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## What Property Does

Christopher Serkin

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# What Property Does

Christopher Serkin\*

*For centuries, scholars have wrestled with seemingly intractable problems about the nature of property. This Article offers a different approach. Instead of asking what property is, it asks what property does. And it argues that property protects people’s reliance on resources by moderating the pace of change. Modern scholarly accounts emphasize voluntary transactions as the source and purpose of reliance in property. Such “transactional reliance” implies strong, stable, and enduring rights. This Article argues that property law also reflects a very different source of reliance on resources, one that rises and falls simply with the passage of time. This new category of “evolutionary reliance” is at the heart of core property doctrines like adverse possession, waste, and the rule against perpetuities. Focusing on evolutionary reliance reveals a new vision of property, not as a bundle of sticks or a bare right to exclude, but instead as a nexus of competing and dynamic reliance interests that can change over time. This new vision has important conceptual and doctrinal consequences for common law doctrines and the Takings Clause, and it highlights the surprising dynamism and change in property.*

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## INTRODUCTION

Few legal categories are simultaneously as familiar and as opaque as property. The distinct categories “mine” and “yours” are deep-seated if not innate.<sup>1</sup> The accessibility of the property intuition is supposed to be a large part of its power, giving rise to claims of right that are easy to identify and that command respect.<sup>2</sup> However, the category of property is fiercely contested. Positivists disagree with

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1. See, e.g., James E. Krier & Christopher Serkin, *The Possession Heuristic*, in *LAW AND ECONOMICS OF POSSESSION* 150–52 (Yun-chien Chang ed., 2015) (discussing evolutionary biology in relation to the origins of property). More colloquially, this is captured in common phrases like “My home is my castle.” See Jeannine Bell, *The Fair Housing Act and Extralegal Terror*, 41 *IND. L. REV.* 537, 540 (2008) (describing the racist history of the phrase); Rocket Mortgage, *Jason Momoa Super Bowl Commercial*, YOUTUBE (Feb. 2, 2020), <https://www.youtube.com/watch?v=g2ERWFMLptw> [<https://perma.cc/2655-G2RN>] (describing his home as his sanctuary).

2. See, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 38–40 (2000).

natural rights theorists about the source of rights.<sup>3</sup> Lawyers call property a bundle of rights, and then argue about which—if any—of those rights are fundamental.<sup>4</sup> And those conflicts generate meaningful disagreements over core property doctrines: what resources to characterize as property;<sup>5</sup> how property constrains regulations like environmental protections and land use controls;<sup>6</sup> how to protect the right to exclude;<sup>7</sup> and many others. These are often ontological disagreements over the very nature of property itself.<sup>8</sup> As a foundational source of rights, its internal logic is surprisingly mysterious.<sup>9</sup>

This Article offers a different approach. Instead of asking what property *is*, it asks what property *does*.<sup>10</sup> This Article argues that property law serves an underappreciated purpose: protecting reliance on resources by favoring slow changes over fast ones in the evolution of property rights. Property, in this view, is a stabilizing but not ossifying force. It reflects the familiar psychological phenomenon that rapid changes are especially disruptive.<sup>11</sup> Across a number of doctrines,

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3. See, e.g., Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413 (2017) (offering a natural rights theory of property); see also Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 543–50 (2005) (characterizing the field).

4. See, e.g., Bell & Parchomovsky, *supra* note 3, at 545 n.85 (describing history of the “bundle of sticks” account of property).

5. See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 493 (Cal. 1990) (refusing to recognize property rights in body parts); REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010) (describing development of HeLa cells and the lack of property protection for the original patient from whom they were developed).

6. See, e.g., Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 12 (2017) (identifying property rights and regulatory power as effectively zero-sum).

7. See, e.g., Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275 (2008) (critiquing the right); Adam Mossoff, *The False Promise of the Right to Exclude*, 8 ECON. J. WATCH 255 (2011) (summarizing criticisms of the conception of property as a right to exclude); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453 (2002) (contrasting the exclusion strategy with the governing strategy).

8. See, e.g., Bell & Parchomovsky, *supra* note 3, at 533–35 (discussing the nature of property).

9. Cf. 2 WILLIAM BLACKSTONE, COMMENTARIES \*2 (“There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property . . . . And yet there are very few that will give themselves the trouble to consider the origin and foundation of this right.”).

10. See generally Eric R. Claeys, *Property, Concepts, and Functions*, 60 B.C. L. REV. 1 (2019) (offering a functional account of property). For another example of this kind of approach, see CAROL ROSE, *PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* 3 (1994), assigning to Bentham the view that “property is designed to *do* something, and what it is supposed to do is to tap individual energies in order to make us all more prosperous.”

11. See, e.g., KATHERINE LEVINE EINSTEIN, DAVID M. GLICK & MAXWELL PALMER, *NEIGHBORHOOD DEFENDERS: PARTICIPATORY POLITICS AND AMERICA’S HOUSING CRISIS* 34 (2020) (“[R]apid changes are especially psychologically salient.”); Holly Doremus, *Takings and*

property facilitates changes in reliance on resources that happen gradually over time while resisting changes that are sudden or abrupt. Rules governing adverse possession, the changed conditions doctrine in servitudes, and many others reveal a hidden dynamism animating property law while also minimizing disruptions by ensuring that changes occur slowly. Change is not in tension with property but is essential to it.<sup>12</sup>

This Article offers a new synthetic account of property as serving the fundamental purpose of protecting reliance. It also frames a new set of questions. Whose reliance interests should the law protect at any moment?<sup>13</sup> How much reliance is necessary to produce property's many benefits? And how much time do people need to adjust their expectations in order to accommodate shifting entitlements? These are the inquiries that should inform the substance of property rights. But this requires reevaluating some of the assumptions about the source and role of property in the legal system today.

At the highest level of generality, the institution of property allows people to rely on resources in the world, whether land, chattels, or incorporeal resources like intellectual property.<sup>14</sup> But what is the source of reliance in property and whose reliance does it protect? During the twentieth century and into the twenty-first, answers to those questions have most often been supplied by law and economics with reference to voluntary transactions.<sup>15</sup> People acquire property through contracts, gifts, inheritance, and so forth. And property persists so that people internalize the costs and benefits of ownership, helping to ensure that resources will be put to their most productive or valuable use.<sup>16</sup>

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*Transitions*, 19 J. LAND USE & ENV'T L. 1, 22 (2003) ("Cognitive psychology tells us that, as a rule, people seek to limit change."); see also DAVID A. NADLER, ROBERT B. SHAW, A. ELISE WALTON & ASSOCIATES, DISCONTINUOUS CHANGE: LEADING ORGANIZATIONAL TRANSFORMATION 14–33 (1995) (observing that the more rapid a change, the more traumatic, painful, and demanding it will be on an individual).

12. Cf. Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L.J. 1631, 1632 (1989) ("Where institutionalized law exists, it claims for itself many formal roles in managing normative change."). But see Laura S. Underkuffler, *Property and Change: The Constitutional Conundrum*, 91 TEX. L. REV. 2034–35 (2013) (arguing that property is inherently protective of the status quo and therefore in tension with legal change).

13. Cf. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 637 (1988) ("It is old-fashioned, misleading and unproductive to identify a single 'owner' of valued resources when control of those resources has been divided by law or contract among several interested parties.").

14. See, e.g., John A. Lovett, *Property and Radically Changed Circumstances*, 74 TENN. L. REV. 463, 466 (2007) ("[Property law] is typically understood as an institution whose very identity and purpose is intimately associated with the task of promoting stability . . .").

15. See *infra* Part I.A.

16. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 3–6 (1960) (invoking the Parable of the Farmer and the Rancher to illustrate how bargaining maximizes wealth enhancement by internalizing externalities); Richard A. Posner, *Wealth Maximization Revisited*,

Property serves this purpose by creating stability in the service of alienability and owner control.

