stoebuck, *supra* note 3, at 564; Davies,

alone.<sup>43</sup> As the “supreme” or “sovereign” governmental authority in the United Kingdom,<sup>44</sup> Parliament exercises plenary authority over the country. It is “omnicompetent and might legislate over any matter that might come before it.”<sup>45</sup> 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.”<sup>46</sup>

This presumption of universal consent gives rise to the doctrine of Parliamentary infallibility,<sup>47</sup> which disables the courts from voiding Parliamentary acts (although judges retain

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*supra* note 40.

<sup>43</sup> See WILLIAM BLACKSTONE, I COMMENTARIES ON THE LAWS OF ENGLAND 140 (1979 [1765] ).

<sup>44</sup> POOLEY, *supra* note 39, 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 17.

<sup>45</sup> Matthew P. Harrington, “Public Use” and the Original Understanding of the So-Called “Takings” Clause, 53 HASTINGS L.J. 1245, 1266 (2002).

<sup>46</sup> SIR THOMAS SMITH, DE REPUBLICA ANGLORUM 49 (L. Alston ed. 1906 [1583]), *quoted in* Harrington, *supra* note 45, at 1265.

<sup>47</sup> *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-

the authority to interpret and enforce statutes).<sup>48</sup> 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.”<sup>49</sup> Nor does the Crown, by convention, intervene to veto or even voice concerns about legislation.<sup>50</sup> 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.”<sup>51</sup> The only real constraint on Parliament’s plenary authority is self-regulation in

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1477) served as Lord Chancellor and as a Chief Justice of England. Note the consistency of Smith’s and Fortescue’s statements with John Locke’s later theory of “tacit consent,” discussed *supra* notes 14-15 and accompanying text.

<sup>48</sup> See Davies, *supra* note 40; Harrington, *supra* note 45, at 1266; Pooley, *supra* note 39, 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.”);

<sup>49</sup> 36 J.P. 54 (1872), *quoted in* GOLDSWORTHY, *supra* note 17, 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.”).

<sup>50</sup> See Davies, *supra* note 40.

<sup>51</sup> BLACKSTONE, *supra* note 43, at 157.

view of possible electoral replacement, revolution, or anarchy.<sup>52</sup>

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 tacit legal consent of the entire realm, including those from whom property is taken.<sup>53</sup> 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

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<sup>52</sup> See A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 76-7, 79 (10th ed. 1964); Davies *supra* note 40; Pooley, *supra* note 39, 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.").

<sup>53</sup> Harrington, *supra* note 45, 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 13, at ¶ 138. See also *supra* notes 14-15 and accompanying text; GOLDSWORTHY, *supra* note 17, 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.").

them from one man, and give them to another without any cause of consideration, that it binds the law of conscience.”<sup>54</sup> 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.”<sup>55</sup>

Given Parliament’s plenary authority over property rights and compensation for takings, “the use of eminent domain [is] limited only by those restraints the legislature impose[s] on itself.”<sup>56</sup> 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 sewer commissioners to take land for the purpose of locating new drainage sewers, ditches, gutters, walls, bridges, and causeways in Lincoln County.<sup>57</sup> This statute did not explicitly require compensation for any land taken for this purpose, perhaps because such takings were in furtherance of the king’s prerogative powers over navigation. By the early sixteenth century, however, it had become *conventional*, but not constitutionally required, for Parliament to pay compensation for expropriating private

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<sup>54</sup> 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 45, at 1266.

<sup>55</sup> PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN 1.22[1] (J.L. Sackman ed., 1997).

<sup>56</sup> Harrington, *supra* note 45, at 1269.

<sup>57</sup> Stat. 6 Hen. 6, c. 5 (1427), *described in* Stoebuck, *supra* note 3, at 565.

property.<sup>58</sup> This convention evolved from the many statutes that expressly required 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 to facilitate the river improvement project.<sup>59</sup> In such statutes, Parliament did something Justice Scalia could never imagine an American legislature doing: it imposed compensation requirements upon itself, as well as on all agencies operating under its statutory authority.

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, but expressly denied

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<sup>58</sup> *See id.* at 578. Even into the 16th 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. St. 2, c. 11 (1421); 5 Eliz. c. 13 (1562-63). *See also* Harrington, *supra* note 45, at 1262 n. 62. Parliament also declined to compensate the Church, in the 16th century, when 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 17, at 58 (noting that “the Reformation Parliament frequently overrode title to property”).

