The Taking/Taxing Taxonomy

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> I do not propose either to purchase or to confiscate private property in land. The first would be unjust; the second, needless. Let the individuals who now hold it still retain, if they want to, possession of what they are pleased to call *their* land. Let them continue to call it *their* land. Let them buy and sell, and bequeath and devise it. We may safely leave them the shell, if we take the kernel. *It is not necessary to confiscate land; it is only necessary to confiscate rent.*
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> —Henry George, 1879[1]

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

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

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

Identifying American property law as conforming to two fundamental principles—formalism of rights and strong market propensity—but at the same time devoid of a constitutional undertaking to protect privately held value against potential losses as a self-standing strand in the property bundle, this

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1. HENRY GEORGE, PROGRESS AND POVERTY 405 (Robert Schalkenbach Found. 1975) (1879).

Article explains why prevailing forms of taxation do seem to be disparate from other forms of governmental interventions with private property. Focusing on property taxation, this Article shows why taxation is considered a lesser-evil type of government coercion, how the taking/taxing dichotomy better addresses the public–private interplay in property law, and why taxation is often viewed as actually empowering property rights and private control of assets.

I. Introduction

Takings jurisprudence faces enormous, nearly Sisyphean challenges in trying to design legal doctrines to fit the complexities of government acts that affect private property. This body of law is often criticized as being ad hoc, vague, and unpredictable.[2] Yet whenever courts do try to come up with some allegedly bright-line categorical rules within this field by viewing some instances of public intervention with property as takings per se, others as subject to multifactor, case-specific tests, and yet others as generally falling outside the scope of this strand of constitutional protection, such taxonomies are then criticized as being too rough, conceptually inconsistent, or normatively indefensible.[3] Although such dilemmas about conceptual and doctrinal line drawing are quite familiar to other legal fields, the law of takings seems

2. *See, e.g.*, William P. Barr et al., *The Gild that Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 431–33 (2005) (discussing the patchwork nature of takings jurisprudence concerning public utilities); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 594–97 (1984) (suggesting that the source of muddled takings jurisprudence is in the tension between Lockean natural rights and Aristotelian civic republican conceptions of property, each of which underpins areas of the law); Susan Rose-Ackerman, *Against Ad-Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697–1700 (1988) (rebutting Frank Michelman's argument that the Supreme Court's most recent term signaled a move towards a coherent, unified takings jurisprudence).

3. *See* discussion *infra* Parts II(A), III.

to be particularly vulnerable to perpetual discontent over the way in which its landscape is being shaped.[4]

This Article takes up what traditionally purports to be the clearest division within this alleged entanglement: the distinction between taking and taxing. American courts have been practically unanimous in viewing taxation as a chief and essential state power, and have generally refused to strictly scrutinize tax legislation and regulation.[5] As the epigraph demonstrates, the taking/taxing divide has also been hailed as normatively worthy by numerous thinkers—though for diverse reasons—throughout American history.

The dichotomy between the sweeping deference to taxation and the extensive judicial preoccupation with other forms of government-based adverse effects on private property has been, however, increasingly criticized. Various theorists have pointed to the strong conceptual similarity between the compulsory levy and collection of a tax and the nonconsensual transfer of ownership or other key rights in a privately owned asset for a public purpose. Very simply argued, in both types of cases, government forces an owner to hand over privately held value.[6] Some scholars have taken this argument further by calling to formally synchronize the normative and jurisprudential framework for these currently distinctive legal spheres, albeit with differing views about the appropriate direction that this reunification should take.[7]

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

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4. *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 889 (2000) (reviewing four Supreme Court cases decided in the space of two years, all involving the definition of "property," and criticizing the fact that none of these cases "makes any reference to any of the others, or makes any effort to integrate its innovations . . . into the preexisting fabric of the law").

5. *See* Stephen W. Mazza & Tracy A. Kaye, *Restricting the Legislative Power to Tax in the United States*, 54 AM. J. COMP. L. (SUPPLEMENT) 641, 644–46 (2006) (surveying the sweeping judicial deference to tax legislation and administrative regulation).

6. *See, e.g.*, William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 571 (1972) (arguing that taxation "is not merely similar to eminent domain; it is the same, as far as the power itself goes").

7. *See* discussion *infra* subpart III(A).

legal concepts that otherwise seem to make little sense under a point-blank analysis of specific property doctrines.

In essence, American law comprehends the governmentally provided system of property as charged mainly with the duty to provide and enforce readily identifiable sets of entitlements and obligations in regard to resources—ones that endow property owners with the security of holding on to features that stress visible bundles such as formal title, possession, use, and control over decision making. But at the same time, property law is largely devoid of an independent, firm undertaking to preserve a definite economic value for assets. In other words, whereas the American property system, as construed by the Supreme Court, considers the power to exclude to be "one of the most treasured strands in an owner's bundle of property rights,"[8] and similarly views rights of possession, control, and disposition as "valuable rights that inhere in the property,"[9] no such clear commitment exists for any particular benchmark of value. Counterintuitive as it may sound, value in itself is not one of the strands of constitutionally guarded property.

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

This construction of American property law is far from inevitable. In many national and subnational economic systems, the rules pertaining to the control and use of resources are more oriented toward ensuring a certain value for stakeholders, but this comes at the price of stronger ongoing intervention with formal property strands. This is the case not only with traditional communities in the developing world or with centrally controlled national economies,[10] but it can also be traced in other market economies as well, as in alternative subsociety structures within the United States.[11]

Nowadays, following the financial crisis, American society is undergoing a dramatic process of aggressive governmental intervention with what were considered to be the basic tenets of markets and private rights.

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8. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

9. Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998).

10. *See* Amnon Lehavi, *The Global Law of the Land* (pt. 1), 81 U. COLO. L. REV. (forthcoming 2010) (manuscript at 3–7, on file at http://ssrn.com/abstract=1357731) (surveying the history of property law in Europe and Asia).

11. *See infra* notes 83–86 and accompanying text.

The American Recovery and Reinvestment Act of 2009,[12] viewed as a "striking return of big government" with its $787 billion worth of government spending, expansion of social programs, and federal tax cuts,[13] and its predecessor the Emergency Economic Stabilization Act of 2008,[14] which mandated the massive purchase of mortgage-related securities and capital investments in banks,[15] along with the outright takeover of key financial institutions and companies to prevent asset meltdown,[16] may all have profound long-term effects on the fundamentals of American property law.

Importantly, this Article does not aim at suggesting which property paradigms should be considered normatively superior. What this work does is recognize the fact that American law made some very meaningful choices—not at all universally "inherent"—in the way it has conventionally constructed its property system, and argue that the resulting jurisprudence and its specific doctrines and line drawing that emerged over the years should be understood in view of these foundational principles. Accordingly, this Article does not offer a normative defense of the current taxonomies in takings law. It instead takes on the innovative analytical enterprise of illuminating the broader perspectives against which current legal rules have been shaped, thus tying together what are so often considered to be loose ends within the takings jurisprudence.

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

First, a formal, market-oriented system that consecrates certain sticks as indispensable seems to view as a lesser evil those forms of governmental extraction of private value that minimize the explicit derogation of such prominent property incidents. Whenever a governmental act coercively acquires entitlements—such as ownership, leasehold, or easement—either explicitly, by registering such rights in the government's or a third party's name, or implicitly, by using rights and prerogatives that are regularly considered to represent the core of such rights—by entering land to set up

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12. Pub. L. No. 111-5, 2009 U.S.C.C.A.N. (123 Stat.) 115.

13. David M. Herszenhorn, *A Smaller, Faster Stimulus Plan, but Still with a Lot of Money*, N.Y. TIMES, Feb. 14, 2009, at A14.

14. Pub. L. No. 110-343, 122 Stat. 3766 (to be codified at various sections of 5, 12, 31 U.S.C.).

15. *See* David M. Herszenhorn, *Bush Signs Bill: House Votes 263 to 171—Markets Down on Jobs Data*, N.Y. TIMES, Oct. 4, 2008, at A1 (describing how the legislation enabled the U.S. Treasury to buy troubled securities to ease the credit crisis); Mark Landler, *Stock Markets Rally Worldwide—Biggest Intervention Since '30s*, N.Y. TIMES, Oct. 14, 2008, at A1 (announcing the Treasury Department's plan to invest in banks and guarantee new debt issued by banks for three years).

16. *See, e.g.*, Stephen Labaton & Edmund L. Andrews, *Mortgage Giants Taken Over by U.S.: A Costly Bailout.*, N.Y. TIMES, Sept. 8, 2008, at A1 (discussing the bailout of "the nation's two largest mortgage finance companies," Fannie Mae and Freddie Mac).

public facilities and thus undermining the right to exclude,[17] by making certain interventionist decisions about the use of the resource,[18] or by prohibiting or limiting certain forms of asset transfers[19]—the owner's remaining rights are viewed as crippled. This is so even if the pure economic consequences of such governmental acts are not harsher than those inflicted by a newly imposed tax on the property. The property system has been better accustomed to view taxation as a background institution, which although financially significant, creates less uncertainty in figuring out who the owner is and what she owns.[20]

Second, legal concepts and doctrines controlling governmental interventions with private property are obviously not hermetically detached from the private law of property, especially in a market-oriented system. Although the interface between the private and public realms in property is highly intricate and avoids clear demarcation,[21] and although I definitely do not argue that the law of governmental intervention with private property should necessarily aspire for harmony with the law governing property relations among private parties,[22] it would be safe to say that the law of takings does have some bearing on the way people broadly understand property entitlements and obligations.

Thus, for example, the public and legal outrage over the *Kelo v. City of New London*[23] decision, as vividly expressed in Justice O'Connor's assertion in her dissent that "[n]othing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory,"[24] expressed a deep concern that the overbroad construction of "public use" to facilitate a condemn-and-transfer practice for economic development was not only a matter of governmental abuse, but one that also undermined the fundamental understanding of what it means to be a property owner, including vis-à-vis other persons.[25] Indeed, in a number of cases, the

17. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–36 (1982) (arguing that a cable TV company's installation of wires in an apartment building constituted a taking from the building's owners).

18. *See* Phillips v. Wash. Legal Found., 524 U.S. 156, 170 (1998) (asserting that the right of disposition over even minimal interest income generated by funds is essential to the concept of private property and that government interference with that disposition may constitute a taking).

19. *See* Hodel v. Irving, 481 U.S. 704, 715–17 (1987) (holding that the right to will one's property to one's heirs is essential to the meaning of ownership and that the total abrogation of this right constitutes a taking).

20. *See infra* section III(B)(1).

21. Amnon Lehavi, *The Property Puzzle*, 96 GEO. L.J. 1987, 2000–12 (2008).

22. *See id.* at 2017–18 (arguing that governmental intervention through eminent domain is often justifiable).

23. 545 U.S. 469 (2005).

24. *Id.* at 503 (O'Connor, J., dissenting).

25. *See id.* at 505 (arguing that property rights are fundamentally insecure once a legislative body may take one party's private property for the benefit of another private party); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1879–84

Supreme Court has made cross-references between the public law and private law of property, for example by referring to its private law jurisprudence in defining the "treasured" right to exclude in takings cases such as *Loretto v. Teleprompter Manhattan CATV Corp.*[26] and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*.[27] Viewed through this prism, one might understand why taxation is generally considered to be less controversial than the governmental taking of property strands that are intuitively analogized to the core concepts of private law. In this sense, it is more convenient for courts to view taxation as a qualitatively distinct type of governmental intervention with private property.

Third, taxation may often be viewed as actually entrenching and validating formal ownership, thus strengthening the security of title and formal rights. As this Article shows, this is especially the case with the property tax, which has received only scant attention in the taking/taxing academic debate, but is nevertheless considered a major source of revenue for government, as well as a chief determinant of local governance and property-owner-based collective control. In fact, one underlying characteristic that seems to broadly differentiate legal systems with state-dominated formal private-property rights in land from those that have a less comprehensive formal regime is the extent to which the imposition and collection of property taxation is fiscally significant and administratively feasible, since such a tax inevitably depends on a centrally coordinated recordation (or at the least a governmental validation) of lands and title holdings.

An important caveat is in order at the outset. Even if one accepts the categorization of taxation as a distinguishable type of governmental action in the American setting, this does not necessarily mean that judicial review of such acts must always be lenient. Specifically, the ability of courts to divert their attention in such matters to other constitutional channels, most prominently to procedural and substantive due process, may be considered a potential blessing rather than a matter of confusion or undue fragmentation. Since the "property" component of due process is quite consistently considered to be more detached from the private law of property than is the case with the "private property" of the Takings Clause,[28] due process jurispru-

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(2007) (portraying a *Kelo*-type condemn-and-transfer use of the eminent domain power as contradicting popular conceptions about the overall morality of property rights).

26. 458 U.S. 419, 436 n.12 (1982) (referring to PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980), which discussed the private property rights of a shopping mall that banned the handing out of antiwar pamphlets).

27. 527 U.S. 666, 673 (1999) (referring to K Mart Corp. v. Cartier, Inc., 485 U.S. 176, 185–86 (1988), which was a trademark law dispute).

28. *See* Merrill, *supra* note 4, at 969–70 (identifying takings jurisprudence as especially befitting discrete assets that are the object of ownership and that include in turn a right to exclude others, hence doing "a good job of identifying those interests that we may loosely call common-law property rights").

dence may be better suited for doctrinal severance in reviewing such types of governmental actions.