Property in this view starts with some original acquisition based on first-in-time claims and then extends forward in time through voluntary transactions that become the basis for—and purpose of—ownership.<sup>17</sup> While seldom explicit, the standard property curriculum in law school follows precisely this path, beginning with original acquisition (conquest, capture, creation), and then covering the rules protecting prior possession (chain of title, lost-and-found, recordation), before turning to rules governing the unbundling and re-bundling of property rights between people and across time (estates and future interests, concurrent interests, leaseholds).<sup>18</sup> From this perspective, property provides the building blocks of welfare-enhancing transactions; its animating purpose is to create stable and strong rights to resources around which people can then interact and contract.

This Article agrees that property rights protect reliance on resources. However, for every doctrine like trespass that protects ownership and prior possession, there is another like adverse possession that promotes dynamism, recognizing that reliance can shift through means other than voluntary transactions.<sup>19</sup> This Article therefore offers a new account of property's internal logic. It argues that property is best understood as protecting people's reliance on resources but reveals how reliance often arises through organic, evolutionary processes that the law ultimately protects. Property law, then, is best understood as mediating between competing reliance interests that can change over time.<sup>20</sup>

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2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 92 (1985) (“Wealth is maximized by creating a system which allows offer and asking prices to be compared . . . [Therefore], it is necessary to have a way of deciding who may charge an asking price and who must make offers; this is a question about property rights.”).

17. See, e.g., Lawrence Berger, *An Analysis of the Doctrine that “First in Time Is First in Right,”* 64 NEB. L. REV. 349 (1985).

18. See JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL H. SCHILL & LIOR JACOB STRAHILEVITZ, *PROPERTY*, at xi–xxiii (9th ed. 2018) (casebook table of contents); JOSEPH WILLIAMS SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PENÁLVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES*, at xv–xxviii (7th ed. 2017) (same).

19. See Sarah E. Hammill, *Enduring Trespass: What Adverse Possession Reveals About Property*, 96 SUP. CT. L. REV. 215, 231 (2021) (“Adverse possession suggests that property entitlements only seem to be fixed and enduring, that the reality is they can and do change as time passes.”); cf. HERMAN MELVILLE, *MOBY DICK* 357 (Tony Tanner ed., Oxford Univ. Press 1988) (1851) (finding opposing pressures in the rules of acquisition and asking rhetorically, “And what are you, reader, but a Loose-Fish and a Fast-Fish, too?”). For discussion of specific doctrines, see *infra* Part II.

20. For leading accounts of reliance at the heart of property, see, for example, Singer, *supra* note 13; Nestor M. Davidson, *Property's Morale*, 110 MICH. L. REV. 437, 444 (2011); and Laura S. Underkuffler, *Individual Reliance and Government Forbearance: A Tale of Five Cases*, 3 BRIGHAM-KANNER PROP. RTS. CONF. J. 141 (2014). Cf. Liaquat Ali Khan, *Temporality of Law*, 40 MCGEORGE

Property's temporality is its most undertheorized defining feature.<sup>21</sup> Stable property rights allow people to make choices and pursue long-term goals.<sup>22</sup> What fundamentally distinguishes a mere license from the full-blown property right of an easement, and what distinguishes mere possession from property, is stability over time and the resulting ability of the owner to rely on property's persistence. For people to be future-regarding, there must be some resources on which they can rely.<sup>23</sup> As Charles Beitz explained, "The fact that the successful exercise of self-determination is an intertemporal achievement means that there will be circumstances in which we have an interest in security of possession over time."<sup>24</sup> Similarly, for property to carve out a sphere of ordered liberty, people must be able to rely on its protection into the future.<sup>25</sup> Momentary possession is not enough to produce property's benefits.<sup>26</sup> From either a conceptual or instrumental perspective, property must be durable.

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L. REV. 55, 81 (2009) ("Temporal inertia is law's core attribute. It ensures the systemic stability of law because one primary purpose of law is to provide stable rules that do not change over a period of time . . .").

21. See Charles R. Beitz, *Property and Time*, 26 J. POL. PHIL. 419, 419 (2018) ("It is an interesting if neglected question in modern theories of property why we should care about the temporal extension of property protection."); Hammill, *supra* note 19, at 231 ("[T]he role of time is often absent from much theorizing about property."). There are other leading works that explicitly acknowledge property's temporal dimension. See, e.g., JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 174 (2000) ("[Property rights] must be redefined over time to prevent the illegitimate concentration of power in ways that keep individuals from participating in the market system on fair and equal terms."); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667 (1986); Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 741 (1986) ("[T]ime is embedded in the heart of rule-utilitarianism."). Cf. Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMANS. 37, 38 (1990) ("[D]iscussions of property at some point take a striking turn toward a narrative or 'diachronic' explanatory mode," where time and cumulative experience play essential roles.).

22. See Beitz, *supra* note 21, at 419; HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY 64 (2021) ("Indeed, the temporal extension, which typifies property rights, follows quite closely from property's autonomy-enhancing *telos*.").

23. José Brunner, *Modern Times: Law, Temporality and Happiness in Hobbes, Locke and Bentham*, 8 THEORETICAL INQUIRIES L. 277, 302 (2006) ("[F]or the durable protection of property allows humans to have rational expectations, i.e. to live fully as [the] future-oriented creatures that they are.").

24. Beitz, *supra* note 21, at 427; see also JEREMY BENTHAM, THE THEORY OF LEGISLATION 115 (C. K. Ogden ed., Richard Hildreth trans., Routledge & Kegan Paul Ltd. 2d prtg. 1950) (1789) ("Everything which I possess . . . I consider in my own mind as destined always to belong to me. I make it the basis of my expectations, and of the hopes of those dependent upon me, and I form my plan of life accordingly."); DAGAN, *supra* note 22, at 1 (arguing that property is concerned with "self-authorship, ensuring to all of us as free and equal individuals the possibility of writing and rewriting our own life stories").

25. See JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT (3d ed. 2008).

26. Beitz, *supra* note 21, at 427 ("Our capacity to act successfully as planning agents depends on having secure, intertemporal control of the things required for the success of our plans.").

Property rights do not have to be permanent and immutable, however, to create the benefits of owner reliance and control. Numerous and familiar property doctrines implicitly recognize the ways in which people’s reliance on underlying resources can shift, from the changed conditions doctrine in covenants, to the law of accretion, to the “coming to the nuisance” defense.<sup>27</sup> This Article argues that these doctrines are expressions of the dynamism running through property.<sup>28</sup> Property ensures stability over time, but not *too much* stability.

Methodologically, this Article is interpretivist.<sup>29</sup> It identifies reliance on resources as the core animating purpose of property. But it demonstrates that this reliance can arise either through transactions or through repetition over time—what the Article calls “evolutionary reliance.” It then identifies specific doctrines that would benefit from incorporating this focus on scalar or incremental change.

This Article therefore provides a new vision of property, not as a collection of discrete sticks in a bundle of rights, but instead as the locus of a web of competing reliance interests—between property owners, between owners and nonowners, and between owners and the State—none of which are necessarily static.<sup>30</sup> Property law ensures that rules and expectations shift gradually and that people are given time to adapt to those changes.<sup>31</sup> The role that property serves in the legal system is to protect reasonable reliance by constraining the pace of change.

The Article is both positive and prescriptive. It examines, first, neoliberal claims that have dominated property for much of the twentieth century, with a focus on stability and owner control. But it then demonstrates all the ways that property’s stability is tempered with dynamism and how property law moderates the pace at which reliance on resources changes over time. This claim is largely ground-up and inductive, and the evidence comes from the substantive content of existing property law and theory. Prescriptively, the Article shows

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27. See *infra* Parts II & III (considering these and other doctrines).

28. Nestor Davidson has also usefully identified property’s dynamism in the context of the Takings Clause. See Davidson, *supra* note 20.

29. See, e.g., Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, 70 U. TORONTO L.J. 489, 489–90 (2020) (distinguishing between “interpretivist” and “functionalist” theories of private law, and arguing that interpretivists seek to understand the “law from within and evaluat[e] it in terms of the coherence of the morality immanent in the law itself”).

30. Tony Arnold has also offered a similar characterization of property, usefully distinguishing a “web of interests” from the more traditional “bundle of sticks” metaphor. See Craig Anthony (Tony) Arnold, *The Reconstitution of Property: Property as a Web of Interests*, 26 HARV. ENV’T L. REV. 281, 332 (2002). His work did not focus on reliance, however, but instead on more general connections between people and resources. Nevertheless, this Article embraces the same formulation.