<sup>59</sup> Stat. 6 Hen. 8, c. 17 (1514-1515), *described in* Stoebuck, *supra* note 3, at 566.

compensation.<sup>60</sup> 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 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.”<sup>61</sup>

By the seventeenth and eighteenth centuries, the convention of paying compensation for expropriated land had become so well established that “[n]o statute of that era has been found denying compensation for a taking.”<sup>62</sup> Even during the great enclosure movement, the period 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.<sup>63</sup> In his *Commentaries on the*

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<sup>60</sup> Stat. 4 Hen. 8, c. 1 (1512).

<sup>61</sup> Stoebuck, *supra* note 3, at 566 (emphasis added).

<sup>62</sup> *Id.* at 579.

<sup>63</sup> 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

*Laws of 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.<sup>64</sup>

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.

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

<sup>64</sup> BLACKSTONE, *supra* note 43, at 135.

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.*,<sup>65</sup> 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.”<sup>66</sup> The evolution of the compensation *convention* into a common law *presumption* did not, however, prefigure a judicial assertion of authority over legislative 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.”<sup>67</sup> 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.

## **B. 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-

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<sup>65</sup> [1960] NI 60 (14 Dec. 1959).

<sup>66</sup> *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.”).

<sup>67</sup> [1960] NI 60 (14 Dec. 1959).

represented within its ranks.”<sup>68</sup> 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.”<sup>69</sup> 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 institutions, such as regulatory takings.<sup>70</sup> Instead, the UK continues to rely on its historical conventions, including the convention that no compensation is required or presumed when the government merely regulates private property (rather than taking title to it).

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<sup>68</sup> Harrington, *supra* note 45, at 1265.

<sup>69</sup> Pooley, *supra* note 39, at 29 n. 47.

<sup>70</sup> *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, 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.

Lord Radcliffe explained this convention in the case of *Belfast Corporation v. O.D. Cars Ltd.*:<sup>71</sup>

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, 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

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<sup>71</sup> [1960] NI 60 (14 Dec. 1959).

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 even more extensive and intrusive than comprehensive zoning in the US. The UK’s 1947 Town and

Country Planning Act nationalized all land development rights,<sup>72</sup> 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 rights were taken or significantly reduced.<sup>73</sup> 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

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<sup>72</sup> 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)”).

<sup>73</sup> GRANT, *supra* note 44, at 23.

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.<sup>74</sup>

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, for example to increase the size of an existing building by 10 percent or less.<sup>75</sup> In addition, the 1947 Act allowed landowners to force compulsory purchase by the government – akin to the American inverse condemnation action – if the lack of development rights left their lands without any “reasonably beneficial use.”<sup>76</sup> Landowners also might receive compensation if planning authorities ordered an existing use of land discontinued or reneged on a previously granted planning permission.<sup>77</sup> Even where Parliament provided for compensation,

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<sup>74</sup> *Id.* at 63.

<sup>75</sup> Parliament repealed this exception in the 1991 Town and Country Act. *See id.* at 63, n.3.

<sup>76</sup> *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.

<sup>77</sup> 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 72, at 454-55.

however, the amount of compensation was based only on existing uses, never on potential use following development.<sup>78</sup>

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."<sup>79</sup> 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.

In the landmark case of *Pyx Granite v. Minister of Housing and Local Government*,<sup>80</sup> 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

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<sup>78</sup> There is, however, an exception, allowing payment of an *ex gratia* supplement, when necessary to avoid undue hardship. See CULLINGWORTH, *supra* note 72, at 157. Such *ex gratia* supplements do *not* constitute compensation because they are not received as of right.

<sup>79</sup> *Id.*

<sup>80</sup> [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.

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.”<sup>81</sup>

The judiciary’s role could increase in future years, however, thanks to 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, which concerns The Protection of Property, provides that:

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 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.<sup>82</sup>

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<sup>81</sup> GRANT, *supra* note 44, at 560.

<sup>82</sup> See <http://www.hms0.gov.uk/acts/acts1998/80042 --e.htm#sch1ptII>.

The ultimate effect of this provision on relations between Parliament and the courts remains uncertain.<sup>83</sup> 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, meanwhile, make clear that in case of a conflict between an act of Parliament and the European Convention for the Protection of Human Rights and Fundamental Freedoms, Parliament’s will prevails.<sup>84</sup> Thus, parliamentary sovereignty remains intact.<sup>85</sup> The Human Rights Act itself, as an act of Parliament, is subject to parliamentary repeal,

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<sup>83</sup> “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.” See Dominic McGoldrick, *The United Kingdom’s Human Rights Act 1998 in Theory and Practice*, 50 INT’L & COMP. L.Q. 901 (2001).