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

II. The Core of American Property Law

Reducing American property law to a clear-cut paradigm is obviously highly challenging. First, local and state property laws may substantially diverge among different jurisdictions within the United States,[29] and federal law in itself is highly complicated and often obscure, with federal constitutional property law being a special source of intricacy.[30] Second, the law of property is also highly contingent on the type of resource that is the object of property rights, both in defining the scope of rights and in providing remedies to protect them, such that the laws of land, chattels, intellectual property, or securities may significantly differ from one another.[31] Third, on a normative level, it is highly doubtful whether American property law adheres to

29. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Of Property and Federalism*, 115 YALE L.J. 72, 74–75 (2005) (discussing competition over property regimes among different jurisdictions); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 889 (2007) (explaining how local zoning restrictions change over time due to electoral changes or shifts in demographics).

30. *See, e.g.*, Merrill, *supra* note 4, at 889–90 (discussing four Supreme Court decisions in 1998 and 1999 that were "likely to produce bewilderment among lower courts and practicing lawyers" in terms of how to demonstrate that an interest is property deserving protection under the Due Process Clause or the Takings Clause).

31. The question of the degree to which there is—or should be—similarity in defining property rights for different resources is highly contentious and will not be discussed here. For the tension between tangible and intangible property, compare Peter S. Menell, *Intellectual Property and the Property Rights Movement*, REGULATION, Fall 2007, at 36, 37, with Richard A. Epstein, *A Response to Peter Menell: The Property Rights Movement and Intellectual Property*, REGULATION, Winter 2008, at 58, 61–63.

any predominant goal, as various values such as societal welfare, liberty, personhood, equity, and social responsibility battle it out not only in scholarly discourse[32] but also in the actual design of property doctrines.[33] This latter aspect is particularly pertinent in dramatic times such as the current ones, in which government engages in a major restructuring of property markets and institutions.[34]

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

A. The Formality of Property . . .

Property law in the United States is by and large formal, meaning that state institutions set out to create and enforce sets of private and public entitlements and obligations pertaining to resources,[35] to make them publicly known and transparent to the extent necessary and feasible,[36] and to generally subject other types of property arrangements to the overall supervision and control of the centrally coordinated property system.[37]

Formality of property is obviously no novelty. It is a fundamental feature of the social contract underlying modern organized society and government, by which the protection and stability of private property is both cause and effect in the entrustment of rule making and enforcement at the hands of the sovereign—even if the various prominent theories in Western thought substantially diverge on the proper scope of government power in shaping the procedural and substantive ingredients of such a property system.[38]

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32. *See* Lehavi, *supra* note 21, at 1997–98 (contrasting arguments regarding appropriation of resources based on economic-efficiency considerations with arguments based on ideas of social justice and equality). For an important recent statement in favor of social responsibility in property, see Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 769–70 (2009).

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

34. *See, e.g.*, Labaton & Andrews, *supra* note 16 (reporting the federal government's seizure of Fannie Mae and Freddie Mac in an effort to stabilize the financial crisis). For a listing and description of all the interventions by the government during the financial crisis, see FED. RESERVE BANK OF N.Y., FINANCIAL TURMOIL TIMELINE 4–5 (2010), http://www.ny.frb.org/research/global_economy/Crisis_Timeline.pdf.

35. *See* YORAM BARZEL, A THEORY OF THE STATE: ECONOMIC RIGHTS, LEGAL RIGHTS, AND THE SCOPE OF THE STATE 23 (2002) (arguing that the state uses third-party power to enforce contractual agreements and that in doing so it delineates legal rights).

36. *See infra* notes 41–43 and accompanying text (discussing the standardization of property entitlements and obligations and the publication of these rights and duties).

37. For the intricate relationships between formal and informal subsociety property regimes, see Amnon Lehavi, *How Property Can Create, Maintain, or Destroy Property*, 10 THEORETICAL INQUIRIES L. 43, 67–74 (2009).

38. *See, e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 5–16 (1989) (offering a critical assessment of prominent property theories, from Marxist to libertarian ones).

In the case of land, the most significant step in the evolution of property in the Anglo-American tradition was the gradual shift of the land tenure system from the original, early medieval interpersonal web of direct services and duties owed through the chain of feudal hierarchy to the impersonal, permanent, and inheritable system of land entitlements.[39] This process reflected and further entrenched the centralization of political power, the shifting focus from the family to the individual as the subject of law, and the constant expansion of market—rather than status—society.[40] Accordingly, two prominent principles that emerged from the formalization of property were, first, standardization of the types of officially recognized forms of property entitlements and obligations (i.e., the *numerus clausus* principle explicit in the civil law system[41] but also highly indicative of the Anglo-American one[42]) and, second, the creation of mechanisms for publicizing such rights and duties, mainly by public recordation or registration of entitlements in land.[43]

The resulting structure of the American legal regime is thus that property rights—ownership, leasehold, servitude, mortgage, etc.—comprise a set of rights and duties that are "endorsed" by the state—to use Felix Cohen's famous depiction of property[44]—and are accordingly enforced and remedied when these rights are being breached.

The specific content of the property bundle is a source of fierce debate, mainly between essentialists—those who believe that certain sticks inhere in property rights with the right to exclude being most often associated with the inevitable core of ownership—and those who take the bundle concept to have a normative meaning such that the array of rights and duties can and should be contextually crafted by state institutions.[45] But regardless of this debate, property is typified by the fact that the various entitlements and obligations,

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39. *See* JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 199–204, 209–11 (5th ed. 2002) (describing the early system of feudal tenures, services, and incidents and the rise of the fee simple).

40. Lehavi, *supra* note 10, at 4.

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

42. *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1, 12–24 (2001) (describing the relative strength of *numerus clausus* in property rights, from the five fixed types of estates in land and concurrent interests to the wider variety of more customizable intellectual property interests).

43. *See* Benito Arruñada, *Property Enforcement as Organized Consent*, 19 J.L. ECON. & ORG. 401, 425–28 (2003) (justifying governmental monopoly in land recording and registration as facilitating private contracts and protecting third parties).

44. *See* Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) (summarizing Cohen's analysis of property in terms of a simple label, which is signed by a private citizen and endorsed by the state, that says "[k]eep off X unless you have my permission, which I may grant or withhold").

45. For an overview of this debate, see Lehavi, *supra* note 21, at 2000–07, providing the history and distinct viewpoints of essentialists and disintegratives, and then examining the weaknesses of each school of thought.

the strands in the bundle that are recognized by the state institutions, are then formally enshrined, respected, and enforced.[46]

One needs, however, not to confuse the formal trait of property with any of the terms "absolute," "clear-cut," or "complete." First, the absolutistic conception of ownership as a "sole and despotic dominion"[47] is long considered obsolete, normatively unworthy, and practically unfeasible.[48] Second, property entitlements and obligations are often not clear-cut either in terms of the nature of the right or in the scope of its remedial enforcement. As Henry Smith shows, whereas some property doctrines follow an "exclusion" strategy, others—such as nuisance conflicts—often adopt a "governance" approach that breaks up property rights into more specific-use entitlements and also tend to contextualize the remedy awarded.[49] This does not undermine, however, the formality of property in the senses elaborated above. Third, and related, the formality of property law does not necessarily mean that property rights are complete, such that law is able to conceive of every possible conflict in advance, explicitly allocate every potential attribute of the resource,[50] or predict every relationship that will develop among persons with respect to the resource.[51] Accordingly, in recognizing that potential loopholes are probably inevitable, property law often resorts to legal standards that leave such conflicts to *ex post* judicial rulings that would fill such incomplete norms with content.[52] Yet this too does not undercut the overall formal structure of property.

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46. Importantly, the specific composition of the bundle is a source of argument even among those who subscribe to an essentialist viewpoint. *See, e.g.*, Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 277–78 (2008) (arguing that the core feature of ownership is not physical exclusion but rather the owner's exclusive right to "set the agenda" for the resource).

47. 2 WILLIAM BLACKSTONE, COMMENTARIES *2.

48. *See, e.g.*, Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 603–06 (1998) (describing the limitations and qualifications of Blackstone's notion of property as exclusive dominion and noting that Blackstone himself was aware of many of these problems with his theory).

49. *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 972–73 (2004) (discussing modes of delineating property rights and comparing "exclusion" regimes, in which the law grants owners a "gatekeeper" right to exclude others from a resource, to "governance" regimes, which focus on proper use of a resource).

50. *See* YORAM BARZEL, ECONOMIC ANALYSIS OF PROPERTY RIGHTS 90–91 (2d ed. 1997) (stating that describing and protecting property consumes resources, and perfect delineation of property rights is prohibitively costly, so property rights are never perfectly delineated).

51. *See* Amnon Lehavi, Legal Standards in Property 19–32 (Feb. 2, 2010) (unpublished manuscript, on file with Texas Law Review) (laying out a nonexhaustive taxonomy of incompleteness in property to describe why legal designs cannot "predict, allocate, and decide in advance all possible states-of-the-world regarding the bundle of property rights").

52. A seminal work on the rules-versus-standards debate in law is Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). For a slightly different depiction of this type of difference in the context of property, see Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 592–95 (1988).

That said, American property law does place enormous weight on defining types of property interests, crafting the bundle of entitlements and obligations for each one of them, and viewing property rights as worthy of legal validation and protection *as such*[53]—so that the jurisprudential inquiry starts with the identification of rights and duties and whether these were violated, and only then moves to evaluate the effects of the infringement for designing the appropriate remedy. Hence, for example, in the constitutional setting, it is not the loss of value in itself that triggers constitutional scrutiny and intervention, but rather the identification of constitutionally protected rights and a resolution that such rights have been infringed by state action.[54]

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

In *Loretto*, the Court reviewed § 828 of the 1973 New York Executive Law enacted to facilitate tenant access to cable television.[55] Section 828 provided that a landlord may not "interfere with the installation of cable television facilities upon his property" and limited compensation to an amount later set by the State Commission on Cable Television at $1.[56]

The Court accepted the New York Court of Appeals' determination that § 828 serves a legitimate purpose.[57] Yet, portraying the power to exclude as "one of the most treasured strands in an owner's bundle of property rights," the Court viewed permanent physical invasion to land as qualitatively different from other types of intervention, noting that a special injury occurs when such an invasion and occupation is made by "a stranger,"[58] and concluded that state-authorized permanent invasions constitute a taking per se.[59] On remand, the New York Court of Appeals upheld the State Commission's determination regarding the $1 compensation, relying, *inter alia*, on the relatively insignificant market-value damage to an owner's property by attachment of cable facilities.[60] And yet, *Loretto* remains deeply rooted in

53. *See, e.g.*, Chi., Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 241 (1897) (finding that a violation of a property owner's rights in his property is, on principle, an unconstitutional violation of due process).

54. *Id.*

55. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982) (summarizing the impact of N.Y. EXEC. LAW § 828 (McKinney Supp. 1981–1982)). Prior to 1973, Teleprompter obtained installation permits from property owners along the cable route in return for a standard rate of 5% of the gross revenues that it realized from the particular property. *Id.* at 422–24.

56. *Id.* at 423–24.

57. *Id.* at 425.

58. *Id.* at 435–36.

59. *See id.* at 441 (affirming the traditional rule that a permanent physical occupation is a taking).

60. *See* Loretto v. Teleprompter Manhattan CATV Corp., 446 N.E.2d 428, 434–35 (N.Y. 1983) (concluding that the due process requirement of just compensation had been met).

American takings jurisprudence as constituting a rule that any type of permanent government invasion to land, regardless of its actual effects, violates constitutionally protected property rights.[61]

Even more instructive in this respect are the Court's decisions in *Phillips v. Washington Legal Foundation*[62] and later in *Brown v. Legal Foundation of Washington*.[63] The two cases dealt with the Interest on Lawyers' Trust Accounts (IOLTA) programs adopted in different states. Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in a bank account, with the interest income generated by the funds being paid to foundations that finance legal services for low-income individuals.[64] The Court generally recognized the respondents' argument that each one of the separate client funds was too small to generate interest income in itself, such that there was no direct economic loss,[65] but at the same time held that:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. For example, in *Loretto* . . . we held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it." While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.[66]

In *Brown*, in a 5–4 decision, the Court once again held that the IOLTA programs constituted a taking, since the interest of the bank accounts' beneficial owners was "taken for a public use when it was ultimately turned over to the Foundation."[67] But the Court then went on to say that no "just compensation" was due for the taking because "compensation is measured by the owner's pecuniary loss—which is zero whenever the Washington law is obeyed" so that "there has been no violation of the Just Compensation Clause of the Fifth Amendment in this case."[68]

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61. *See, e.g.*, Eric Kades, *Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application*, 97 NW. U. L. REV. 189, 199 (2003) (acknowledging that permanent state invasions are, per se, unconstitutional takings).

62. 524 U.S. 156 (1998).

63. 538 U.S. 216 (2003).

64. *Phillips*, 524 U.S. at 156.

65. *See id.* at 169 (observing that the one IOLTA provision that might result in a generation of net interest was not being enforced).

66. *Id.* at 169–70 (citations omitted).

67. *Brown*, 538 U.S. at 235.

68. *Id.* at 240.