31. Underkuffler, *supra* note 12, at 2028 (“[The Takings Clause] seeks to protect individual property from radical changes in the status quo . . .”).



how focusing on the pace of change generates specific and important doctrinal payoffs.<sup>32</sup> Some are justificatory, like explaining adverse possession. But some require reforming existing doctrine to ensure that property will continue to serve the central goal of mediating between stability and dynamism over time.

To highlight just a few of the implications that are then canvassed more thoroughly in Part III, this theory offers a new gloss on nuisance law and on the “coming to the nuisance” defense, suggesting that the rate of change in the surrounding area should be an important consideration in allocating property rights. It provides a new justification for the changed conditions doctrine in the law of covenants, suggesting that courts often overprotect real covenants and equitable servitudes. The most important payoff comes at the intersection of property rights and public law, particularly in the law of regulatory takings and legal transitions. It provides a new framework for evaluating whether and when legal change interferes too much with settled reliance interests by focusing on the passage of time.

It is easy to anticipate two broad objections. First, change is sometimes sudden and dramatic.<sup>33</sup> The introduction of new environmental laws, landlord-tenant rules, or new land use regulations can all happen swiftly, reflecting a rapid change in our understanding of the world or dramatic shifts in society’s views about the appropriate use of property. Often, these are some of the most important leaps forward for society.<sup>34</sup> The theory offered here—locating reliance interests at the heart of property—operates as a check on such change in ways that may be normatively problematic. Indeed, this theory of property seems inherently conservative in its focus on protecting the status quo simply for the sake of stability. On the other hand, some may object that property is more protective than this theory suggests—that allowing incremental change is nothing more than death by a thousand cuts and the slow drip-drip erosion of rights. Property, for some, is a more permanent bulwark against regulatory intervention and legal evolution, and the passage of time should not be allowed to eat it all away.<sup>35</sup>

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32. See *infra* Part III.

33. For discussion of the difference between avulsion and accretion, see *infra* Part II.B.

34. See, e.g., Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 795 (2013) (“Viewed through the lens of property law—with its unwavering focus on certainty and consistency—recognition of the implied warranty of habitability in the late 1960s and early 1970s seems too radical to believe.”).

35. Cf. Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1243 (2009) (“A number of courts have held that an amortization period is nothing but a deferred taking of property.”).

Both are serious objections, but the fact that they represent opposite concerns highlights the value of the account of property offered here. Yes, some may worry that focusing on reliance is too protective, and others that it is not protective enough. Indeed, adherents of both camps will find much to dislike. But this account offers a new way of balancing the competing needs for dynamism and stability in the law and a framework for evaluating how the two trade off against each other in any particular context.

Indeed, this approach disarms some of the weaponization of property in contemporary political discourse. Many conservatives believe that the modern regulatory state runs roughshod over property rights and fear that the logical extension of expansive views of state power is the elimination of private property as a meaningful category.<sup>36</sup> Many liberals see the invocation of property rights as an attempt to prohibit redistributive policies; protecting property rights necessarily means protecting the existing allocation of resources and thus stands in the way of efforts to reduce inequality.<sup>37</sup> They worry that protecting property rights limits or prohibits environmental and other regulations that advance the public interest but that burden private property. This is a high-stakes fight, affecting the political palatability and also the constitutionality of a wide swath of the regulatory state.<sup>38</sup> Focusing on the pace of change reveals a narrow middle path. It reassures conservatives that property is a meaningful constraint on change. But it should reassure liberals that protecting property does not mean locking in the status quo. There are many opportunities to change property rights without disrupting settled reliance interests because of the ways in which property already changes dynamically over time.

Part I discusses the conventional view of property as promoting stable reliance interests and argues that most conventional accounts of property focus on reliance arising out of—and for the purpose of—voluntary transactions. Part I then argues that property also protects reliance that evolves naturally over time. From this perspective, property law is best understood as moderating the pace at which reliance interests change. That is what property does. Part II surveys some of the many doctrines that function in precisely this way. Part III then applies this dynamic view of reliance to contested areas of property

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36. See, e.g., John D. Echeverria, *The Politics of Property Rights*, 50 OKLA. L. REV. 351, 365 (1997) (characterizing the political disputes over property rights).

37. See, e.g., Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741 (1999); cf. PIERRE-JOSEPH PROUDHON, WHAT IS PROPERTY? 3 (Cosimo 2007) (1840) (“Property is theft!”).

38. See, e.g., Todd F. Gaziano, *PLF’s Commitment to End the Unconstitutional Regulatory State*, SWORD & SCALES, Spring 2018, at 3 (“[Pacific Legal Foundation] is the leader in thought and action to end the regulatory state and restore government to its proper, constitutional limits.”).

law, bringing surprising coherence to doctrines in nuisance law, adverse possession, and the Takings Clause.

## I. RELIANCE IN PROPERTY

Property law includes a heterogenous collection of topics and doctrines. It can be difficult to identify a single theme that links together rules as diverse as the touch-and-concern requirement for covenants, the rule against perpetuities, and the law of nuisance. It is therefore no surprise that normative accounts of property are deeply contested. Philosophers and legal scholars have wrestled with them for centuries.<sup>39</sup> Instead of asking what property is, reframing the inquiry to ask what it *does*—i.e., what role it serves in our legal system—reveals a theme that cuts through all these accounts: the institution of property protects people’s reliance on resources in the world.<sup>40</sup> But the source and content of that reliance is surprisingly undertheorized.

### A. Defining Reliance

Reliance is ubiquitous in the law. In criminal law, the prohibition against ex post facto laws and bills of attainder sounds in reliance; it reflects the intuition that people should be able to rely on existing rules when choosing how to act.<sup>41</sup> Prohibitions on retroactivity outside the criminal law are also explained by reliance.<sup>42</sup> Reliance is

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39. Leading works discussing the origins and content of property include, among many others, ARISTOTLE, *POLITICS*, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1113 (Richard McKeon ed., Benjamin Jowett trans., Random House 1941) (c. 330 B.C.E.); G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (Allen W. Wood ed., H. B. Nisbet trans., Cambridge Univ. Press 1991) (1821); THOMAS HOBBS, *ON THE CITIZEN* (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1647); DAVID HUME, *A TREATISE OF HUMAN NATURE* (Ernest C. Mossner ed., Penguin Books 1986) (1739–40); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1689); and KARL MARX, *CAPITAL* (Ernest Unterman, Samuel Moor & Edward Aveling trans., Stief Books 2018) (1867).

40. See, e.g., Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1376 (2013) (observing that the predictability offered by property regimes “allows actors to invest in reliance on clear rules of the game, avoids unfair surprise, controls the arbitrary discretion of judges, and promotes equality before the law by treating cases alike”).

41. See Serkin, *supra* note 35, at 1230 (“[I]t seems unfair for a government to change the regulatory rules in the middle of the game, thereby interfering with owners’ reasonable reliance on preexisting rules.”); see also, e.g., Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 876 (1960) (“Hostility of the Framers toward bills of attainder was so great that they took the unusual step of barring such legislative punishments by the States as well as the Federal Government.”). Reliance on apparent authority can sometimes be a defense to a criminal prosecution. Thomas W. White, *Reliance on Apparent Authority as a Defense to Criminal Prosecution*, 77 COLUM. L. REV. 775 (1977).

42. See Serkin, *supra* note 35, at 1230 (describing how government is not allowed to change the rules of the game on which private citizens have relied). Daniel Troy, in his leading treatment of the retroactivity problem, framed the issue this way: “[T]o what extent is one willing ‘to sacrifice

invoked so frequently in so many different contexts that it appears as an undercurrent throughout all law.<sup>43</sup>

Reliance in this broad sense does not require a technical or legalistic definition. It is a familiar and colloquial concept. In the context of property, it refers quite simply to someone's behavior resulting from a belief about an entitlement to a resource in the future, like planting a field to harvest the crops.<sup>44</sup> Such reliance can take the form of an affirmative action but also, for example, a decision *not* to sell a house, or to forego cutting down trees, because of an expectation that the house or the trees will still be available at some later time.