<sup>84</sup> 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).

<sup>85</sup> 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.”).

amendment, or exception.<sup>86</sup> 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.”<sup>87</sup> To date, however, the courts have declined to use Article 1 of the First Protocol to impose substantive limitations on government land-use planners.<sup>88</sup>

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<sup>86</sup> See McGoldrick, *supra* note 83.

<sup>87</sup> 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 Role of the Courts in Planning*, in *BRITISH PLANNING: 50 YEARS OF URBAN AND REGIONAL POLICY* 166 (B. Cullingworth ed., 1999).

<sup>88</sup> 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

**IV. COMPARING US LEGAL AND UK POLITICAL 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 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:

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

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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 84, at 948.

apparatus to deal with both land's use *vis-à-vis* the interests of neighbours and its use over time.<sup>89</sup>

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 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.”<sup>90</sup> Such arguments may 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.”<sup>91</sup> 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 and cultural differences between the US and the UK, how radical, really, is the UK's planning system? How much less protection does it offer private landowners than the constitutionally-based judicial doctrine of regulatory takings in the US?

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

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<sup>89</sup> 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).

<sup>90</sup> Grant, *supra* note 72, at 64.

<sup>91</sup> *Id.*

“[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 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.”<sup>92</sup>

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.<sup>93</sup> 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 constitutional judicial review, along with its attendant social costs. In other words, is the game worth the candle?

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<sup>92</sup> POOLEY, *supra* note 39, at 31.

<sup>93</sup> See David Callies, *An American Perspective on UK Planning*, in *BRITISH PLANNING: 50 YEARS OF URBAN AND REGIONAL POLICY* 264 (B. Cullingworth ed., 1999).

I cannot pretend to offer a complete answer to that question because 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. 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*<sup>94</sup> and *Dolan* cases,<sup>95</sup> in which the US Supreme Court established a substantive due process-like rule for government-imposed conditions on land-use permits. When the government imposes conditions on 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*.<sup>96</sup> 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

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<sup>94</sup> *Nollan v. California Coastal Commission*, 483 US 825 (1987).

<sup>95</sup> *Dolan v. City of Tigard*, 512 US 374 (1994).

<sup>96</sup> *See supra* note 80 and accompanying text.

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.<sup>97</sup>

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?<sup>98</sup> 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.”<sup>99</sup> The Town and County Planning Act also allows for consideration of landowners’ reasonable and legitimate “development expectations,”<sup>100</sup> 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*.<sup>101</sup>

More generally, in neither the US nor the UK are landowners entitled to compensation for the effects of the vast majority of regulatory impositions.<sup>102</sup> On the other hand, landowners in

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<sup>97</sup> 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 AND LUCAS* 332, 350 (D. Callies ed., 1996)

<sup>98</sup> See *supra* notes 23-24 and accompanying text.

<sup>99</sup> See *supra* note 76 and accompanying text.

<sup>100</sup> See *supra* note 75 and accompanying text.

<sup>101</sup> 438 U.S. 104 (1978).

<sup>102</sup> 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.

both countries are always compensated when the government takes title, although the UK uses a lower measure of compensation (existing use value) than the US (“fair market” value).<sup>103</sup>

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*.<sup>104</sup> It is likely that the UK system entails greater social costs.<sup>105</sup> General 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.<sup>106</sup> Such shortages are relatively rare in the US

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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).

<sup>103</sup> In *Takings*, Richard Epstein, *supra* note 3, 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.

<sup>104</sup> 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 93.

<sup>105</sup> *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).

<sup>106</sup> According to the 2004 “Barker Review,” between 1995 and 2001, while housing prices in the UK rose by nearly 8 percent, the rate of new housing construction declined by more

(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 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 supposition 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."<sup>107</sup> The rankings are based on 50 variables grouped into the following 10 categories: trade policy; fiscal burden of government;

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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; but by the 1990s that percentage had fallen to 37. The Barker Review specifically asserts 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 89, 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).

<sup>107</sup> 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>.

government intervention in the economy; monetary policy; capital flows and foreign investment; 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).<sup>108</sup> 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 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

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<sup>108</sup> On the overall index, the UK ranks 7th, three places ahead of the US. *See id.* at 9.

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. . . .<sup>109</sup>

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.<sup>110</sup> The US and the UK are both perceived to have,

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<sup>109</sup> *Id.* at 404-05.

<sup>110</sup> *See, e.g.*, JAMES GWARTNEY AND ROBERT LAWSON, ECONOMIC FREEDOM IN THE WORLD: 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”).