One may be left to wonder—as the dissenting opinion in *Brown* did[69]—what point is there in recognizing an infringement of property rights as a "taking" but at the same time holding that no compensation is due. Puzzling and controversial as this ruling may be,[70] it does seem to reflect a persisting leitmotif in U.S. property law, by which formal property rights, and not value, are the subject of legal protection,[71] whereas lost private value serves as a benchmark—though not the only possible measure—in designing the remedy.[72]

As a matter of fact, the less clear the issue of formal rights, the "muddier" the applicable legal doctrine. Consider, for example, the body of law that deals with nonconfiscatory regulations that adversely affect private assets. It is governed by the extremely complicated and ad-hoc test developed in *Penn Central Transportation Co. v. New York City*,[73] according to which the court examines: (1) "[t]he economic impact of the regulation on the claimant"; (2) the extent of interference with "distinct investment-backed expectations"; and (3) "the character of the governmental action."[74]

Although at least one prong of the test seems to focus on value as an independent factor that should be considered to determine whether a taking has occurred, it seems that the enormous confusion that governs regulatory takings can be attributed to the fact that the Court has been unable to address a more fundamental, straightforward question: What kind of legal right, if any, does a person have to develop her privately owned land?[75] The difficulty in defining the nature and extent of such a strand and the ensuing ad hocery are understandable, yet they emphasize that when the Court moves away from the notion of rights, it truly struggles in shaping its takings jurisprudence.[76]

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69. *See id.* at 252 (Scalia, J., dissenting) ("Perhaps we are witnessing today the emergence of a whole new concept in Compensation Clause jurisprudence: the Robin Hood Taking . . . . [T]o extend to the entire run of Compensation Clause cases the rationale supporting today's judgment . . . would be disastrous.").

70. Debate lingers as to the finding of a taking in this case. *See* MERRILL & SMITH, *supra* note 33, at 1333 (questioning whether the Court engaged in inappropriate "conceptual severance" of the right to the interest as distinctive of the overall right to the principal in a single account balance). Debate lingers even more so as to the question of compensation. *See, e.g.*, Christopher Serkin, *Valuing Interest: Net Harm and Fair Market Value in* Brown v. Legal Foundation of Washington, 37 IND. L. REV. 417, 418 (2004) (criticizing *Brown*'s compensation principle of "net harm" as inconsistent with just compensation precedents).

71. *See* MATTEI, *supra* note 41, at 172 ("Western legal tradition has developed almost entirely around the protection of property rights.").

72. *See id.* at 178–79 (discussing the use of an injunction as a remedy when monetary damages do not guarantee the property right).

73. 438 U.S. 104 (1978).

74. *Id.* at 124.

75. *See* Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679, 701–02 (2005) (expressing concern that an owner's right to build on her own land has in some cases effectively ceased to exist).

76. *See infra* text accompanying notes 255–59.

B. . . . and Its Market Propensity

The relationship between property rights and markets might seem straightforward at first glance, but it is far more subtle and intricate, and avoids inherent causality in either direction.

The right of alienability, i.e., the right to transfer property rights in assets to others, is considered to be a standard ingredient of the institution of property. Beyond the clear economic benefit that it endows on the property owner by allowing her to realize the asset's long-term value at the timing of her choice, it is also perceived as enhancing her autonomy in controlling the identity of the successor to the rights, be it in case of a transfer for consideration (sale) or for none (gift, inheritance).[77] In some outstanding cases, the legal system prohibits alienability when it considers the general societal benefits of allowing assets to end up in the hands of those who value them most to be much more than offset by particular moral, societal, or economic considerations—prohibitions on most types of transfers of body parts being a prominent example.[78]

However, the options for legal ordering of alienability do not necessarily narrow down to either authorizing property owners to act in an unfettered market or prohibiting owners altogether from engaging in any sort of transfer. Alienability may be legally sanctioned but at the same time be denied certain features of the free market, e.g., by restricting the identity of potential buyers or sellers, limiting overall supply, substantially intervening in the terms of transference, or otherwise constructing the bundle of rights in certain resources so as to constrain the development of wholly decentralized, impersonal markets (consider instances such as tradable allowance schemes,[79] taxi medallions,[80] tenancy by the entirety,[81] or a partner's interest in the standard business partnership[82]).

Other legal structures for transfers of rights may include pricing mechanisms that deviate from free-market rules. This is the case, for example, with the rapidly growing sector of "shared equity housing,"[83] most

77. MERRILL & SMITH, *supra* note 33, at 531.

78. For a discussion of inalienability in the body-parts context, see Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2132–52 (2003).

79. *See* Carol M. Rose, *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes*, 10 DUKE ENVTL. L. & POL'Y F. 45, 51, 68 (1999) (analyzing the effectiveness of tradable environmental-allowance systems, which allow environmental rights to be traded to conserve resources).

80. *See* Katrina M. Wyman, Is Bentham Right? The Case of New York City Taxi Medallions 18–23 (Dec. 15, 2008) (unpublished manuscript, on file with Texas Law Review) (exploring the rights and regulations of transferring taxi medallions in New York City).

81. *See* MERRILL & SMITH, *supra* note 33, at 635–36 (describing tenancy by the entirety).

82. *See infra* text accompanying note 112.

83. *See* JOHN EMMEUS DAVIS, NAT'L HOUS. INST. SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE RESTRICTED, OWNER OCCUPIED HOUSING 2 (2006), *available at* http://www.nhi.org/pdf/SharedEquityHome.pdf (explaining that nonprofit organizations, private

dominantly Community Land Trusts (CLTs).[84] One of the underlying features of CLTs is that upon resale of an individual housing unit, the CLT repurchases the property itself or monitors its direct transfer from seller to buyer, restricting the resale price to a formula that aims at giving the departing homeowner a fair return on her investment while giving future income-eligible homebuyers fair and affordable access to this housing.[85] Hence, CLTs formally circumvent free-market pricing in transfers of housing units.[86]

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

A prominent example of property law's market propensity is the evolution of the land system. In subpart II(A), I mentioned the major shift in English land law, by which the original feudal system was gradually replaced by an impersonal, inheritable, and marketable system of property rights, reflecting major sociopolitical changes.[87]

The intensification of such processes typified American law's early endeavors to break ranks with those elements of English land-law heritage that were still considered archaic in the American context.[88] Thus, for example, Thomas Jefferson's view that the fee tail and primogeniture were detestable means of perpetuating a hereditary aristocracy led him to persuade

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lenders, and governmental agencies have all increased their involvement with resale-restricted owner-occupied housing in recent years).

84. Briefly, the CLT is a community-based nonprofit that acquires land for the purpose of retaining ownership in it forever for affordable housing. *Id.* at 18. The individual homeowner leases the land for a long period of time and is the owner of the building that is erected on the land. *Id.* "The lease agreement on the land divides the property bundle between the individual and the CLT both during the tenancy and upon its transfer by inheritance or resale." Amnon Lehavi, *Mixing Property*, 38 SETON HALL L. REV. 137, 201 (2008). Thus, for example, the homeowner must occupy the land as his primary residence, may not sublease the land without the CLT's consent, and is obligated to properly maintain the building. DAVIS, *supra* note 83, at 19. "If the homeowner fails to pay the mortgage, his interests may be taken over by the CLT." Lehavi, *supra*, at 201.

85. DAVIS, *supra* note 83, at 19.

86. *See* Lehavi, *supra* note 84, at 199–202 (describing the alternative process by which CLTs transfer housing units).

87. *See supra* text accompanying notes 39–40.

88. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 413 (2d ed. 1985) ("Inherited doctrines did not last if they seemed to clash with the needs of the American economy."). For the immigration of English land law to the American colonies and later to the United States, see *id.* at 58–65, 230–45, 412–21.

the Virginia legislature to abolish these mechanisms around the time of the American Revolution, with most other state legislatures soon following suit.[89] More broadly, American law consistently worked to entrench concepts of standardization of estates and types of property rights, promote free alienability, coordinate registration of transactions in land, and facilitate a broad, impersonal free market for real estate.[90] Not surprisingly, the fee simple soon came to dominate the landscape of American real estate, as it seemed to epitomize the idea of clearly delineated, strong property rights that allow for easy recordation, facilitation of credit, and broad mandate for transfer of rights.[91]

Moreover, in view of the fact that public housing traditionally has not played a dominant role in shaping land development,[92] the real-estate economy that developed over the years was one of a decentralized market that is governed mainly by the forces of supply and demand,[93] and is regulated chiefly by local governments that in turn rely extensively on value-based property tax as a major source of public revenue.[94] Real property has thus been dominated, for better and for worse, by market forces and trends.

This market propensity is evident in the crafting of property institutions for other resources. Intellectual property law, for example, is an immensely broad field that does not follow a single blueprint either in its normative underpinnings or in the doctrinal rules applying to each one of its different branches.[95] But it seems safe to say that the market is not only the mechanism through which intellectual property rights are being implemented and

89. JESSE DUKEMINIER ET AL., PROPERTY 188 (6th ed. 2006).

90. *See, e.g.*, Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1189–90 (1982) (explaining the development of new types of servitudes in America both by the reduced fear of impeding assignability in a country with vast resources of uncultivated land and by the existence of an efficient recording system in the United States from early on).

91. *See, e.g.*, Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1368–71 (1993) (discussing the benefits of fee ownership in land).

92. *See* Robert C. Ellickson, *The Mediocracy of Government Subsidies to Mixed-Income Housing Projects* 4–7 (Yale Law & Econ. Research Paper No. 360, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1217870 (noting the varied public-housing programs that have been adopted since the 1930s).

93. Major exceptions to this have been the federally sponsored mortgage insurance and secondary mortgage market starting as of the mid-1930s. *See* ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES: AN INTRODUCTION 47–68 (2006) (outlining the history of housing finance in the United States).

94. Amnon Lehavi, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 948–52 (2006).

95. *See, e.g.*, Yochai Benkler, *Through the Looking Glass: Alice and Constitutional Foundations of the Public Domain*, 66 J.L. & CONTEMP. PROBS. 173, 175 (2003) (arguing that copyright law is defined by a tension between doctrines rather than by a single rule); Daniel A. Crane, *Intellectual Liability*, 88 TEXAS L. REV. 253, 254 (2009) (arguing that recent developments in intellectual property law represent "a shift from a property regime to a liability regime"). There are of course other approaches to intellectual property law, emphasizing values such as democracy, openness, and pluralism, calling in turn to extend the scope of public domain in regard to such resources. *See* Benkler, *supra*, at 181–82 (discussing the various values of the public domain, a concept exemplified by the Internet and television).

given economic substance, but is also a dominant goal in its own right in the very creation of certain intellectual property rights. U.S. intellectual property law has thus been portrayed as fulfilling two distinct fundamental functions: first, promoting innovation in technological or expressive works (being a principal motive behind patent, copyright, and other laws), and second, "ensuring the integrity of the market place" (pertaining to trademark law and issues of unfair competition law).[96]

As for innovation, the choice to promote it through the allocation of exclusive property rights in the information output, rather than through other potential legal mechanisms for reward—such as a governmental grant for the innovative effort—is by no means self-evident and has been the subject of increasing debate in legal and economic literature.[97] This is especially so in view of the concern that the benefits of awarding exclusive property rights may be offset by problems such as consumer deadweight loss,[98] inefficient underutilization of information for further development by others,[99] and transaction costs that may prohibit efficient reallocation of the rights.[100]

Yet irrespective of the normative debate on whether the mechanism of exclusive property rights is better than others, by awarding innovators exclusive rights such as using, selling, displaying, or reproducing the protected information, the legal system consciously absolves itself of the need to measure and legally entrench the value of the input or of reasonable expected returns to it.[101] Rather, law awards the innovator with an exclusive right to capitalize on her innovation through the market for the period of protection, thus granting the forces of market demand the power to decide the economic fate of the information's realized value. While a small percentage of patent- or copyright-protected information turns out to enjoy large, long-enduring streams of incomes, most others turn out to be commercially insignificant or

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96. *See* Peter S. Menell & Suzanne Scotchmer, *Intellectual Property Law*, *in* 2 HANDBOOK OF LAW AND ECONOMICS 1473, 1475 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (exploring the "economic dimensions of the intellectual property field" and the "principle objective[s] of intellectual property law").

97. *See generally* Steven Shavell & Tanguy van Ypersele, *Rewards Versus Intellectual Property Rights*, 44 J.L. & ECON. 525 (2001) (explaining both sides of the scholarly debate on preferable mechanisms to facilitate innovation).

98. *See* Menell & Scotchmer, *supra* note 96, at 1476–77 (arguing that the protection of intellectual property is necessary because a competitive market is unable to support an efficient level of innovation yet acknowledging that this very protection may result in "dead weight loss to consumers").

99. *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES 1–22 (2008) (arguing that the creation of too many separate owners of a single resource leads to a failure of cooperation because each owner can block the others' use).

100. *See* Menell & Scotchmer, *supra* note 96, at 1477 (pointing out that intellectual property does not "guarantee that the research effort will be delegated efficiently to the most efficient firms, or even the right number of firms").

101. *See* Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information*, 116 YALE L.J. 1742, 1748 (2007) (arguing that exclusive property rights allow returns from inputs without the need to value the uses of the inputs).

outright failures.[102] Hence, notwithstanding any intrinsic autonomy-based benefits that a creator may enjoy when she is recognized as formal owner of her innovation, the actual economic value of such protected information is not in any way enshrined or guaranteed by the state, as opposed to the protection of the legal right in it.

The second major pillar of intellectual property law, that of "protecting the integrity of the marketplace," is obviously no less inclined towards the market. It is in fact the cause for the creation of the rights. The conventional economic rationale for protecting trademarks or restricting certain types of unfair competition is to ensure the "quality of information in the marketplace" so that consumers are not misled or confused about the source of goods and accumulated information on producers' goodwill and products' quality.[103] In this sense, granting legal rights and subsequent causes of action to producers is conceived largely as a vehicle to promote the functionality of the market.[104]

As a final example, the unique property structure of business organizations, and especially of the modern corporation, is the subject of much analysis.[105] My interest here is in the property rights of corporate shareholders, in view of the corporation's separate legal entity and its ownership of the corporation's assets.[106] This "asset partitioning"[107] between the corporation's separate pool of assets and the personal assets of the firm's owners calls into question what it is exactly that the shareholder "owns."