Importantly, reliance is informed by law but is not determined by positive legal rights.<sup>45</sup> Reliance is also affected by community norms, by politics, and by all of the routine day-to-day interactions that occur without any reference to the legal system at all—like the scenic view across a neighbor's property, or the rules governing parking spaces after a snowstorm in South Boston.<sup>46</sup> People can and often do rely on things to which they have no legal entitlement, i.e., no contract, no property right, or no statutory right of any kind. Reliance in this sense is therefore a psychological phenomenon more than a legal one.<sup>47</sup>

reliance on existing rules' to accommodate 'the need for change?' " DANIEL E. TROY, *RETROACTIVE LEGISLATION* 3 (1998).

43. See, e.g., *Heckler v. Mathews*, 465 U.S. 728, 746, (1984) ("The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides 'an exceedingly persuasive justification . . .'" (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981))).

44. This is distinct from the reliance interest animating Singer's article, which is primarily reliance on relationships and not on resources. See, e.g., Singer, *supra* note 13, at 664 ("The legal rules often grant the non-owner immunity from having such access revoked when the non-owner has legitimately relied on a relationship with the owner that made such access possible.").

45. See, e.g., Rose, *supra* note 21, at 50–55 (discussing how people develop expectations with regards to property through norms and "narrative"); Singer, *supra* note 13, at 666–67 n.178 ("Expectations are to some extent (but not completely) dependent on what the legal rules are . . . [E]xpectations may develop that are legitimate and worthy of legal protection even in the absence of prior specific legal rules giving parties a right to expect certain things."). *But cf.* Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 564 (1991) ("The only basis for determining what people expect [of property] is what they have been told to expect based on their legal rights.").

46. See, e.g., Maureen Dahill, *The Unofficial Rules for Saving a Spot*, CAUGHTINSOUTHIE (Dec. 17, 2020), <https://caughtinsouthie.com/features/unofficial-rules-2/> [<https://perma.cc/DQ7D-RMZ9>]; see also Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 18–21 (1990) (discussing role of norms in collective management of resources).

47. There is a venerable tradition of scholarship focused on this kind of "human nature" account of law. See, e.g., Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1047 (2011) ("Carol [Rose] points out that famous accounts of property from Locke and Blackstone to Demsetz all involve a view—or views—of human nature."). Ultimately, Justice Holmes's admonishment is apt: "The law can ask no better justification than the deepest instincts of man." Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897). For a similar focus on important psychological intuitions, see Davidson, *supra* note 20, at 444, noting

This use of reliance is very different from the more technical one that pervades contract law, for example.<sup>48</sup> In most contract law and scholarship, reliance is both the basis for—and a measure of—damages.<sup>49</sup> As one theorist explained, the reliance interest is one’s “interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made.”<sup>50</sup>

More generally, of course, contracts are a mechanism for inducing reliance over time.<sup>51</sup> As a practical matter, in transactions of any complexity, reliance is the entire point.<sup>52</sup> The reason for contracting is to create or induce reliance, and reliance arises out of—and from the moment of—contract formation.<sup>53</sup> Parties have considerable—but not complete<sup>54</sup>—latitude to contract around the possibility of significant

that “[j]ustifications for property rights reflect varying and often implicit assumptions about the habits of mind that animate the work of property,” and Sarah Harding, *Perpetual Property*, 61 FLA. L. REV. 285, 325 (2009), writing that “Emphasis on the subjective element of ownership, the importance of imagination, and psychological attachments, have been key elements in property theory going back at least to Hume.”

48. Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481, 490 (1996):

Reliance is a form of “relationship-specific investment.” More specifically, it is any choice, be it action or inaction, which will (1) make S’s performance more valuable to B if S does in fact perform, but (2) make B worse off than if he had not relied if S fails to perform. The second element of this definition means that reliance always involves some risk to the relying party.

49. L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages* (pt. 2), 46 YALE L. J. 373, 374 (1937) (describing reliance in contract).

50. Robert A. Hudec, *Restating the “Reliance Interest,”* 67 CORNELL L. REV. 704, 707 (1982) (describing a theory of reliance in contract).

51. See, e.g., Singer, *supra* note 13, at 700 (“We enforce promises because they create expectations that figure into our conduct: We change our behavior based on our trust that promises will be fulfilled; we act with promises in mind; *we rely on them.*”). Sometimes, contracts are so fleeting that their temporal aspect fades into the background. If someone buys something at a store, the exchange—cash for widgets—is a contract but does not induce reliance in any meaningful way. Aspects of the transaction may have a temporal dimension, like any warranty that lasts into the future. But reliance is a relatively unimportant goal or even byproduct of the transaction.

52. See, e.g., MARTIN HOGG, PROMISES AND CONTRACT LAW 98 (2011) (“Reliance theory . . . is based on the view that promising is moral because a promise generates reliance in others . . .”).

53. The promise theory of contracts has this kind of reliance explicitly at its core. According to Martin Hogg, “Promises are only morally (and indeed legally) worthy of being kept on a reliance approach when such reliance is generated . . .” *Id.* at 98–99. Hogg goes on to explain, “Genuine reliance theorists hold that it is the very presence of the reliance which generates the moral obligation . . .” *Id.* at 99.

54. Under modern contract doctrine, nonbreaching parties may have obligations to mitigate damages, for example through cover. See, e.g., U.C.C. § 2-712 (AM. L. INST. & UNIF. L. COMM’N 2020); see also RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. h (AM. L. INST. 1981) (“[I]f a buyer of goods who decides, on repudiation by the seller, to ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller, he is protected under Uniform Commercial Code § 2-712.”). Some changes in the world may be so dramatic as to render the contract unenforceable. See

changes in the world.<sup>55</sup> And more granular contract terms can specify all kinds of contingencies that may modify performance obligations. In the main, the content of these provisions is left to the parties, and courts' enforcement is intended to hold parties to their bargains.

In other words, the extent of reliance on contracts is by and large internal to the substance of the contract and so is subject to negotiation. Contractual duration, cancellation provisions, mechanisms for modification of price terms, and so forth are all provisions that can affect the extent and nature of parties' reliance. There are limits at the outer edges. A contract without any reliance at all may be illusory.<sup>56</sup> Some contract doctrines inject a measure of dynamism in contractual relationships.<sup>57</sup> And efforts to create too much reliance—say, in the form of excessive liquidated damages—may not be enforced.<sup>58</sup> But within a large band, the parties themselves can agree on the extent of reliance embodied in a contract.

The source and content of reliance in property is different but is surprisingly undertheorized. In most modern accounts of property, reliance arises primarily through transactions and for the purpose of facilitating further transactions. Property protects this kind of “transactional reliance” by promoting strong, stable rights to resources that endure over time. However, reliance on resources can also arise

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Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co., 582 F.3d 721 (7th Cir. 2009) (allowing impossibility defense if unexpected events upset parties' expectations). Impossibility can be a defense to performance, as can impracticability in certain situations. See 102 AM. JUR. PROOF OF FACTS 3D 401 *Impossibility of Performing Contract* § 6, Westlaw (database updated Dec. 2021) (“Under the doctrine of impossibility of performance, one party's duty to perform under the contract is discharged when, without any fault of that party, it becomes impossible to perform.”); see also RESTATEMENT (SECOND) OF CONTRACTS, *supra*, § 261:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

55. For example, force majeure clauses can excuse performance where acts of God undermine the purpose of the contract. Michael Polkinghorne & Charles Rosenberg, *Expecting the Unexpected: The Force Majeure Clause*, 16 BUS. L. INT'L 49, 50 (2015) (“Force majeure clauses thus serve as a precaution against the risks posed by certain economic, political and natural disaster events.”).

56. See, e.g., JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 4-12, at 228–38 (3d ed. 1987).

57. Examples include relational contract theory, which focuses on the informal dynamics governing contract rights, see Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649, 654 (2010); doctrines related to contract modification, see Kevin E. Davis, *The Demand for Immutable Contracts: Another Look at the Law and Economics of Contract Modifications*, 81 N.Y.U. L. REV. 487 (2006); and output and requirement contracts, see Mark P. Gergen, *The Use of Open Terms in Contract*, 92 COLUM. L. REV. 997, 1046 (1992).