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 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.<sup>111</sup>

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<sup>111</sup> 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>

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.<sup>112</sup> 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.<sup>113</sup> 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 values by 33 percent or more.<sup>114</sup> However, that bill did not pass, and the 104th Congress ultimately enacted no takings legislation.<sup>115</sup>

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?<sup>116</sup> Such counterfactual questions are impossible to

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<sup>112</sup> *See id.*

<sup>113</sup> H.R. 925, 104th Cong. (1995).

<sup>114</sup> S. 605, 104th Cong. (1995).

<sup>115</sup> *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 *ECOL. L.Q.* 187, 189 (1997).

<sup>116</sup> 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,

answer with confidence, but they are nonetheless worth considering.

Congress is not the only political branch of government that protects property rights. In 1988, President Reagan signed Executive Order No. 12,630,<sup>117</sup> 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.<sup>118</sup> 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.<sup>119</sup> Many states adopted *assessment* statutes, which require the Attorney

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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.").

<sup>117</sup> Exec. Order No. 12,630, 53 Fed. Reg. 8859 (1988), *reprinted in* 5 U.S.C. 601.

<sup>118</sup> *See* Cordes, *supra* note 115, at 190 n. 18.

<sup>119</sup> Larry Morandi, *Evaluating the Effects of State Takings Legislation*, 23 STATE LEGIS.

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 for regulatory impositions that reduce the value of their properties.<sup>120</sup> 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 seem to offer more concrete protection.<sup>121</sup>

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 Act<sup>122</sup> authorizes owners of agricultural or forest lands to sue the state or one of its agencies (including

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REP. (Jan. 1998), available on the World Wide Web at: <http://www.ncsl.org/programs/esnr/lr232.htm>

<sup>120</sup> At least 25 states have *considered* compensation bills. *See Cordes, supra* note 115, 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.

<sup>121</sup> The discussion below is based extensively on Morandi, *supra* note 119, and Cordes, *supra* note 115.

<sup>122</sup> Miss. Code Ann. 49-33-1 *et seq.*

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 substantial threats to the public health and safety.”<sup>123</sup>

In Louisiana, the 1995 Right to Farm and Forest Act<sup>124</sup> 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.<sup>125</sup>

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 Act<sup>126</sup> 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

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<sup>123</sup> Miss. Code Ann. 49-33-7(I).

<sup>124</sup> La. Rev. Stat. Ann. 3:3601 *et seq.*

<sup>125</sup> La. Rev Stat. Ann. 3:3602(12)(h).

<sup>126</sup> Tex. Gov’t Code Ann. 2007.001 *et seq.*

Mississippi and Louisiana statutes, the Texas law exempts actions, taken in good faith, to prevent “a grave and immediate threat to life or property.”<sup>127</sup> In addition, state and local actions 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 Act<sup>128</sup> – 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.<sup>129</sup> 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.”<sup>130</sup> Although the Florida

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<sup>127</sup> Tex. Gov’t Code Ann. 2007.003(b)(7).

<sup>128</sup> Fla. Stat. Ann. 70.001 *et seq.*

<sup>129</sup> Fla. Stat. Ann. 70.001(2).

<sup>130</sup> 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]

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.<sup>131</sup> 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 substantially “expand the scope of compensable takings” by adopting thresholds for compensation that are far lower than the US Supreme Court requires.<sup>132</sup> Second, very few lawsuits have been brought under any of

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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.”).

<sup>131</sup> 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.”).

<sup>132</sup> Cordes, *supra* note 115, at 220.

these statutes,<sup>133</sup> including four in Texas,<sup>134</sup> six in Florida,<sup>135</sup> one in Louisiana,<sup>136</sup> and none in

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<sup>133</sup> This does not necessarily mean there have been no claims leading to settlements, but the amount of litigation has been extremely low.

<sup>134</sup> *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 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).

<sup>135</sup> *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

Mississippi. The Florida and Texas cases have not yet resulted in any actual compensation awards to property owners.<sup>137</sup> It is not clear, however, whether (and to what extent) the existence of the statutes has induced state and local governments to reduce regulatory impositions in order to avoid liability for compensation; nor is it clear whether (and to what extent) state and local governments are settling claims prior to litigation. Third, and most important for present purposes, the state takings statutes provide direct evidence that state political processes are

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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).

<sup>136</sup> *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).

<sup>137</sup> 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 119.

responsive to the perceived needs of private property owners.