In their classic work, *The Modern Corporation and Private Property*, Adolf Berle and Gardiner Means define the shareholder interest as "passive property," endowing him with the beneficial interest of "an expectation that a portion of the profits remaining after taxes will be declared as dividends, and

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

103. *See* Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1241 (2008) ("Trademarks are an efficient and simple means of communicating information. Sellers use advertising and trade symbols to inform likely buyers about desirable qualities and characteristics of their goods. Trademarks ensure that consumers associate these characteristics with the right product.").

104. The legal system therefore protects formally recognized rights but not an independent commitment to guarantee some benchmark of economic value for the producer of information. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 354–56 (2003) (stating that the only remedy for lost trade secrets is through conventional common law; the law gives no remedy when a trade secret has been leaked or unmasked by an opponent).

105. The two foundational works on this topic are probably ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (Transaction Publishers 1991) (1932), and Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

106. *See generally* ROBERT CHARLES CLARK, CORPORATE LAW 15–19 (1986) (explaining the legal bases for partnerships' and corporations' legal personalities).

107. *See* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 392–96 (2000) (defining "asset partitioning" as "the partitioning off of a separate set of assets in which creditors of the firm itself have a prior security interest").

that in the relatively unlikely event of liquidation each share will get its allocable part of the assets."[108] This is in addition to the right to vote (which they deemed to be diminishing to negligible importance) and the right to bring action against the corporation in cases of theft, fraud, or certain wrongdoing by the managers.[109]

According to Berle and Means, shareholders in the corporation have "exchanged control for liquidity."[110] Although the argument that power and control in the corporation has shifted away from the common shareholders is subject to much criticism and indeed seems to be overbroad in reality, the second part of their insight seems to adequately reflect what is perhaps the most striking feature of shareholding: the nearly unconstrained ability to sell the shares in the market "for ready cash."[111] As Robert Clark notes, the free transferability of shares and the existence of organized stock markets make the shareholder's bundle of rights easily sold and realized, in stark contrast to the property interest of a partner in a business partnership.[112]

Somewhat surprisingly, the doctrinal development of the shareholder's right to sell his shares has been rather sparse,[113] perhaps because it has been seen as self-evident in the absence of specific circumstances that justify the imposition of limits on this right. In practice, the right to sell shares in the market is considered to be much more significant and readily viable than the right to receive actual dividends, and thus seems to reflect the economic core of property rights in corporate shares.[114] This means that similar to other types of resources discussed above, property rights in corporate shares are very much market-oriented. In other words, while the legal system protects the right of shareholders to approach the market and not to be abused by other shareholders or the corporate managers,[115] the price of the share is generally determined by the market and no set or minimal value is enshrined by law as part of the property right. The decentralized market setting of the value of ownership obviously has its price tag, as we are witnessing in the

108. BERLE & MEANS, *supra* note 105, at xxxi.

109. *Id.*

110. *Id.* at xvi.

111. *Id.* at xxxi.

112. CLARK, *supra* note 106, at 14–15.

113. *See* J.P. Ludington, Annotation, *Validity of Restrictions on Alienation or Transfer of Corporate Stock*, 61 A.L.R.2d 1318, § 7 (1958) (noting that no American decisions have addressed the validity of an absolute prohibition on the transfer of stock contained in articles of incorporation).

114. *See* Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 407 (2006) (conceptualizing the right to sell alongside the right to elect directors as the two "fundamental rights").

115. *See id.* at 421–24 (describing the rights of shareholders to sue shareholders and managers under state and federal law).

current financial downturn.[116] But this principle has been, at least until now, the key to the social and legal understanding of what stock ownership means.

III. Property-System Analysis of the Taking/Taxing Taxonomy

A. The Judicially Created Divide and Its Critique

The judicial treatment of taxing as a governmental power that is inherently different from other types of economic deprivations of private wealth is one of the most long-standing and entrenched concepts of American constitutional law.[117] The constitutional "power to lay and collect taxes"[118] had been depicted by the Court from early on as "essential to the very existence of government,"[119] and it has consequently been viewed as located well within the domain of the legislature.[120] Without going into a detailed chronology of the fate of different channels of constitutional challenges to tax legislation, this basic conception of taxation means that courts broadly defer to legislatures and guard only against rare instances in which the act demonstrates a gross abuse of the taxing power.[121]

Moreover, the Court has made clear that taxation for a public purpose does not even trigger the Takings Clause because taxation, "however great," is not considered "the taking of private property for public use, in the sense of the Constitution."[122] Thus, although the Court has stated that it will intervene in "rare and special instances" in which the tax is "so arbitrary as to constrain to the conclusion that it was not the exertion of taxation but a confiscation of property; that is, a taking of the same in violation of the Fifth Amendment,"[123] the judicial review of taxation has been conceptually and doctrinally divorced from takings jurisprudence, with the Court emphasizing time and again that these two realms are "essentially different."[124] Put somewhat differently, tax legislation is being scrutinized only when the governmental act is considered to be illegitimate on its own terms: the focus is on the appropriateness of the public action and less on the nature and extent of harm to the taxpayer. This is unlike takings law, under which an

116. *See, e.g.*, Steven Gjerstad & Vernon L. Smith, Editorial, *From Bubble to Depression?*, WALL ST. J., Apr. 6, 2009, at A15 (explaining that price trends and momentum can drive bubbles even when traders know the true value of an asset).

117. Mazza & Kaye, *supra* note 5, at 641.

118. U.S. CONST. art. I, § 8, cl. 1.

119. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819).

120. Leo P. Martinez, *"To Lay and Collect Taxes": The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL'Y REV. 111, 113–14 (1999).

121. Kades, *supra* note 61, at 204–06; *see also* Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85, 102–11 (1996) (explaining the conceptual distinction between taxation and takings); *cf.* Martinez, *supra* note 120, at 126–44 (explaining how this premise would permit congressional implementation of a progressive taxation scheme).

122. County of Mobile v. Kimball, 102 U.S. 691, 703 (1880).

123. Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 24–25 (1916).

124. *Kimball*, 102 U.S. at 703.

infringement of property rights may require constitutional compensation even if the governmental act is otherwise legitimate, reasonable, and furthers a public purpose.[125]

This traditional divide has been increasingly criticized. Commentators, looking at the substantive effects of tax legislation—the amounts extracted, the proportionate sacrifice of the taxpayer vis-à-vis others, and the reciprocity of governmental benefits in return for the tax—have argued that the cases in which a taxpayer is forced to surrender substantial value on a disproportionate or nonreciprocal basis are not inherently different from the taking of property.[126] In other words, whatever, if any, the institutional or power-conferring-source differences between tax legislation and other government measures are, overlaying substantive principles such as fairness, proportionality, or efficiency in burden sharing for the public benefit are those that should govern legal delineation.[127]

Accordingly, numerous writers, albeit with very different normative agendas, have called to formally unify the legal principles pertaining to takings and taxings. At one end of the spectrum, Richard Epstein has seen the conceptual similarity as vindicating the case for circumventing any type of governmentally imposed burden that does not conform to strict proportionality, most notably progressive income taxation.[128] Calvin Massey, driven by a similar normative agenda, calls to extend the various takings-doctrine tests to progressive taxation,[129] such that in appropriate cases the court could "conclude that the portion of income taken by progressive taxation is an uncompensated taking either because it is a permanent dispossession or because it deprives the taxpayer of all economically viable use of that severed strand of property."[130]

At the other end, progressive writers take a different route in calling for such a synthesis. Eric Kades identifies an overreaching constitutional principle of preventing the singling out of a few property owners for an unfair share of public burdens while allowing reasonably constructed progressivism, and thus calls to apply a "Continuous Burden Principle" that

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125. *See* Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 55–56 (1996) (chronicling takings law jurisprudence).

126. *See* Eduardo Peñalver, *Regulatory Taxings*, 104 COLUM. L. REV. 2182, 2185–91 (2004) (reviewing the scholarly literature representing the different sides of the taking/taxing debate).

127. *See, e.g.*, Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 292 (1990) (suggesting that a system of government that protects property rights would minimize the use of broadly based taxes that do not directly entitle the taxpayer to corresponding benefits).

128. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 283–305 (1985) (analyzing special assessments, windfall-profits taxes, severance taxes on the extraction of minerals, income taxes, and estate and gift taxes to determine their validity based on the principle of proportional impact).

129. *See* Massey, *supra* note 121, at 111–23 (arguing that a constitutional rule of proportional taxation is required to make taxation consistent with the Takings Clause).

130. *Id.* at 124.

would monitor against two discontinuous "jumps" in marginal burdens imposed on owners or taxpayers.[131] Eduardo Peñalver identifies two principles that should guide all inquisitions as to the constitutionality of governmental burdens: (1) effect on nonfungible property interests and (2) singling out of owners for disparate treatment.[132] Yet Peñalver works in exactly the opposite way from Epstein or Massey. Viewing taxation doctrines as ones that enjoy "greater consensus," he suggests that it is rather takings law that should make systematic adjustments, such that many types of governmental interventions that are currently being considered as takings—physical or regulatory—should be regarded as legitimate forms of "regulatory taxation," thus narrowing the scope of the takings doctrine.[133]

Irrespective of these normative divergences, all of these writers are probably correct in their basic intuition that an isolated, "one on one" comparison of taking and taxing cases yields little support for the type of deep and uncompromising divide created by the courts over the years. Possible "reconciling theories"[134] trying to distinguish either the facts of specific cases, the economic consequences of certain taxing schemes versus confiscatory or regulatory acts, or the doctrinal sources of government authority as a ground for such a categorical disconnect are bound to encounter some substantial degree of incoherence or overlapping.

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

B. Reevaluating the Taking/Taxing Line Drawing

1. The Divide and the Constitutional Protection of Rights, Not Value.— What exactly is it about property that the Constitution protects under the Fifth Amendment? My argument is that it does not protect the asset's value

131. Kades, *supra* note 61, at 224–47.

132. Peñalver, *supra* note 126, at 2215–18, 2223–28.

133. *Id.* at 2248–51.

134. *See id.* at 2192 (arguing that "Reconciling Theories" concentrating on only one element of takings law fail to account for "subsidiary fixed points," such as the need to compensate those whose real property is appropriated by the government).

in itself against government-inflicted losses, but rather that it shields those legally recognized rights contained within the statutorily or judicially crafted bundle of rights in regard to such assets, with the question of restoring lost value coming into play mostly during the second stage of remedying the infringement.[135] The thrust of the judicial enterprise of creating content in constitutional property thus lies in delineating the type of protected rights and entitlements and the kind of circumstances under which governmental invasion of such rights amounts to a constitutional violation that requires a remedy.

Moreover, the unequivocal embracement of fair market value as the measure of constitutional "Just Compensation"[136] further illustrates that the question of value is not only contingent on the identification of an otherwise protected right, but also that the quantification of compensated-for value is not determined a priori. The top-down constitutional protection of rights is not followed by an enshrinement of a certain socially determined stream of benefits or a capitulation to the subjective demands of the injured owner; value is set by aiming to mimic the market and trying to identify what would have been agreed upon between a "willing buyer" and a "willing seller."[137] Opting for fair market value frees the government from making difficult policy choices about what is the proper value that a person is entitled to enjoy as owner of a certain resource, a determination that may have enormous implications on the government/individual property relationships in many ways beyond the specific instance of a taking.[138]

In these two fundamental respects, the public law of property very much resembles the American private law of property. In setting up a system of formal, enforceable private property rights that applies among members of society, the law determines what interests or strands are enshrined and under what circumstances they would be enforced and remedied in case of a breach

135. This is not to say that the question of loss is irrelevant to the first stage of inquiry. As I showed in subpart II(A), the amount of loss is one of the prongs of the *Penn Central* test for regulatory takings—but as I argued, this is exactly why regulatory takings law is so muddy. *See supra* text accompanying notes 73–76.

136. U.S. CONST. amend. V, cl. 4.

137. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("[T]he owner is entitled to receive 'what a willing buyer would pay in cash to a willing seller' at the time of the taking." (quoting United States v. Miller, 317 U.S. 369, 374 (1943))).

138. *See* Katrina M. Wyman, *The Measure of Just Compensation*, 41 U.C. DAVIS L. REV. 239, 244 (2007) (criticizing the sweeping adherence to "subjective" measures and calling to incorporate objective parameters for compensation that will reflect broader societal perspectives about the goals of property). Other legal systems do tie up the question of just compensation for takings to fundamental societal concepts about property. For example, § 25(3) of the 1996 South African Constitution, dealing with compensation for expropriation, creates a multi-factor test, in which the market value is but one component, and aims at achieving "an equitable balance between the public interest and the interests of those affected." S. AFR. CONST. 1996 § 25(3).

by another.[139] But unlike the state endorsement of such rights and correlative duties, no such guarantee exists in regard to the actual value that the legally undisturbed owner would enjoy.[140] As Lee Anne Fennell notes, whereas a homeowner more or less controls the "onsite factors" of the resource (and I would add the control of onsite-related legal infringements such as nuisances), the owner can do no more than hope for the best regarding the substantial value influences of "offsite factors" such as "neighborhood changes and larger housing market trends."[141]

The private law of property thus enshrines a certain bundle of rights and access to the market. But it does not vouch for the actual stream of benefits that the owner derives, either as consumption or as investment within the market. What one therefore legally owns is the set of exclusive rights allocated to her, not the resource's value.[142] Accordingly, although different in many ways from the public law realm, the private law of property similarly protects rights, not value.