58. See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 225 (1995) (“It is a basic principle of contract law that contractual provisions that liquidate damages for breach are not enforceable in the same way as most other kinds of bargain terms, but instead are reviewed with special scrutiny.”).

more organically over time. This “evolutionary reliance” is less familiar but appears throughout the law of property and supplies its own internal logic. Consider these in turn.

### *B. Transactional Reliance*

The source and purpose of reliance that dominates modern approaches to property is transactional in nature. People acquire property through discrete transactions—contracts, gifts, and so forth. And the law protects property as a way of empowering private control over resources. This is explicit and obviously true of neoliberal property theory that privileges free-market exchange over regulations to ensure that decisionmakers internalize the costs of their actions to the fullest extent possible.<sup>59</sup> But this transactional view pervades property law and theory more generally and is lurking at the heart of any conventional account of property today.<sup>60</sup>

For example, a core justification for the institution of private property is in response to the tragedy of the commons.<sup>61</sup> Communal ownership of resources can lead to overconsumption. Property is a response precisely because it solves collective action problems and facilitates transactions in the resource.<sup>62</sup> Or consider Harold Demsetz’s anthropologically dubious but famous account of the rise of property rights in Native American tribes.<sup>63</sup> When animals had only consumption value, they were not overhunted and there was no need

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59. See RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 12–13 (1985) (arguing against government redistribution and in favor of voluntary transactions); Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 136 (1979) (“The system I have sketched of property rights . . . provides foundation and accommodation both of individual rights and of the material prosperity upon which . . . the happiness of most people depends.”). On cost internalization, see, for example, Garret Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967); and Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 6 (2003), which states “No one owner fully internalizes all of the costs associated with [public property], so all users have an incentive to overuse.”

60. See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (justifying property rules on grounds of facilitating voluntary transactions).

61. See Hardin, *supra* note 59.

62. *Id.* at 1245 (arguing that private property prevents overconsumption because it “deters us from exhausting the positive resources of the earth”).

63. See Demsetz, *supra* note 59. But see Katrina Miriam Wyman, *From Fur to Fish: Reconsidering the Evolution of Private Property*, 80 N.Y.U. L. REV. 117, 121–25 (2005) (arguing that Demsetz’s theory of private property ignores the role of the political decisionmaking process in market ordering).

for private property.<sup>64</sup> People had no reason to try to acquire more pelts or meat than they could use and consume themselves. But once a market arose and fur had economic value as an item to trade, incentives changed. In order to prevent battles over fugitive resources, private property rights arose over hunting territory. As Demsetz theorized, “the fur trade made it economic to encourage the husbanding of fur-bearing animals. Husbanding requires the ability to prevent poaching and this, in turn, suggests that socioeconomic changes in property in hunting land will take place.”<sup>65</sup>

Property, in this view, is a tool for forcing (or allowing) owners to internalize the costs of their decisions vis-à-vis resources in the world.<sup>66</sup> If a farmer plants hemp instead of corn, she reaps the rewards if hemp succeeds and suffers the costs if corn would have been the better choice. So too with every property decision: replace the leaky house roof now or wait a year, build a new garden shed or a hot tub, license the movie rights to a novel or not. The list is endless. But the through line is that the goal of property—its animating logic—is to provide rights that allow people to invest in resources, secure in their ability to realize the rewards in the future.<sup>67</sup> In colloquial terms, property ensures that people can reap where they have sown.<sup>68</sup> And this predictability and control allow people to decide for themselves how to put property to its highest and best use.

The ubiquity of this framework is partly a testament to the influence of the Coase Theorem, which asserts that, in the absence of transaction costs, the initial allocation of resources will not affect their ultimate distribution because subsequent transactions will transfer rights and resources into the hands of the parties that value them the most.<sup>69</sup> It is also a testament to the influence of the law and economics

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64. Demsetz, *supra* note 59, at 351 (“Before the fur trade became established, hunting was carried on primarily for purposes of food and the relatively few furs that were required for the hunter’s family.”).

65. *Id.* at 352.

66. *Id.* at 348.

67. See LOCKE, *supra* note 39, at 91–120 (articulating labor theory of property); *cf.* Pierson v. Post, 3 Cai. 175, 180–81 (N.Y. Sup. Ct. 1805) (Livingston, J., dissenting) (identifying the functional goal of property as incentivizing capturing foxes).

68. See, e.g., Epstein, *supra* note 21, at 695; BENTHAM, *supra* note 24, at 110 (“[Law] says[:] *Labour and I will assure to you the enjoyment of the fruits of your labour—that natural and sufficient recompense which without me you cannot preserve[:]* I will insure it by arresting the hand which may seek to ravish it from you.”).

69. Coase, *supra* note 16, at 15 (“[When] market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.”).



movement more generally.<sup>70</sup> Any voluntary transaction, by definition, involves moving a resource to someone who values it more.<sup>71</sup> And so, one influential way of assessing a rule or doctrine in property is by its likely effect on voluntary transactions, or at least its approximation of the outcome of a voluntary transaction if no such transaction is possible.<sup>72</sup>

Conventional property doctrine and theory therefore focuses on the ways in which property allocates decisionmaking authority over resources to owners.<sup>73</sup> This, in turn, motivates an internal logic based upon stability over time. Ownership ideally begins with original acquisition of a resource—through doctrines like capture or creation—and then passes through a series of voluntary transactions that constitute an unbroken chain of title.<sup>74</sup> Conceptually, the existing allocation of property can be traced through a chain of voluntary transactions all the way back to original acquisition, or at least to a time when “the memory of man runneth not to the contrary.”<sup>75</sup> Property reaches back into the past through a chain of title to justify its current distribution.

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70. At the most general level, Law and Economics is concerned with maximizing welfare. *See e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.12, at 95 (8th ed. 2011); Richard A. Posner, *The Ethics of Wealth Maximization: Reply to Malloy*, 36 U. KAN. L. REV. 261, 263 (1987) (defending wealth maximization as the “best theory, both positive and normative, of common law rights and remedies”).

71. Economic conditions are “Pareto efficient” where it is impossible to reallocate the resources in a manner that would make at least one person feel better off without making someone else worse off. *See generally* Uwe E. Reinhardt, *The Concept of “Efficiency” in Economics*, PRINCETON UNIV., [https://scholar.princeton.edu/sites/default/files/reinhardt/files/597-2016\\_efficiency\\_in\\_economics-conceptual\\_issues.pdf](https://scholar.princeton.edu/sites/default/files/reinhardt/files/597-2016_efficiency_in_economics-conceptual_issues.pdf) (last visited Mar. 28, 2022) [<https://perma.cc/9MHR-UAP6>].

72. *See* Bell & Parchomovsky, *supra* note 3, at 547–50 (2005) (detailing the influence of economic analysis on property law doctrines); Louis Kaplow & Steven Shavell, *Economic Analysis of Law*, 14–17 (Nat’l Bureau of Econ. Rsch., Working Paper No. 6960, 1999) (explaining that consolidated ownership, rights to transfer, and possessory rights are beneficial forms of property interests because they minimize transaction costs). For the latter, see, for example, CAL. CIV. JURY INSTRUCTIONS No. 3501 (2020), which defines compensation for purposes of eminent domain as “the highest price for the property that a willing buyer would have paid in cash to a willing seller.”

73. *See* Katz, *supra* note 7, at 278 (“The law preserves the exclusivity of ownership not by excluding others but by harmonizing their interests in the object with the owner’s position of agenda-setting authority.”).

74. *Cf.* Jack Gostl, *Lawyer Joke*, NETFUNNY.COM, <https://www.netfunny.com/rhf/jokes/99/Jan/fhaloan.html> (last visited Mar. 28, 2022) [<https://perma.cc/B25V-NAVM>] (referring to apocryphal email from a lawyer conducting a title search as providing title back to God as original owner).