Even more compelling evidence comes from Oregon, a state with a long history of intensive land-use planning and regulation.<sup>138</sup> In a 2004 public referendum, Oregon voters approved the nation's most radical anti-regulatory statute, Measure 37, by a 60 to 40 margin.<sup>139</sup> 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 landowner 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.

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.<sup>140</sup> Thousands more are expected to follow. Assuming Measure 37 is implemented

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<sup>138</sup> See, e.g., JAN G. LAITOS, DANIEL H. COLE, MARY CHRISTINA WOOD, AND SANDRA B. ZELLMER, *NATURAL RESOURCES LAW* \_\_\_ - \_\_\_ (forthcoming 2006).

<sup>139</sup> Measure 37 is reprinted on the World Wide Web at: [http://www.sos.state.or.us/lections/nov22004/guide/meas/m37\\_text.html](http://www.sos.state.or.us/lections/nov22004/guide/meas/m37_text.html)

<sup>140</sup> 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.

and enforced as written,<sup>141</sup> it will eviscerate 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 under the Measure.

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) political limitations are potentially much stronger and farther reaching than 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 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.<sup>142</sup> Cross-institutional (and organizational) dynamics could be a significant (if somewhat confounding) factor in the comparative institutional analysis.

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<sup>141</sup> It is possible that the Measure could face legal or constitutional challenges; it may be amended, or even replaced, by the Oregon legislature. But most observers believe the odds of a successful legal challenge are remote. See Laura Oppenheimer and Ashbel S. Green, *Challenges to Land Law Face Slim Prospects*, *The Oregonian*, Nov. 12, 2004.

<sup>142</sup> See *supra* note 116 and accompanying text.

## CONCLUSION

In contrast to the widespread judicial and scholarly presumption that political/legislative bodies cannot be trusted to protect private property rights, the theoretical analysis and empirical evidence presented in this article indicate that political institutions will – and do in fact – substantially protect private property rights, even in the absence of constitutional judicial review. This is not to argue that constitutional judicial review is irrelevant for protecting private property rights, only that its utility is likely more limited than is commonly thought.

So, what is the marginal utility of constitutional judicial review for protecting private property rights? This article does not purport to answer that question, but provides a warrant for future work to frame and measure the marginal utility of constitutional judicial review.

In the meantime, the UK's courts and Parliament seem to concur that property rights are at present sufficiently well protected in that country 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 in the UK still exceed the *perceived* marginal 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.<sup>143</sup>

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<sup>143</sup> 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-*

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 noncompensable regulations – the *status quo* prior to *Pennsylvania Coal* – any time soon.

Is one country’s institutional structure for protecting property rights protection obviously and objectively “better” than the other’s?

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 activities. This 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.

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*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 2004/2005).

The problem with this line of argument is that it substantially overstates the 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 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 conformity with parliamentary directives.<sup>144</sup> 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

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<sup>144</sup> See *supra* note 48 and accompanying text (noting that courts in the UK retain the authority to interpret and enforce statutes).

the treatment of *national* regulations. In the US, congressional and state legislative 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 maps almost precisely on to a normative model elaborated by economist William Fischel.<sup>145</sup> Fischel argues that judicial review is needed to protect private property rights from the depredations of local governments; but in larger jurisdictions, "political action, which is often disparaged as rent-seeking, is sufficient to protect property without the help of judges."<sup>146</sup> The reason is that property owners (particularly land developers) are more likely to be victims of majoritarian bias (Madison's chief reason for including a takings clause in the Bill of Rights) at the local level. The primary political malfunction of higher-level governments, by contrast, is not majoritarian but minoritarian bias (rent-seeking by discrete interest groups), which, in Fischel's view, poses little risk to private property owners.

In substantial accordance with Fischel's normative model, national legislation in the UK is subject to virtually no judicial review, but local government decisions are subject to substantial *statutory* judicial review, to ensure conformity with parliamentary directives. Consequently, land-use regulation in the UK provides a natural test of Fischel's model. Does the UK's institutional structure, in fact, protect private property rights sufficiently? As noted earlier,<sup>147</sup> the answer to that question remains under-determined by the available evidence. It is

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<sup>145</sup> *Cited supra* note 9.

<sup>146</sup> *Id.* at 324.

<sup>147</sup> *See supra* text following note 93.

obvious, 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, if not quite so well as in the US.

At the very least, the available evidence provides ample reason to reject the extreme variety of distrust of democratically enacted regulations reflected in the scholarly writings of Richard Epstein and the regulatory takings opinions of Justice Scalia. It is clear that 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.

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