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

Disregarding these elements makes it very difficult to understand why the Court is taking pains to hold that the governmental acts in the above-discussed *Loretto* and *Washington Legal Foundation* cases constitute a taking, and why it hails the significance of constitutionally recognized strands such as possession, use, or alienability and accordingly refrains from awarding compensation when it is obvious at the outset that no actual economic or market value loss has occurred.[143] But this is the way in which American property law works: it attributes enormous significance to identifying the formal features and attributes of property rights and to pointing out the cases in which these recognized rights are infringed upon—although it is

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139. *See* Wyman, *supra* note 138, at 246 (explaining the process of formulating a system of property law by analogizing the common justifications for takings law, justice and deterrence, to similar justifications for tort law).

140. *See* EPSTEIN, *supra* note 128, at 3 (discussing the uncertainty of the value of the enjoyment of property rights apart from state endorsement).

141. Lee Anne Fennell, *Homeownership 2.0*, 102 NW. U. L. REV. 1047, 1049 (2008).

142. *See* J.E. Penner, Value, Property, and Wealth 1–7 (2007) (unpublished manuscript, on file with Texas Law Review) ("To own something is to be in the position of one with a particular property right to it, the property right (or interest) called 'ownership.'").

143. *See supra* subpart II(A).

at the same time careful and pragmatic in selecting the actual modes of intervention, relying as it does broadly on the dominance of markets in value setting.

It is this broader perspective of American property law that helps to explain why taxation is generally considered the lesser evil among the different forms of governmental extraction of private value. The property system is better accustomed to viewing taxation as a background institution, which, although financially significant, creates less uncertainty in figuring out who the owner is and what is the bundle she owns as compared to other types of governmental interventions with property rights in resources.[144]

The starting point of this differentiation is the pragmatic understanding that government must act at times through coercion to finance public goods, solve other collective-action problems, or promote values and goals that cannot be advanced solely through the market.[145] The qualitative nature and extent of such government activity is of course a matter of a fundamental normative resolution, be it a "night-watchman state,"[146] a highly progressive interventionist welfare state, or anywhere in between, but the essentiality of some level of resource coercion in itself cannot be denied.

Given this upfront dictate, the way that typical taxing schemes work, including progressive income or business taxation, may be very irritating to those who pay them, but they do not tend to undermine the broader understanding of who the formal owner and the person who otherwise controls decision making, use, and other legally recognized strands for a given resource is.[147] Taxes also tend to impinge less on the basic freedom that a person has to act in the market (in most cases, taxation is a result of a person's otherwise-autonomous decision to sell or buy, although some specific types of taxes do seek to change actors' incentive structure).[148] Moreover, these are not generally interpreted as reshuffling common

144. *See* JOHN RAWLS, A THEORY OF JUSTICE 274–84 (1971) (arguing that taxation is a conditional institution that exists to further the more essential aspects of governance).

145. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 101 (1965) ("Coercion is a means of assuring the full effectiveness of the communal spirit, which is not equally developed in all members of the community.").

146. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–27 (1974) (announcing the subtle distinction between the minimal state and the ultraminimal state).

147. *See* WALTER J. BLUM & HARRY KALVEN, JR., THE ANATOMY OF JUSTICE IN TAXATION 4–5 (1973) ("[T]he taking of specific property by the state is more intrusive than the creation of obligations to be satisfied in money. . . . [P]erhaps it is suspected that the taking of property will be not systematic or disciplined by principle.").

148. *See* Roy Bahl et al., *The Property Tax in Practice*, *in* MAKING THE PROPERTY TAX WORK: EXPERIENCES IN DEVELOPING AND TRANSITIONAL COUNTRIES 3, 5–8 (Roy Bahl et al. eds., 2008) (reconciling the standard view that property taxes should be designed merely to raise revenues with the conflicting theory that property taxes have the potential to "influence social policy and economic decisions").

understandings about other property institutions that are not directly affected by the tax.[149]

It would be safe to say that although progressive income taxation in the United States is not a matter of consensus, it is not understood by its proponents and opponents alike as giving government carte blanche to similarly intervene with all other types of privately held resources.[150] Even with its various taxing schemes intact, the United States has been perceived from both outside and within as the paradigm of a formal property rights, free-market society.[151] In this respect, taxes are more easily regarded as an isolated phenomenon that does not undercut, and at times—such as with property taxation discussed below—even entrenches ownership, enforcement and protection of rights, and free-market propensity. Obviously, a 100% income tax or anything close to it would be viewed differently by everyone,[152] but this is exactly the kind of "rare and special instances" that take such government deprivation way outside the scope of conventional taxation in American law.[153]

This state of affairs is very different for high profile cases regarding other types of government interventions with private property. I mentioned above the public outcry and legal backlash following the *Kelo* case,[154] but this is in no way an isolated phenomenon. Other key takings cases typically have much broader effects beyond the contours of the specific dispute, and it thus seems clear why the Court is paying such close attention to reviewing these cases and why it retains its ability to intervene in designing and redesigning through them the constitutional landscape of property. Thus, for example, the Court places enormous weight on portraying the nature and scope of the various "strands" such as possession (e.g., *Loretto* or the recent

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

150. *See* Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 480–81 (1987) (recognizing that "consensus on tax reform may be impossible because of disagreements on underlying basic values" but noting that tax policy must respond to certain normative values).

151. *See* Kades, *supra* note 61, at 196 n.32 (contrasting the formalism of some judicial opinions with classical thought).

152. *See id.* at 200 ("The classic view suggests that, at some point, a narrowly focused tax becomes a taking; however, the discrete-asset model does not apply the Takings Clause to such a general liability."); Massey, *supra* note 121, at 104–05 (considering it self-evident that such a tax would violate the Takings Clause).

153. *See* A. Magnano Co. v. Hamilton, 292 U.S. 40, 44 (1934) (collecting authority applying this exception).

154. *See supra* text accompanying notes 23–25.

Wilkie v. Robbins[155] case),[156] use and control (e.g., the *Washington Legal Foundation* cases),[157] or alienability (e.g., the *Hodel v. Irving*[158] ruling on the invalidity of prohibitions on descent of fragmented individual ownership within Indian tribal land).[159]

Whereas all of these cases greatly differ from one another, and thus often lack orderly intrafield rules and classifications in the delineation of the spectrum of takings, they do seem to share one distinctive feature. They all touch in some significant manner on the core understandings of the institution of property and the underlying features of the American property system, and thus go well beyond questions of the legitimacy of government authority or the sheer economic consequences of the forced contribution of privately held value. This, so I argue, substantially distinguishes them from tax disputes.

2. Incorporating the Public/Private Interface in Property.—The interrelationship between the public and private law of property is extremely complex, although it receives surprisingly scant attention within the broader public law/private law discourse.[160] Whereas a detailed analysis is outside the scope of this Article, a few observations are in order to explicate why this intricate issue may further support the taking/taxing differentiation.

I referred above to an underlying similarity between the public and private law of property regarding the two basic traits of rights formalism and market propensity.[161] This does not mean, of course, that these two branches of law are synchronic or anything close to it. There are good reasons to

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155. 551 U.S. 537 (2007).

156. *See id.* (rejecting a claim by a Wyoming rancher, who argued that six years of trespass and harassment by a federal agency looking to attain a free easement constituted a taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (declaring that the "power to exclude," which is inherently bound up with the power to possess, "has traditionally been considered one of the most treasured strands in an owner's bundle of property rights").

157. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 240 (2003) (rejecting a challenge to the application of IOLTA rules to "Limited Practice Officers (LPOs), nonlawyers who are licensed to act as escrowees in real estate closings"); Phillips v. Wash. Legal Found., 524 U.S. 156, 172 (1998) ("While IOLTA interest income may have no economically realizable value to its owner, its possession, control, and disposition are nonetheless valuable rights.").

158. 481 U.S. 704 (1987).

159. The Court invalidated as a taking the provision of § 207 of the Indian Land Consolidation Act, Pub. L. No. 97-459, tit. II, 96 Stat. 2519 (1983). *Hodel*, 481 U.S. at 718. Section 207 prohibited the descent or devise of any individual interest in Native American tribal land that represented less than two percent of the total tract, so that upon the death of the fractional owner the shares would escheat to the tribe. *Id.* at 704.

160. *See, e.g.*, N.E. Simmonds, *Justice, Causation and Private Law*, *in* PUBLIC & PRIVATE: LEGAL, POLITICAL AND PHILOSOPHICAL PERSPECTIVES 149, 149 (Maurizio Passerin d'Entrèves & Ursula Vogel eds., 2000) ("[T]he distinction between public and private law will only rarely play a dispositive role in the decision of litigated disputes . . . . Legal practitioners and judges are concerned with the immediate business of representing clients or deciding particular cases. It is therefore left to the legal theories to speculate about the public/private distinction.").

161. *See supra* text accompanying notes 141–42.

award government with certain powers that should not be granted to private persons who interact with private property owners—including the power to exercise coercion at times—just as there are solid arguments to impose certain duties and restrictions on government that should not apply, at least not in the same magnitude, to individuals, including limits on discrimination against owners or nonowners,[162] due process requirements,[163] transparency in property dealings,[164] and so forth.

Yet even given these differences, it is clear enough that no hermetic separation exists between public law and private law in just about any specific doctrine.[165] First, as I have shown elsewhere, simply drawing the line between public and private in property is especially complicated as compared to other fields of law, in a way that mandates that decisions shaping the core aspects of property law must be made by state entities entrusted with the power and duty of collective decision making—chiefly legislative and administrative bodies supervised in turn by judicial review.[166]

Second, in dealing with specific doctrines in takings law, it is evident that the Court is aware of the potential spillover effects and interrelationships between the two realms of property law. In Part I, I mentioned the way in which the Court, in deciding the key takings cases of *Loretto* and *College Savings Bank*, referred to its private law jurisprudence in defining the "treasured" right to exclude as a mainstay of constitutional property.[167] Hence, although takings cases touch on the distinctive government power to coercively take or regulate property, the way in which the bundle of rights is

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162. The borders between public and private action in this respect are not, however, clear-cut. In the famous *Shelley v. Kraemer* case, the Court invalidated race-based restrictive covenants in privately owned houses, reasoning that "in granting judicial enforcement of the restrictive agreements . . . the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand." 334 U.S. 1, 20 (1948). An even earlier example, the roots of which are located in common law, is the set of limits on exclusion from privately owned public accommodations. *See* Joseph William Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283, 1348–51 (1996) (discussing the scope of these limitations).

163. *See* MERRILL & SMITH, *supra* note 33, at 1164–91 (describing how due process provides both procedural and substantive protection of private property rights from government interference).

164. Consider, for example, the prohibition on government to secretly purchase land for public purposes—a limit that does not apply to private actors. *See* Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 31–33 (2006) ("[W]hile private parties can choose not to disclose the nature or location of their projects, government projects are subject to public accountability and thus publicly known in advance.").

165. *See* Simmonds, *supra* note 160, at 150 ("Unable to proceed from the common understanding of [the public/private] distinction, therefore, we can only proceed from theoretical articulations that are inherently contentious.").

166. *See* Lehavi, *supra* note 21, at 2012–25 ("[T]he integrity of property as a legal system designed to send broad signals for specific properties and resources is preserved when rival ethical and other considerations are battled out publicly through the prism of society's collective institutions.").

167. *See supra* text accompanying notes 26–27.

defined in such cases has bearing—conceptual and practical—on the way in which we basically understand property in seemingly parallel conflicts among private stakeholders.

Thus, for example, the power of eminent domain, i.e., the coercive taking of possession and title in privately owned land, is allegedly unique to government.[168] However, conflicts about the limits of the power, such as the *Kelo*-type contested application of the public-use requirement for economic development—meaning in effect the condemning and transferring of land to private entities—have obvious implications on the scope of property rights and the type of legal protection that a person is entitled to against potential incursions by others. Beyond the oft-made point that politically powerful private actors would be motivated to circumvent the market and turn to the government as merely a vehicle to facilitate a coerced private transaction,[169] the delineation of the power of eminent domain for such nonquintessential public uses may have implications for the ways in which persons understand the laws of trespass, building encroachments, servitudes, adverse possession, etc. If the Court in *Loretto* defines the constitutional property rights against uncompensated, permanent government invasion based in part on private law doctrines, might not jurisprudential connections be drawn from the expansion of the power of eminent domain for economic development to a potential erosion of the traditional, property-rule protection against private invasions (i.e., injunction) and to a switch toward liability-rule protection (i.e., compensation)? This is not to say that such a private law switch is necessarily wrong.[170] But the point here is that the potential interconnectivity is not something that courts can ignore, especially when they have drawn their own public/private parallels in past cases.

The same can be said about cross-effects in other takings doctrines. Take, for example, the famous "nuisance exception" to takings, as articulated in late nineteenth- and early twentieth-century cases such as *Hadacheck v. Sebastian*[171] and *Miller v. Schoene*,[172] according to which diminution in property value caused by nuisance-control measures never requires compensation.[173] In the 1992 *Lucas v. South Carolina Coastal Council*

168. However, this power extends to entities such as common carriers that are specifically authorized by statute to do so. *See* Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1710–11 (2007) (illustrating the situations in which governments delegate their powers of eminent domain to private corporations).

169. *See, e.g.*, Kelly, *supra* note 164, at 34–41 (describing how private parties with disproportionate influence may subvert the eminent domain process for their own advantage).

170. Numerous commentators have advocated such a switch. *See, e.g.*, IAN AYRES, OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 38 (2005) (concluding by suggesting an alternative to the injunction approach).

171. 239 U.S. 394 (1915).