75. 1 BLACKSTONE, *supra* note 9, at \*76–77; *see also* Bell & Parchomovsky, *supra* note 3, at 595 (“The chain of title rule is instrumental in maintaining the value of stable ownership by ensuring that loss of possession—voluntary or involuntary—will not, of itself, endanger the ownership right. Consequently, the status and benefits of ownership may be enjoyed without excessive investment in the asset’s protection.”); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 14 (1960) (discussing the theory of the lost grant).

It also extends forward by protecting expectations about resources in the world.<sup>76</sup> Property law vindicates people's reliance on that chain of title, for example with recordation rules and protection for bona fide purchasers.<sup>77</sup> The role of property rights in this system is to ensure that people can rely on resources they acquire, whether through original acquisition or subsequent transactions.<sup>78</sup> Indeed, Abraham Bell and Gideon Parchomovsky identified "stability" as property's central feature, arguing that "property increases value by creating and defending stable ownership."<sup>79</sup> Rights must be clear and stable at any moment in time.

Transactional reliance therefore appears instantly. If you buy my house, you can rely on owning that house from the moment we sign the closing documents. My reliance in the house is wiped clean, or nearly so. I may return days or years later and may even knock on your door and ask to look around, but we both understand that you are under no obligation to let me in, and that my ability to rely on the house terminated the moment I sold it to you—the same moment at which your reliance began.<sup>80</sup>

The resulting property rights are also presumptively perpetual, generating open-ended reliance.<sup>81</sup> While some specific forms of

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76. See, e.g., Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 586 (1988) ("The *raison d'être* of such [titling] systems is to clarify and perfectly specify landed property rights for the sake of easy and smooth transfers of land."); see also A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 119 (A.G. Guest ed., 1961) ("An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses.").

77. See, e.g., Donald J. Kochan, *Dealing with Dirty Deeds: Matching Nemo Dat Preferences with Property Law Pragmatism*, 64 U. KAN. L. REV. 1, 3 (2015) (describing protection of bona fide purchasers); cf. Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 81 (1985) ("[C]lear titles facilitate trade and minimize resource-wasting conflict.").

78. Even where there are breaks in that chain, as when property is lost, narrow doctrines step in to settle title, in effect reaffirming the overall sanctity of stable property rights. See, e.g., *supra* Part II.A (discussing adverse possession).

79. Bell & Parchomovsky, *supra* note 3, at 552 ("[T]he benefits provided by property systems increase with the stability of the property rights they create."); see also Lovett, *supra* note 14, at 466 (describing role of property in promoting stability).

80. See J. E. Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 752 (1996) ("[W]e feel no obligation to consider the wishes of the seller when we decide how to use the things we buy. The seller has relinquished his interest in the property by trading it."). But see *Modern Family: The One That Got Away* (ABC television broadcast May 25, 2011) (following siblings who break into former house to recreate a photograph from their childhood). Even here, there is space between reliance and what the law actually protects. Conveyance of property through a defective deed, for example, can induce transactional reliance, even if it does not successfully convey legal title. See, e.g., *White v. Farabee*, 713 S.E.2d 4, 10 (N.C. Ct. App. 2011) ("[B]ecause the deeds were executed by a group of persons failing to have full and complete title to the property, the deeds fail to actually convey the land as described in the deeds.").

81. But see Harding, *supra* note 47, at 286 ("[P]roperty interests typically exist for a specific time period."). See generally BENTHAM, *supra* note 24.

ownership like the life estate or term of years come with time limits, most property rights are temporally unbounded. Fee simple ownership is defined by its infinite length.<sup>82</sup> Property's persistence over time means that reliance interests, once they arise, cast shadows far into the future. Contracts expire, either explicitly or implicitly.<sup>83</sup> Property does not.

Richard Epstein has argued that this unlimited duration is an important feature of property rights, at least those acquired by some claim to first-in-time (or through chain of title back to first-in-time).<sup>84</sup> In one of the more explicit and lucid accounts of property's temporality, Epstein reasoned that only perpetual ownership avoids the problems that would otherwise arise at the end of the tenure, for example rent-seeking or other strategic behavior that can destroy the value of a resource or impose other costs.<sup>85</sup> In his view, temporally bounded ownership creates a mismatch between reaping and sowing and would make an owner reluctant to invest. Perpetual property rights prevent the kinds of strategic behavior that otherwise might occur as ownership ends.

This need for enduring stability also prioritizes rights of exclusion. For people to be able to rely on resources over time, they must—by and large<sup>86</sup>—be able to exclude others. Indeed, Thomas Merrill and Henry Smith place exclusion at the heart of property because it creates and enforces clear boundaries, allowing people to set for themselves the terms on which they will transact.<sup>87</sup> They follow on

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82. D. Benjamin Barros, *Toward a Model Law of Estates and Future Interests*, 66 WASH. & LEE L. REV. 3, 9 (2009) (“Because the fee simple absolute is of unlimited duration, it is not accompanied by a future interest.”); cf. Lee Anne Fennell, *Lumpy Property*, 160 U. PA. L. REV. 1955, 1961 (2012) (“Property intentionally bundles along the temporal dimension and, at least in the case of the fee simple absolute, it does so in a very open-ended way.”).

83. See, e.g., 91 N.Y. JUR. 2D *Real Property Sales and Exchanges* § 95, Westlaw (database updated Nov. 2021) (“Generally, when nothing appears in the writings as to the time and manner of taking the property, the omission is not necessarily fatal since the law will presume a reasonable time and customary procedure.”).

84. Epstein, *supra* note 21, at 694 (“Ownership acquired by first possession is and should be of infinite duration.”).

85. *Id.* at 695–96; see also Roy E. Cordato, *Time Passage and the Economics of Coming to the Nuisance: Reassessing the Coasean Perspective*, 20 CAMPBELL L. REV. 273, 283 (1998) (arguing that changes in property rights create the possibility of pricing errors that lead to inefficiency).

86. Larissa Katz has argued that exclusion is not always strictly necessary, and that others may be able to use resources so long as their use does not interfere with owners' “agenda-setting authority” over the resource. See Katz, *supra* note 7 (arguing that exclusion does not necessarily require a right to exclude others' non-interfering uses of a resource).

87. Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1702 (2012) (“The exclusion strategy defines a chunk of the world—a thing—under the owner's control . . .”).

a long tradition.<sup>88</sup> Lee Fennell makes explicit this connection between stability and exclusion. In her article “Lumpy Property,” she argues that property creates and then enforces usable “lumps.”<sup>89</sup> As she points out, “A bridge stretching only three-quarters of the distance across a chasm is useless, while a bridge that is longer than necessary does no more good than one that just spans the gap.”<sup>90</sup> And she argues that Merrill and Smith’s theory “takes as a given the blocky chunks of control that property has historically given owners. Interfering with what seems to be a minor twig, we are warned, could upend the owner’s plans and projects in ways we cannot foresee.”<sup>91</sup> Exclusion and stability are flip sides of the same coin—and that coin is protecting owners’ reliance on resources in the world.

Doctrines preventing involuntary incursions are therefore central to protecting and encouraging voluntary transactions. Merrill and Smith begin their property casebook with a trespass case, *Jacque v. Steenberg Homes, Inc.*<sup>92</sup> There, Defendant sought to deliver a mobile home by crossing Plaintiffs’ snow-covered field without their consent. The trespass was clear, but so was the absence of harm. A jury awarded only \$1 in compensatory damages, but \$100,000 in punitive damages. Upholding the award, the Wisconsin Supreme Court held that, “[B]oth the private landowner and society have much more than a nominal interest in excluding others from private land. . . . [N]ominal damages may support a punitive damage award in an action for intentional trespass to land.”<sup>93</sup> Trespass is thus the clearest and most familiar doctrine protecting owners’ reliance on resources by strictly policing the right to exclude.

Property law also reinforces stability and the centrality of voluntary transactions by enforcing rights through injunctions instead of damages in most property contexts—the distinction between “property rules” and “liability rules.”<sup>94</sup> The latter are damages assessed by a court. The former are stronger, providing “immunity against forced transactions.”<sup>95</sup> Property rules protect owners’ right to choose the terms

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88. See 2 BLACKSTONE, *supra* note 9, at \*2 (defining property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”).

89. See Fennell, *supra* note 82, at 1964.

90. *Id.* at 1956.

91. *Id.* at 1982.

92. 563 N.W.2d 154 (Wis. 1997).

93. *Id.* at 161.

94. See Calabresi & Melamed, *supra* note 60 (distinguishing between property and liability rules).

95. Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1824 (2009); see also Calabresi & Melamed, *supra* note 60, at 1092 (“An entitlement is

on which they transact, and Guido Calabresi and A. Douglas Melamed justify them when transaction costs and market failures are likely to be low.<sup>96</sup> Damages, after all, amount to a kind of pricing mechanism for the invasion of rights. This is obviously true in contracts, which is suffused with theories of efficient breach.<sup>97</sup> Property is stronger. It has a kind of moral force.<sup>98</sup> There is no equivalent sense of efficient breach in property, and violations of property rights are often remedied with injunctive relief and punitive damages.<sup>99</sup>

Ultimately, property rights arise to encourage the development of valuable resources, and then are defined and protected to promote stability and minimize transaction costs. Strong and durable property rights protect owners' autonomy in deciding whether or not to transact, giving parties themselves the ability to decide whether, how, and when a resource should be used, developed, transferred, or even left unused.

This transactional approach views the institution of property as functioning primarily to protect owners' stable reliance on resources in the world. The principal sources of property rights are voluntary exchanges traced all the way back to some original acquisition, and the purpose of property law is to protect that chain of title and to minimize transaction costs.

### *C. Evolutionary Reliance*

While transactional reliance permeates property today, reliance on resources can also arise through a more organic process of evolution over time, what this Article labels "evolutionary reliance."<sup>100</sup> Property's

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protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”).

96. See Calabresi & Melamed, *supra* note 60, at 1092–93 (defining a property rule as “the form of entitlement which gives rise to the least amount of state intervention . . . . It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough”).

97. See Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 558 (1977) (“The modern law of contract damages is based on the premise that a contractual obligation is not necessarily an obligation to perform, but rather an obligation to choose between performance and compensatory damages.”).

98. Thomas W. Merrill & Henry E. Smith, *Morality of Property*, 48 WM. & MARY L. REV. 1849, 1891 (2007). Alternatively, some might say it is suffused with violence. See Daniel J. Sharfstein, *Atrocity, Entitlement, and Personhood in Property*, 98 VA. L. REV. 635 (2012) (exploring the role of violence in the acquisition and use of property); Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59 (2014) (describing the violent nature of historical private ordering regimes).

99. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 161 (Wis. 1997).

100. In fact, it may take more forms than this, but a thoroughgoing typology of reliance interests in the legal system is beyond the scope of this Article.

core function may be to protect reliance on resources in the world, but *whose* reliance it protects can shift, as can the substantive content of the rights it reflects. As a result, property law mediates between people's competing reliance interests, allowing them to evolve. This is in sharp contrast to the purely transactional view of property's origins and purpose.

Evolutionary reliance is less familiar as a category but captures a universal phenomenon. It is the reliance on resources that arises simply through repetition or familiarity over time. It should take only a moment to think of something on which you have come to rely despite the lack of any legal right to it, perhaps a shortcut over private property to school or work that you take every morning, a scenic vista from your living room, a favorite field, or any number of nearly limitless examples.<sup>101</sup> You can also rely on a particular use of your property whether or not it is strictly legal, like renting an apartment in violation of local zoning, rehearsing emo music in your garage in violation of nuisance law, and so forth. Evolutionary reliance, in short, arises alongside but separately from law.<sup>102</sup>

When property law protects evolutionary as opposed to transactional reliance, it is not protecting stable rights of exclusion. It is instead serving as the locus for competing reliance interests that change over time. This is fundamentally a dynamic vision of property quite different from the neoliberal conception of property as the hard-edged building blocks of consensual transactions.

Dynamism in this context is not the same as weakness. Property rights can be both strong and dynamic. Indeed, they are. They are strong at any given time, but dynamic over time. This runs counter to most people's intuitions. Laura Underkuffler, for example, has argued that property is inherently incompatible with change. As she puts it, in criticizing the Supreme Court's takings jurisprudence: "The core difficulty . . . is the collision of the *idea of property* with the *idea of*

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101. People can, indeed, rely on the availability of a footpath, and emotions can run very high in the face of interference. *See, e.g., Julie Halpert, Sue Thy Neighbor*, ANN ARBOR OBSERVER (May 2014), [https://annarborobserver.com/articles/sue\\_thy\\_neighbor.html#.XfgEgy2ZNp9](https://annarborobserver.com/articles/sue_thy_neighbor.html#.XfgEgy2ZNp9) [<https://perma.cc/7AB6-X8BZ>] (describing one such costly legal battle).

102. Law sometimes trails reliance and sometimes leads it. Someone might rely on something for a long time before the law eventually catches up and recognizes a right (if it ever does). Or the law might grant a right—say, a rent-regulated apartment or a patent—and thereby induce reliance in the future. *See* Christopher Serkin, Penn Central *Take Two*, 92 NOTRE DAME L. REV. 913 (2016) (discussing regulatory property); Katrina Miriam Wyman, *Problematic Private Property: The Case of New York Taxicab Medallions*, 30 YALE J. ON REGUL. 125 (2013) (discussing property rights in taxi medallions). The focus here is on the former and how people come to rely on resources in the world, and how the law then comes to vindicate reliance.

change.”<sup>103</sup> The account here, in contrast, sees dynamism at the heart of property itself. Change is not a concession to other important values but is instead inherent in property itself.<sup>104</sup> What property law does is moderate the *pace* of change.

Reliance can solidify, as people rely consistently on a set of expectations around the ongoing availability of a resource. And it can liquify, as expectations shift through nonuse.<sup>105</sup> When changes occur slowly, reliance may evolve without much awareness at all. But sudden changes can be enormously disruptive to settled expectations. If a parent grabs a toy from a child’s hand, the child will likely cry. But if the parent gives a warning—“five more minutes before you have to put that away”—the eventual transition can be smoother because the child’s reliance on the toy is given a chance to shift more gradually. This is no guarantee of the absence of tears, but anyone with children understands that advance warning can have dramatic effects on a child’s experience of the eventual wrench of loss precisely because it eases the transition over time.

Evolutionary reliance is related to, but distinct from, the endowment effect that is well known in the psychological literature.<sup>106</sup> The endowment effect—a function of loss aversion—explains that people tend to value resources in their possession more highly than resources they do not yet own.<sup>107</sup> The resulting ask/offer gap is a staple of behavioral economics.<sup>108</sup> Importantly, some studies support the intuition that the value of an object grows over time the longer the object is possessed.<sup>109</sup> But these studies have not focused on the pace of

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103. Underkuffler, *supra* note 13, at 2016; *see also* Bell & Parchomovsky, *supra* note 3, at 573 (“The stability in ownership afforded by the law creates the possibility for developing new kinds of value in, and uses of, property that would otherwise be unavailable.”).

104. Nestor Davidson, too, has argued that people rely on the legal system to be responsive to changes in the world, and so he too sees dynamism in the content of property law. Davidson, *supra* note 20.

105. Margaret Jane Radin, *Property as Personhood*, 34 STAN. L. REV. 957, 977 (1982) (“[P]eople and things have ongoing relationships which have their own ebb and flow . . .”).

106. *See, e.g.*, Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1327 tbl.1 (1990) (citing studies).

107. *See, e.g.*, Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1483–84 (1998) (describing endowment effect). This insight long predates behavioral economics. *See* BENTHAM, *supra* note 24, at 115 (“Every part of my property may have, in my estimation, besides its intrinsic value, a value of affection . . .”).

108. *See* Jolls et al., *supra* note 107, at 1484 (“This effect is generally referred to as the ‘endowment effect’; it is a manifestation of the broader phenomenon of ‘loss aversion’ . . . which in turn is a central building block of Kahneman and Tversky’s prospect theory.”); Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935 (2008) (discussing the endowment effect in the context of evolutionary biology).

109. *See, e.g.*, Michael A. Strahilevitz & George Loewenstein, *The Effect of Ownership History on the Valuation of Objects*, 25 J. CONSUMER RSCH. 276 (1998) (discussing studies that suggest

change. As a result, existing psychological literature gestures at, but does not fully capture, the intuition here: that people come to rely on resources in ways that change predictably over time.