172. 276 U.S. 272 (1928).

173. *See generally* MERRILL & SMITH, *supra* note 33, at 1323–28 (describing how the state's police power can interfere with private property rights without providing just compensation under these precedents).

case,[174] the Court limited the rule only to those noxious uses that constitute common law nuisances—hence not only referring to private law but also directly relying on it for the purpose of reconstructing the doctrine.[175]

One can also think about the alleged similarity between the *Washington Legal Foundation* cases and the law of unjust enrichment that deals, *inter alia*, with scenarios in which one person benefits from another person's property and the owner demands to be restituted for such benefits even though she suffered no direct economic harm.[176] Again, although the formal legal fields are distinctive, the conceptual question of whether a nonowner may use property without receiving the owner's consent even if the latter does not suffer direct economic loss is one that crosses the boundaries between public and private law.

Hence, in such takings cases, although the courts are dealing with the use of distinctive governmental powers, the judiciary must and does take into consideration the broad-based effects that such doctrines have on the entire system of property law.[177]

Taxes are different. Taxation does seem to be a unique government power that has no apparent or intuitive parallel in the private law of property.[178] It may be annoying or socially contestable, but it does not have a substantial bearing on the entire property system in the way that various takings cases do. This characteristic allows courts to view taxation as a genuinely distinctive sphere of government activity that must not be inherently conjoined with the takings doctrine but rather can be classified and evaluated on its own terms.

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

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174. 505 U.S. 1003 (1992).

175. *Id.* at 1029–31. Accordingly, future challenges to regulatory measures, such as whether the *Lucas* rule applies to regulation of noxious uses that do not constitute a common law nuisance but nevertheless do not wipe out all economically viable use of the property, are bound to consider developments in private nuisance law. John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 1–2 (1993).

176. *See generally* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004) (surveying the current practice and theory of unjust enrichment in American law). For such a cross-field analysis in the context of land use, see Lehavi, *supra* note 94, at 986.

177. *See* Humbach, *supra* note 175, at 13–17 (discussing how the Supreme Court has instructed lower courts with regard to takings and their impact on the property law system through the lens of nuisance cases).

178. *See supra* notes 147–49 and accompanying text.

3. Taxation as an Empowerment of Property Rights.—Counterintuitive as it might seem at first glance, some forms of taxation, as opposed to other types of governmental intervention with private property, may rather be viewed as validating, entrenching, and solidifying property rights in assets. The argument here goes beyond the often-contested general claim that the financial contribution of taxpayers is more than offset by the level of overall public benefits provided directly or indirectly to the taxpayer, including through the preservation of a public system of law and order.[179] The extent to which this "tax benefit" theory is valid and can further justify progressive taxation remains deeply contested, though empirically heavily under-researched.[180]

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

a. Why the Property Tax Is So Contested.—The property tax in the United States is within the province of state and, chiefly, local governments.[181] Although the state authorizes the imposition of the tax and at times sets certain limits on local decision making (such as on the maximum tax rate or on the overall growth rate of annual tax levies),[182] the various local-level governments enjoy the overwhelming majority of property tax revenues[183] and rely heavily on this tax as the most important source of own-revenue, second only to state aid as a general-revenue resource.[184]

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179. *See* Kades, *supra* note 61, at 221 (summarizing the arguments that the wealthy benefit disproportionately from goods and services provided by the state).

180. *See id.* at 221 (explaining the difficulty of valuing public goods and services).

181. ROBERT B. DENHARDT & JANET V. DENHARDT, PUBLIC ADMINISTRATION: AN ACTION ORIENTATION 242 (2008).

182. *See* MARK HAVEMAN & TERRI A. SEXTON, PROPERTY TAX ASSESSMENT LIMITS: LESSONS FROM THIRTY YEARS OF EXPERIENCE 9 (2008), *available at* http://www.lincolninst.edu/pubs/dl/1412_733_PFR%20Property%20Tax%20Limits.pdf (discussing the inadequacies of limits on assessment values).

183. *See* RONALD FISHER, STATE AND LOCAL PUBLIC FINANCE 319 (3d ed. 2007) (reporting that these localities—counties, municipalities, townships, school districts, and special districts—enjoy 96.5% of all property tax revenues).

184. *See id.* at 319–20; JOAN YOUNGMAN, LEGAL ISSUES IN PROPERTY VALUATION AND TAXATION: CASES AND MATERIALS 3–6 (2d ed. 2006) (discussing the advantages of using a property-tax system to create revenue for state and local government). The distribution of the property tax among the various types of local governments that have overlapping jurisdiction and taxing power is a highly complicated, state-specific issue that need not be addressed here. *See*

Although the property-tax scheme changes among the different states and localities, land and buildings typically form the major part of the property-tax base, alongside a few items of personal property.[185] The tax base for a specific piece of property is its assessed value ("taxable value"), derived from an estimate of the property's market value according to a set of formal procedures and formulas established by state law.[186] The tax rate is calculated as a certain fraction of the assessed value.[187] The tax rate typically differs among different sorts of assets, with commercial or industrial properties usually subjected to higher tax rates than are residential properties.[188] The property-tax levy for a specific asset is thus calculated by multiplying its assessed tax base by the applicable tax rate.

The property tax is often considered to be unpopular among taxpayers.[189] Probably most famously, in 1978, after several years of major annual increases in property-tax bills following the rapid rise in real-estate prices, voters in California approved Proposition 13, which broadly limited the growth of property taxes.[190] Proposition 13 stated, *inter alia*, that (1) the assessed value of all properties would be set back to their 1975–1976 values; (2) the property-tax rate would not exceed one percent of the assessed value; and (3) the assessed value of any property can increase at no more than two percent per year, unless there is change of ownership, in which case the property is reassessed at its new market value.[191] In the years that followed, many states similarly imposed limits on property tax.[192] Interestingly, in

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Lehavi, *supra* note 94, at 948–49 (outlining the various state-specific approaches of allocating property-tax revenues among local governments).

185. YOUNGMAN, *supra* note 184, at 7. The movables include certain equipment, inventories, and vehicles. *Id.* at 6–9.

186. The assessed value is set by law or government practice at some specific percentage of market value, called the "assessment ratio rule." This means that the assessed value in itself may often be lower than the full market value of property. FISHER, *supra* note 183, at 321.

187. *Id.*

188. *See* YOUNGMAN, *supra* note 184, at 17 ("[T]he law may in either case call for a nonuniform system of taxation, with the effective tax rates different according to property category, such as residential, commercial, or industrial.").

189. Periodic surveys show that the local property tax is voted by Americans as one of the two most "unfair" taxes, alongside the federal income tax. *See, e.g.*, Richard L. Cole & John Kinkaid, *Public Opinion and American Federalism: Perspectives on Taxes, Spending and Trust*, PUBLIUS: J. FEDERALISM, Winter/Spring 2000, at 189, 194 ("Historically, the local property tax has been ranked the next worst tax. In ACIR's first survey in 1972, it was regarded as, by far, the worst tax. In 1999, 29.4 percent of the respondents rated the local property tax as the worst tax, in line with the predominant trend.").

190. HAVEMAN & SEXTON, *supra* note 182, at 5.

191. *Id.*; *see also* Arthur O'Sullivan, *Limits on Local Property Taxation: The United States Experience*, *in* PROPERTY TAXATION AND LOCAL GOVERNMENT FINANCE 177, 177–78 (Wallace E. Oates ed., 2001) (illustrating the effect of the "modern tax revolt" on the types of property-tax limits in use throughout the nation).

192. *See* HAVEMAN & SEXTON, *supra* note 182, at 15 (reporting that in nineteen states and the District of Columbia there are limits on increases in the assessment of specific properties and that sixteen of these jurisdictions also place limits on the overall growth of tax revenues or cap the tax rate).

2006–2007, after steep price increases for a decade and just prior to the current plunge in the real-estate market, lawmakers in twenty-seven states introduced tax-relief measures to address taxpayer discontent over increased tax burdens.[193]

Despite the alleged discontent with property taxation and the broad disparities between and within different jurisdictions, the Court has broadly deferred to the legislatures in the face of constitutional attacks no less than it has with respect to other taxes. In *Nordlinger v. Hahn*,[194] the Court rejected an equal protection claim made by taxpayers who purchased properties in California after Proposition 13 came into effect and were thus required to pay substantially higher property taxes than their neighbors on otherwise comparable properties.[195] Even though the Court itself admitted that "the differences in tax burdens are staggering,"[196] it emphasized that the standard of review "is especially deferential in the context of classifications made by complex tax laws."[197] It saw "no difficulty in ascertaining at least two rational or reasonable considerations of difference" in the California tax-burden scheme, the first being that "the State has a legitimate interest in local neighborhood preservation, continuity, and stability," and the second being the state's legitimate conclusion that "a new owner at the time of acquiring his property does not have the same reliance interest warranting protection against higher taxes as does an existing owner."[198]

Nordlinger has been depicted as representing the "zenith of the power to tax."[199] My intention here is not to delve into the question of whether *Nordlinger* was rightly or wrongly decided on the merits of its equal protection claim but rather to point to what critics of the taking/taxing taxonomy may view as probably the most artificial categorical distinction between the two realms.[200] Whether one views such a highly differential treatment of property owners as normatively justified or not, what conceptual difference is there between this case and other instances in which landowners claim to have been forced to sacrifice a grossly uneven share of their private assets to promote the public welfare? On the face of it, the property tax seems to be the tax that most resembles other types of governmental intervention with property and should thus be judged accordingly.

My argument is that although a point-blank comparison may indeed leave one to wonder whether such a distinction is genuine or merely a self-

193. *Id.* at 8.

194. 505 U.S. 1 (1992).

195. *Id.* at 10–18.

196. *Id.* at 6.

197. *Id.* at 11.

198. *Id.* at 12–13.

199. Martinez, *supra* note 120, at 140.

200. Peñalver considers *Nordlinger* as justified and well-grounded, and then calls to view regulatory-taking cases in a similar manner, based on the criteria of nonfungibility and singling out. Peñalver, *supra* note 126, at 2202–05, 2212–28.

perpetuating fallacy, a property-system analysis reveals implicit and explicit groundings for the different view of the exerting of property taxation vis-à-vis the taking of property rights in the asset that is subject to taxation. Slanted and disliked as the property tax may often seem, it is in fact part and parcel of the unique way in which the American property system is structured in terms of both individual entitlements and collective governance through property.

b. And Is Yet a Signifier of Formal Rights and Markets.—The existence of an individually assessed, market-based property-tax system that is levied on property owners is far from self-evident. It is in fact probably one of the most identifying features of the American-type, formal, market-oriented property system. Accordingly, property taxation is typified by major differences not only between developed countries vis-à-vis developing and transitional ones, but also among various Westernized countries.[201] My focus is not so much on the quantitative differences in tax revenues (the property tax in OECD countries is on average about 2% of the GDP as opposed to less than 0.7% in developing and transitional countries,[202] with Australia, Canada, and the United States collecting more property taxes than Germany or Britain[203]), but rather on the institutional and organizational features of the establishment, organization, and enforcement of property taxation. The characteristics of the property tax mechanism both reflect and further entrench the fundamentals of a certain property legal system.

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

First, one requires a comprehensive formal recording system of property rights in land. Briefly, the American system of land-title record is one of recordation of deeds.[204] Although the official recordation of a land transaction is not itself binding on third parties, it nevertheless makes public such a constructive notice and endows the recorder with legal priority over

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201. *See* Richard M. Bird & Enid Slack, *Introduction and Overview to* INTERNATIONAL HANDBOOK OF LAND AND PROPERTY TAXATION 1, 4 (Richard M. Bird & Enid Slack eds., 2004) ("The diversity in the application of land and property taxes even among the 25 countries [examined] is striking.").

202. Roy Bahl & Jorge Martinez-Vazquez, *The Determinants of Revenue Performance*, *in* MAKING THE PROPERTY TAX WORK, *supra* note 148, at 35, 39.

203. *See id.* at 40 (stating that total property taxes in United States amount to roughly 3% of the GDP); Bird & Slack, *supra* note 201, at 8 (listing Australian property taxes as 2.49% of their GDP, Canadian property taxes as 4.07%, Germany as 1.05%, and Britain as 1.43%).

204. *See* JOSEPH H. BEALE, JR., THE ORIGIN OF THE SYSTEM OF RECORDING DEEDS IN AMERICA 1 (1907) (summarizing the distinguishing characteristics of the American recording system). For more information about the U.S. title-recording system, see MERRILL & SMITH, *supra* note 33, at 917–36.

subsequent parties seeking to register a conflicting transaction.[205] Together with the instrument of private title assurance and the possibility of initiating a quiet-title action to clear away fears of earlier-though-not-registered conflicting claims, the American system provides stable and secure formal property rights.[206]

Beyond the issue of clearly identifying ownership, the major administrative challenge for setting up a property-tax mechanism is to construct a comprehensive, reliable, and constantly updated system of public information on the attributes of each individual parcel: its exact size and geographical boundaries, its legally authorized land uses and other pertinent planning or zoning data, the nature and scope of buildings and other fixtures located on the land, and so forth.[207] Tracking and documenting these features within some sort of a cadastral system[208] is essential not only for resolving potential property disputes among neighbors, or for allowing government to carry out its land use and planning policies, but is also the basis for an efficient, fair, and enforceable property-tax system.[209] All of these traits have a direct bearing on value, and without them, any type of individual-based assessment of the property for tax purposes is virtually impracticable.

The challenges of developing and transitional countries in this context may shed light on what may be considered self-evident in the American setting. Irrespective of the question as to whether a sweeping Western formalization of property rights is in fact constructive for such countries, or can otherwise claim normative superiority over alternative forms of resource control, it seems clear enough that the underutilization of property taxation in many of these countries stems primarily from the lack of a comprehensive system of rights formalization and cadastral information that is paramount to the construction of an individual, parcel-based property-tax system.

Thus, whereas economist Hernando de Soto depicts countries such as the Philippines, Peru, or Haiti as dominated by extralegal land holdings,[210] he

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205. MERRILL & SMITH, *supra* note 33, at 918.

206. *Id.* at 907.

207. *See* Robert M. Bird & Enid Slack, *Land and Property Taxation in 25 Countries: A Comparative Review*, *in* INTERNATIONAL HANDBOOK OF LAND AND PROPERTY TAXATION, *supra* note 201, at 19, 41–42 (asserting that for a property-tax system to function appropriately, information about property must be periodically updated and made consistent).

208. *See* Chrit Lemmen & Peter van Oosterom, *Cadastral Systems II*, 26 COMPUTERS, ENV'T & URB. SYS. 355, 355 (2002) (explaining that a cadastral system is the environment in which the process of land administration takes place, which includes land registration and the cadastral map).

209. *See* Gerhard Navratil & Andrew U. Frank, *Processes in a Cadastre*, 28 COMPUTERS ENV'T & URB. SYS. 471, 472–73 (2004) (arguing that the sufficient condition for a cadastre is the inclusion of data on the technical and legal traits of privately owned land needed to assess the tax liability for the owner of that land).

210. *See* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 32–33 (2000) (reporting that in the Philippines, 57% of city dwellers and 67% of the rural population live in housing that is dead capital; in Peru, 53% of city dwellers and 81% of the rural population live in extralegal dwellings; and in Haiti, 68% of city dwellers and 97% of the rural population live in housing with no clear title).

seeks to refute the conception that those who take cover in such sectors do so to avoid paying taxes. He argues that the costs imposed on those who act extralegally generally outweigh the amount of potential taxes paid, and thus points the finger at the "bad legal and administrative system" that denies persons in such countries broad-based access to legally protected property rights.[211]

Other writers, who are more ambivalent about an essential positive link between formal property rights and individual prosperity, nevertheless stress the significant interconnectivity between property taxation and a societal validation of claims to assets. Attempts to establish a viable system of property taxation, even in the face of incomplete formality of rights, absence of a comprehensive cadastre, or yet-to-develop property markets, regard property taxation as distinct from other sources of revenue in that it serves to promote individual or group stability and security in the control over assets.[212]

The comparison to emerging or struggling systems of property taxation may thus shed light on the way in which property taxation is considered in the United States to be inherent to a formal, legally entrenched property system. One can say that despite all political murmurs and alleged unpopularity, the prevailing notion is one of "I'm taxed, therefore I own."

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

As Joan Youngman notes, the thousands of taxing jurisdictions in the United States exhibit just about every possible approach to property taxation, with some states such as California, Michigan, Oregon, and Florida allegedly moving away in the last decade from accurate market-based assessments.[213] But at the same time, one can quite safely generalize that the American system, especially as compared to other legal systems, is still very much reliant on property markets as the foundational stone for the design of property taxation.

To start with, even in the aftermath of Proposition 13, most states do not impose statutory limits of market-based assessment, thus maintaining market

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211. *See id.* at 153–59 ("[B]eing free from the costs and nuisance of the extralegal sector generally compensates for paying taxes.").

212. *See, e.g.*, Martim O. Smolka & Claudia M. De Cesare, *Property Taxation and Informality: Challenges for Latin America*, LAND LINES, July 2006, at 14, 18 ("Finally, there is an advantage for the property tax to cover informal property because its application requires specific knowledge of the area, which has immensurable value to the city management.").

213. Joan Youngman, *The Property Tax in Development and in Transition*, *in* MAKING THE PROPERTY TAX WORK, *supra* note 148, at 19, 23–24; *see also supra* text accompanying notes 189–93.

evaluation of assets for tax purposes as the rule rather than the exception.[214] Even within those jurisdictions that have adopted restrictive measures, it would be wrong to conclude that market values have no bearing on the way governments construct their public-finance policy or that property taxation is otherwise considered to be alienated from property market values. The formulas that are set by legislatures in these different states do take market values as the basis for assessing taxable value, even if these are somewhat "modified" during the assessment process (typically by capping the annual growth rate of the assessed value).[215]

No better proof can be provided for this ongoing interconnectivity than the recent turn of events following the sharp downturn of real-estate prices throughout the United States since 2007. Property owners from all states (including California, for that matter) have been appealing to their local governments to reassess their home values, and official reassessments that have been made since then have indeed resulted in often-dramatic reductions in assessed values, tax bills, and overall property-tax revenues.[216] Thus, the caps that have been placed during eras of steep rises in market values may have exhibited the genuine liquidity problem stemming from the rapid increases in the property-tax burden relative to residents' incomes for yet-unrealized paper gains in real-estate prices, as well as the all-too-familiar human tendency to try to exploit the political process to shift the burden onto others (as is the case with Proposition 13's "welcome stranger" provision, reassessing property values at the new market price in the case of transfer).[217] But even during times of mercurial market tides, the connection was never broken. Property taxation is thus still inherently intertwined, in the eyes of both governments and residents, with the workings of property markets.

It is in this sense that property taxes are viewed as fundamentally different from takings and other types of governmental interventions with private property. Even if implicitly, the design and administration of prop-

214. *See supra* text accompanying notes 190–93.

215. FISHER, *supra* note 183, at 334–39.

216. *See, e.g.*, Jill P. Capuzzo, *Homeowners Fight Back as Market Cools Off*, N.Y. TIMES, June 15, 2008, NJ, at 1 (chronicling New Jersey homeowners' requests for property-value reassessments in the face of dropping real-estate prices); Michael Mansur, *Kansas Property Assessments Begin to Reflect Real-Estate Market Downturn*, KAN. CITY STAR, June 19, 2008, at B1 (reporting that assessments following the real-estate market's sharp decline better reflected those battered property prices); Jennifer Steinhauer, *Taxes Reassessed in Housing Slump as Prices Decline*, N.Y. TIMES, Dec. 23, 2007, at A1 ("Homeowners across the nation are looking to county governments to reassess the values of their homes in the face of flattening and falling prices that have befallen scores of markets."); Neil Gonzales, *Money for Schools Hit by Property Value Drop*, INSIDE BAY AREA, Mar. 27, 2008, LEXIS, News Library, INSBAY File (explaining how the reassessment of software mogul Larry Ellison's house in California cost local school districts and agencies significant tax revenues); Richard Halstead, *Thousands in Marin Asking for Property Tax Cuts*, MARIN INDEP. J., June 13, 2008, LEXIS, News Library, MARIN File (describing how many Marin County homeowners were seeking lower property taxes based on reassessment of greatly depreciated property values).

217. *See supra* text accompanying note 191.

erty taxation validates the concept of a market-driven property system and can thus be seen as an integral part of it. Contested and highly visible as it is, the perseverance of the property-tax system as an ad valorem, market-based mechanism and the broad judicial deference to these attributes cannot be viewed as a mere coincidence.

In contrast, takings and especially cases of eminent domain generally represent a deviation from the principles of property markets. The coercive transfer of property rights from an individual owner to the government, even if specifically essential to promote general welfare, is conceived as a challenge or as a constitutionally mandated exception to the normal state of affairs by which properties are voluntarily transferred through markets.[218] Moreover, although constitutional due compensation is based on calculating fair market value at the time of the taking, as I noted above,[219] it cannot practically guarantee that the condemned will be subjectively indifferent to the taking as would be the case in a genuine market transaction.[220] In addition, it inherently denies property owners future-value appreciation stemming from the government action. This tension has obviously been the source of tremendous public conflict, as the vivid examples of Susette Kelo and her counterparts in other high-profile takings cases demonstrate,[221] along with the numerous calls for legal reform.[222] It thus seems clear that takings instances do and will remain a breakaway from the ordinary workings of the market, in a manner that further helps to explain the fundamental difference between taking and taxing when viewed through the prism of the American property system in its entirety.

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

As mentioned, the American property tax is almost exclusively the province of local governments.[223] Although the basic economic features of real-estate taxes do seem to be natural to local governance (due to immobility of land, the more intimate acquaintance of the locality with real-estate values, and so forth), it is not self-evident that property taxes would be set,

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218. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434–35 (1982) (holding that a permanent physical occupation by the government constituted a taking, regardless of the benefit to the public).

219. *See supra* text accompanying notes 136–38.

220. *See* United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979) ("Although the market-value standard is a useful and generally sufficient tool for ascertaining the compensation required to make the owner whole, the Court has acknowledged that such an award does not necessarily compensate for all values an owner may derive from his property.").

221. *See* Lehavi & Licht, *supra* note 168, at 1708–09, 1714–17 (collecting and describing several such cases).

222. *See* Wyman, *supra* note 138, at 256–61 (surveying the different calls for reform in the aftermath of *Kelo*).

223. *See supra* text accompanying notes 181–84.

administered, and collected by local governments, even within the group of market economies. In Britain, for example, the national government has taken over decision making and administration of nondomestic property taxation and distributes the proceeds to localities according to their population.[224] It also sets the assessment and rate principles for the new residential property tax (the Council Tax).[225] Property taxation is also very much centrally coordinated in other Western countries such as in Germany, in which the principles of the federal land-tax law govern this otherwise municipal tax.[226]

The overriding localization of the property tax in the United States thus has to do with much more than administrative feasibility. It represents the pillars of intergovernmental organization, politics, economy, and ideology. As William Fischel argues: "[P]eople view their property taxes as different from other taxes. They are part of their own city's or town's property."[227] Although this popular conception has its downside in that residents of wealthy localities are often hostile to interlocal transfers of tax revenues through regional or state mechanisms,[228] it nevertheless captures the unique way in which owning real property and paying real-property taxes combine to create a collective mechanism that is viewed as entrenching both individual and collective control of resources. The very same polls that point to the alleged "unpopularity" of property taxes also indicate that the American public regards their local governments as providing them with the most for their tax money, as compared to other levels of government.[229] One need not go here into a debate of whether incorporated municipalities are or should be considered genuine corporations in the sense that local property owners may be viewed as shareholders, although municipalities are formally located nowadays at the public end of the public/private corporate spectrum.[230] Even if we wholly deny any formal property or property-like right to individual residents in the collective assets of their local government, property taxation

224. *See* The Non-Domestic Rating (Transitional Period) Regulations, 1990, S.I. 1990/608 (U.K.) (establishing centralized national administration of local-business property taxes, known as National Non-Domestic Rates, or NNDRs).

225. Youngman, *supra* note 213, at 20–23.

226. Paul Bernd Spahn, *Land Taxation in Germany*, *in* INTERNATIONAL HANDBOOK OF LAND PROPERTY TAXATION, *supra* note 201, at 98, 98–99. German land-tax law is also peculiar in that a "standard tax" is set by the state tax administration and applies uniformly to all local governments within the state. *Id.*

227. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 120 (2001).

228. *See id.* at 121–22 (citing Maine, a state in which voters in wealthy areas disproportionally supported a referendum to repeal a statewide property tax and school-funding reform, as an example of wealthy localities rejecting such transfers).

229. *See* Cole & Kincaid, *supra* note 189, at 199 ("Local government entered the new millennium being the most favored government, except for the property tax—a continuing tax thorn for many Americans, especially those living in the eastern half of the United States.").

230. *See* GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 39–45 (1999) (describing the history of "the adoption of the private/public distinction").

is still considered to be an uncontestable part and parcel of what it means to be a "homevoter," as Fischel puts it.[231]

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

The conflicts that do arise with respect to property taxes are therefore more appropriately reviewed under other sets of potential claims that more closely capture the essence of property taxation. Thus, for example, to the extent that one group of taxpayers (e.g., new homebuyers in California) claims that the assessment process or the tax rate levied on it is unequal to that of similarly situated groups, the Equal Protection Clause is indeed the jurisprudential route to follow, as was the case in *Nordlinger*.[232] The same goes for due process claims, including substantive due process ones that focus on the reasonableness of the public decision making, i.e., whether government power was exercised "without any reasonable justification in the service of a legitimate governmental objective,"[233] so as to root out arbitrary and capricious decisions that abuse what is otherwise a legitimate power that is not in itself considered an infringement of independently protected rights.[234] In other words, nothing in the conceptual distinction between taxings and takings means that taxation must always be awarded unconditional deference. What it does mean, however, is that the way in which taxation is constructed and embedded within the broader system of property calls for a different kind of constitutional review that more adequately addresses the typical concerns over taxation.

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231. *See generally* FISCHEL, *supra* note 227 (developing a full description of homevoters as participants in the property system).

232. *See* Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) ("The appropriate standard of review is whether the difference in treatment between newer and older owners rationally furthers a legitimate state interest. In general, the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification . . . .").

233. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1988).

234. This distinction that was made in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), according to which the due-process-based "substantially advances" formula asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose" and is thus conceptually and doctrinally different from the question of whether private property has been "taken." *Id.* at 542.

IV. The Virtues and Vices of Taxonomy in Property

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

To start with, the enterprise of legal taxonomy need not be understood as necessarily yielding to formalist or positivist conceptions of law, in which law purports to be capable of dividing the legal world into neat distinctive categories that simply reflect objective legal reality.[235] Taxonomies and legal categories are analytically and jurisprudentially essential to maintaining a reasonable level of clarity and certainty in organizing the world around us, developing legal expectations, and understanding the normative and policy considerations with respect to different actors, resources, and legal relationships.[236] And yet, no legal taxonomy can be portrayed as wholly detached from the institutional and normative foundations that stand as its basis.[237] Even the allegedly most basic distinctions in law, such as between private and public law, are not "natural" in the sense that these must follow a single formula or that they run across different legal systems irrespective of the governing normative and institutional principles in each one of them. The challenge that a legal system thus faces is to find the appropriate balance between the essentiality of creating a comprehensive taxonomy of legal orderings, while at the same time avoiding the pitfalls of enshrining legal categories as inherently superior to the underlying institutional and normative tenets of the legal system as a whole.[238]

Property law faces particularly intriguing challenges in creating and maintaining such a workable division. As a field of law that sets up the ways in which society orders resources and the human relationships around them, property is typified by the fact that entitlements and obligations in regard to resources regularly implicate numerous parties not only as a matter of

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235. *See* Hanoch Dagan, *Legal Realism and the Taxonomy of Private Law*, *in* STRUCTURE AND JUSTIFICATION IN PRIVATE LAW: ESSAYS FOR PETERSON BIRKS 147, 147–49 (Charles Rickett & Ross Grantham eds., 2008) (criticizing formalism and positivism, and offering a legal realist conception of taxonomy).

236. *Id.* at 147–48.

237. *See id.* at 154–60 (arguing for a realist conception of taxonomies as inextricably connected to their larger social context).

238. *See* Lehavi, *supra* note 84, at 209–11 ("[T]he law has broader lessons to learn from the constant efforts in other fields to define and redefine the borders between the different spheres of life, recognizing the essentiality of line-drawing but at the same time understanding that these distinctions are uncertain, changeable, and often misleading.").

abstract analysis but also in social and economic practice.[239] Thus, although property is so laden with values and constant moral, political, and societal inquiries,[240] excessive ad hocery aimed at attaining resource-specific efficiency, justice, or some other underlying normative goal comes with its own high price tag because it undermines the broad and relatively straightforward signals that property should send about its core attributes to the large numbers of legal actors implicated by its rules.[241]

One more note is needed here about the nature of legal taxonomy, particularly in property law. A point that is often overlooked in the jurisprudential debate over the enterprise of legal taxonomy is that the link between the number of legal categories and the simplicity of the legal system is not straightforward. The question is not only how many different types of legal categories we have, and how easy it is for us to classify a particular event or situation as falling within a specific category, but also what is the type of legal norm that applies to each category—i.e., whether the norm is designed as a clear-cut rule that sets out a straightforward, relatively rigid decree, or rather, as a broadly phrased standard that requires further, later-stage crystallization.[242] This means that even what might seem at first glance to be a very orderly division of the world into legal categories can turn out to be quite different if each legal category is governed by a broad and vague standard that may more than offset the alleged tidiness of having carved out distinctive categories for different types of disputes. This is an issue of tremendous importance in takings law, within which the different categories can be governed by either per se rules or by highly complicated and "muddy" standards, mostly in the case of regulatory interventions with property.[243] It is thus essential to realize that "taxonomy" is not synonymous with "simplicity" or "rigidity."

I now briefly evaluate the taking/taxing taxonomy as part of the overall arc of American law that deals with the various kinds of governmental intervention with private property. My purpose is to demonstrate that although no taxonomy, carefully designed as it is, can ever be perfect in the sense that it

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239. *See* Lehavi, *supra* note 21, at 2000–07 (arguing extensively and concluding that "property should thus be understood as a jurisprudential framework the primary purpose of which is to delineate basic kinds of entitlements and obligations in regard to certain types of resources").

240. *See generally* MERRILL & SMITH, *supra* note 33, at 243–392 (discussing the various "values subject to ownership").

241. *See* Lehavi, *supra* note 21, at 2014–21 (expanding on the core argument that "since property implicates a large—technically infinite—number of parties with certain entitlements or obligations for a specific resource (and resources in general), the legal regime has to rely on some core principles that are broadly understood and communicated, thus enabling a baseline of clarity, stability, and mutual respect").

242. *See supra* text accompanying note 52.

243. *See, e.g.*, John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465, 488 (1985) ("[T]he use-dependency test is more narrowly focused and often is considerably more demanding of government than is the reasonable relationship test.").

would create hermetic factual and normative borders that would never encounter some level of intra- or intercategory difficulty, overlapping, or inconsistency; such a delineation should be weighed for its overall systematic efficacy in giving a substantially coherent sense to what is undoubtedly a very muddy world—one in which there are so many different instances in which government affects in some way or another the rights, interests, and expectations of persons. Moreover, such an evaluation should be based not only on discerning an internal logic between different instances of government deprivations but also on the interrelationship between the takings-law taxonomy and the broader founding principles of property law.

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

Consider, first, the distinction between permanent physical invasion and regulatory intervention. As *Loretto* demonstrates, the per se taking rule in the former instance applies not only to full-scale eminent domain, but also to an allegedly trivial invasion such as the laying of television cable, despite the fact that the pure economic effect was at worst negligible and potentially was even one of positive value.[244] Needless to say, a critique evaluating the legal implications of a governmental act based on the scope and distribution of economic consequences could argue there is little sense in such line drawing, especially as compared to economically more significant instances of regulatory takings that are nevertheless governed by other legal rules.[245]

Second, for regulatory takings, the Court in *Lucas* famously applied a per se takings rule for a regulation that deprived owners of "all economically beneficial or productive use of the land."[246] This is opposed to the three-prong ad hoc test that generally applies to regulations that impose adverse effects, as developed in *Penn Central Transportation Co. v. City of New York*.[247] This distinction too has been criticized. Thus, for example, as Justice Stevens famously stated in his dissent in *Lucas*: "[T]he Court's new rule is wholly arbitrary. A landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."[248]

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244. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 452 (1982) (Blackmun, J., dissenting) (noting that the majority decided that a taking had occurred even though "as a practical matter, the [occupation] . . . likely increases both the building's resale value and its attractiveness on the rental market").

245. *See, e.g.*, Costonis, *supra* note 243, at 529 (viewing the *Loretto* rule as "anachronistic" and "aberrational").

246. 505 U.S. 1003, 1015–16 (1992).

247. *See* 438 U.S. 104, 124 (1978) (identifying three relevant factors: the economic impact on the claimant, the extent of interference with distinct investment-backed expectations, and the character of the government action).

248. *Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting).

Third, consider the opposite per se nontaking rule in the regulatory-takings context: the nuisance exception, according to which diminution in property value caused by nuisance-control measures never requires compensation.[249] This rule too did not evade criticism. Michael Heller and James Krier argue, for example, that this distinction unjustly burdens property owners who undertook certain activities that had been previously legally allowed and that generated a stream of revenues, but later came to be considered "noxious" due to a change of taste by government.[250]

Fourth, land-use law seems to draw a broad distinction between existing uses, which enjoy nearly complete immunity against new land-use regulation, and future uses, which, even if financially more significant at times, can be frustrated by regulation that receives substantial deference by reviewing courts applying the *Penn Central* test. Thus, for example, the vested-rights doctrine examines the extent to which the implementation of a real-estate project is sufficiently far along, and in such case awards the owner protection against a subsequently enacted regulation as if the existing use were already intact.[251] Criticizing this distinction, Chris Serkin argues that neither the Takings Clause nor the Due Process Clause provides for such a categorical differentiation and that, normatively speaking, one cannot view existing uses as worthy of a categorically stronger protection over other types of uses and property interests that are adversely affected by land-use regulation.[252]

In point-blank inspection, all of these distinctions may indeed be debatable. The real question, however, is whether the carving out of a certain category and a corresponding legal norm is deemed to be overall efficient and fair when considering both the entire spectrum of instances involving governmental intervention with private property and the broader

249. *See supra* text accompanying notes 171–75.

250. *See* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1009–13 (1999) ("[T]he conventional takings law treatment of nuisances does not necessarily promote fair results.").

251. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 231–33 (2d ed. 2000) (articulating the generic rule that "[m]ost courts will recognize vested rights only if the owner has made substantial expenditures in good faith reliance upon the issuance of a building permit or other approval"). A related doctrine is that of "amortization," under which the government can eliminate a preexisting use that does not conform to a new zoning scheme without having to pay compensation by allowing the affected owner to continue use for long enough to amortize her investment. *See id.* at 222–26 (surveying the variations and nuances of the amortization doctrine as applied to nonconforming uses).

252. *See* Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1261 (2009) (observing that "current constitutional doctrine does not compel categorical protection for existing uses" and arguing that "none of the possible justifications for the categorical protection of existing uses withstands serious scrutiny"). Serkin thus calls for applying to existing uses the broader tests deriving from substantive-due-process jurisprudence or from the *Penn Central* regulatory-takings three-prong test. *See id.* at 1288–90 ("Once existing uses are dismantled as a specially protected category, it is possible to address whether a particular existing use should be protected with more precision and sophistication about the costs and benefits actually at stake").

institutional and normative principles of American property law. This is not merely a theoretical inquiry but one that has clear empirical and practical implications: How much do we actually stand to lose from having such differentiations within takings law, and do better mechanisms for delineating and maintaining a workable taxonomy while refraining from absurdities exist?

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

First, the application of per se rules—aimed primarily at casting several anchors in the stormy waters of takings jurisprudence—has been criticized for inappropriately tackling borderline cases,[253] but I submit that these rules are generally able to resort to mitigating mechanisms to deal with such peculiarities. Thus, the *Loretto* per se rule seems to efficiently cater to dominant perceptions about the special gravity of physically invading someone's land on a permanent basis, while at the same time seems to avoid the absurdities of what is truly an idiosyncratic case in terms of pure economic impact by setting the amount of compensation at the nominal rate of $1.[254] This way of handling idiosyncrasy thus helps to preserve the category's approach to more paradigmatic situations, i.e., eminent domain cases that involve both permanent physical invasion and substantial economic damage.

Second, the broad differentiation in the legal protection against the frustration of existing uses vis-à-vis future uses, which may be criticized when one merely views the pure economic consequences of allegedly comparable land-use regulations, has independent merits that touch on the formal rights orientation of American property law. It aims at balancing the centrality of the liberty to use one's own property with the justification for limiting it to mitigate potential use conflicts and promote broader public needs. The line that has been drawn legally prioritizes the protection of an already existing use as a more firmly recognized strand of property.[255] And as is the case with other categories, the way in which such lines are drawn nevertheless tries to avoid potential absurdities. The vested-rights tests or amortization periods set for existing uses respect such rights without unduly inhibiting societal progress,[256] whereas on the other hand, under the *Penn*

253. *See supra* text accompany notes 245–48.

254. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–38 (1982); *see supra* text accompanying notes 58–60.

255. For retroactivity in property law, see MERRILL & SMITH, *supra* note 33, at 1197–98.

256. *See supra* note 251 and accompanying text.

Central test, government cannot wholly disregard "investment-backed expectations" regarding future uses whenever these have established themselves objectively—well beyond mere anticipation—and are thus more appropriately viewed as being normatively and jurisprudentially linked to formal rights, not merely value.[257]

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

V. Conclusion

American property law is currently located at a crucial crossroads. Its longtime foundational premises and convictions are now being vigorously reexamined in the face of the domestic and global economic crisis. Governmental action that might have sounded farfetched only a few years ago—such as the partial or full nationalization of financial institutions; dramatically harsher regulation on securities, credit, or mortgage markets; initiatives for different forms of a mortgage moratorium;[258] or provision of a safety net for private savings[259]—questions the underlying features of American property law, including the protection of rights rather than mere economic value and the strong propensity toward markets as the chief vehicle to implement property rights. Whether the government measures taken in the months and years to come will create a major, long-standing upheaval in American property law remains to be seen.

At this point in time, however, it is important to identify the intricate and subtle ways in which the systematic features of American property law implicate, even if often in somewhat implicit ways, the various fields and doctrines in property and property-related matters. As this Article made

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257. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130 (1978) ("[T]he submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable.").

258. *See, e.g.*, David Leonhardt, *Life Preservers for Owners Under Water*, N.Y. TIMES, Oct. 22, 2008, at B1 (examining several contemporary propositions for mortgage foreclosure relief, including a ninety-day moratorium on foreclosures).

259. In the United States, individual money-market deposit accounts were insured at up to $100,000 by the Federal Deposit Insurance Corporation, but money-market mutual funds were not. Tara Siegel Bernard, *Money Market Funds Enter a World of Surprising Risks*, N.Y. TIMES, Sept. 18, 2008, at C13. The Emergency Economic Stabilization Act of 2008 raised the limit to $250,000. Pub. L. No. 110-343, tit. 1, sec. 115, 122 Stat. 3766, 3780 (to be codified at 12 U.S.C. § 5225). Other countries took even more sweeping measures in the face of the financial crisis. In October 2008, the German federal government announced it would guarantee all private savings accounts to address growing fears of wholesale collapse of banks. Carter Dougherty et al., *Financial Crises Spread in Europe*, N.Y. TIMES, Oct. 6, 2008, at A1.

clear, the taking/taxing taxonomy, or any other delineation drawn in regard to governmental intervention in property rights, is not carved in stone as an essentialist conclusion of property law. It is part and parcel of the understanding of a given legal system about what constitutes the bundle of rights in certain resources and what elements of it deserve constitutional protection, so that a change in the paradigms of property law will undoubtedly affect the taxonomy of property law and takings law in particular. As we await future developments in property law, we thus must keep in mind both the innumerable ways in which the currently prevailing convictions shape the landscapes of property law, and how this entire array of doctrines could change upon a societal reconstruction of the institution of property.