Property law and property regimes are of course much more complex institutions than a child's simple claims of possession or the value that research subjects assign to coffee mugs.<sup>110</sup> Nevertheless, the same basic intuition applies. From municipal street mapping to amortization of prior nonconforming uses in land use law, advance warning of change can have meaningful legal consequences. Or, as Carol Rose elegantly articulated the intuition in a different context, "The nooks and crannies of comfortable doctrine supplement the sheer passage of time, reinforcing people's tendency to settle in and think that their 'rights' must have always been there."<sup>111</sup>

That property serves precisely this role is evident across a surprisingly wide swath of doctrines and reveals a very different internal logic than the conventional transactional view.

## II. EVOLUTIONARY RELIANCE IN PROPERTY DOCTRINES

Many property rights arise and change through the gradual evolution of reliance. Instead of creating static rights, or fixed sticks in a bundle of rights, property is better characterized as the nexus of a web of competing reliance interests. Property doctrines mediating these kinds of interests reveal that some property rights are shaped simply by habit and expectations based on familiarity over time.<sup>112</sup> The evolutionary nature of reliance therefore results in dynamism in property rights. This Part samples core property doctrines protecting evolutionary reliance. The key observation is that all of the familiar doctrines discussed below balance reliance interests that shift gradually over time.

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"object valuation is affected by both past and present ownership status—that is, by the history of ownership"); Suzanne B. Shu & Joann Peck, *Psychological Ownership and Affective Reaction: Emotional Attachment Process Variables and the Endowment Effect*, 21 J. CONSUMER PSYCH. 439 (2011) ("Our research supports the concept of emotional attachment as an explanation for many of the endowment effect findings . . .").

110. Krier & Serkin, *supra* note 1, at 149 (identifying possession as a heuristic for the more complex institution of property).

111. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 611 (1998).

112. *Cf.* BENTHAM, *supra* note 24, at 149–50 (identifying "habit" as a basis for the establishment of "natural expectations" to resources that are antecedent to law or legislation).



*A. Adverse Possession*

Adverse possession reveals precisely these forces at work.<sup>113</sup> Through ongoing use of property for the statutory period, a nonowner can eventually claim title to property by adverse possession so long as the “rightful” owner does not assert his rights before the statute has run.<sup>114</sup>

Underlying justifications for adverse possession are familiar but surprisingly contested. Some courts and commentators focus on an earning theory, awarding ownership to an adverse possessor as a kind of reward for putting property to productive use.<sup>115</sup> Others focus on a sleeping theory, which charges the true owner with demerits for failing to protect the property.<sup>116</sup> Still others invoke transaction cost rationales,<sup>117</sup> evidentiary hurdles,<sup>118</sup> or the integrity of the titling

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113. See, e.g., Singer, *supra* note 13, at 665–69 (discussing adverse possession); Hamill, *supra* note 19, at 230–31 (examining the temporality of property through the lens of adverse possession).

114. See 3 AM. JUR. 2D *Adverse Possession* § 9, Westlaw (database updated Jan. 2022). Precisely the same analysis applies to the constellation of property doctrines related to adverse possession. Easements by prescription arise through the continued use of property over time so long as the true owner does not take steps to stop the use. The more byzantine fee simple subject to condition subsequent (“FSSCS”) contains the same dynamic. As its name implies, the FSSCS contains a condition that, if triggered, entitles a third party to take title to the property through a right of entry. Unlike a fee simple determinable, where the third party takes title automatically, the holder of a right of entry must exercise that right, and must do so within a pre-specified amount of time. That time limit is not necessarily the same as the time limit for adverse possession. Nevertheless, the animating intuition is the same. If the right of entry goes unexercised for long enough, the FSSCS converts into a fee simple absolute and the future interest is extinguished. See 1 PATTON AND PALOMAR ON LAND TITLES § 205, Westlaw PATTONTITL (database updated Dec. 2021).

115. Johnson v. M’Intosh, 21 U.S. (8 Wheat.) 543, 569 (1823) (“The measure of property acquired by occupancy is determined, according to the law of nature, by the extent of men’s wants, and their capacity of using it to supply them.”); Radin, *supra* note 21, at 750 (“[I]f property is acquired from the common by a nonowner simply by taking it and using it, can we not sympathize with someone who does likewise with owned but unused property, especially if she does not know it is owned?”); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP 15 (1994) (discussing adverse possession).

116. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130 (1984).

117. Rose, *supra* note 77, at 81 (“[C]lear titles facilitate trade and minimize resource-wasting conflict.”); see also Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2441–42 (2001) (“It is hard to be confident today the net effect of adverse possession is to increase a purchaser’s certainty that his seller is the legal owner.”).

118. Merrill, *supra* note 116, at 1128 (“As time passes, witnesses die, memories fade, and evidence gets lost or destroyed.”).

system,<sup>119</sup> to name just a few. But leading accounts implicitly recognize that *evolutionary* reliance plays a central role.<sup>120</sup>

As Oliver Wendell Holmes famously wrote in his justification for the doctrine of adverse possession: “A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it.”<sup>121</sup>

The quote is familiar and much studied, but revisiting it in this context highlights important themes of evolutionary reliance: that property rights can arise through ongoing reliance by a nonowner and that the underlying reliance emerges with the passage of time.<sup>122</sup> Others—nonowners—may come to rely upon a resource in ways that the law eventually protects. Thomas Merrill also discussed the doctrine in precisely these terms, writing: “[An] explanation for the system of adverse possession focuses on the possessor, and in particular on the reliance interests that the possessor may have developed through longstanding possession of the property.”<sup>123</sup>

Here we have the vision of property as the locus of evolving interests laid bare. As Holmes and later Merrill both observed, it is the passage of time that generates the nonowner’s reliance.<sup>124</sup> The person

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119. Rose, *supra* note 77, at 80 (“The possibility of transferring titles through adverse possession once again serves to ensure that members of the public can rely upon their own reasonable perceptions . . .”).

120. See Singer, *supra* note 13, at 665–69 (“As time goes on, the adverse possessor’s reliance interests are likely to become increasingly substantial.”); Hamill, *supra* note 19, at 231 (same).

121. Holmes, *supra* note 47, at 477. In a letter to William James, Holmes expanded on this vision of adverse possession, writing: “[M]an, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.” Letter from Oliver Wendell Holmes, Jr., to William James (Apr. 1, 1907), in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* 417–18 (Max Lerner ed., reprinted 1946) (1943).

122. See Harding, *supra* note 47, at 292 n.36 (“While adverse possession has many elements, the most unwavering is the simple passage of time.”); see also BENTHAM, *supra* note 24, at 159 (“Possession, after a certain period fixed by the law ought to prevail over all other titles.”).

123. Merrill, *supra* note 116, at 1131. He identified as the competing reliance interests: (1) the adverse possessor’s reliance on the property that develops over time; (2) the true owner’s reliance on the underlying resource and the stability of property rights; and (3) third parties’ reliance—vendors, creditors, tenants, and so forth—who rely on the fact of possession as a “rough and ready substitute for an expensive and time-consuming title search.” *Id.* Another thoroughgoing utilitarian account focuses on competing monitoring, uncertainty, and demoralization costs, all of which vary with the length of the statutory period. See Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 727–30 (1986) (discussing the uncertainty, monitoring, and demoralization costs associated with the landowner’s “risk of permanently losing out to squatters”).

124. Holmes, *supra* note 47, at 477. For a similar account through a different methodological lens, see POSNER, *supra* note 70, § 3.12, at 97–98:

Over time, a person becomes attached to property that he regards as his own . . . and the deprivation of the property would be wrenching. Over the same period of time, as

who tills a field, erects a fence, occupies a house, or otherwise treats property as her own will eventually develop expectations that solidify gradually, over time. Imagine someone starts tilling a field and is immediately told the field belongs to someone else. That may elicit disappointment, but the wrench of loss will be much different after the adverse possessor has tilled the field without interruption for five, ten, or even fifteen years.<sup>125</sup> At a certain point, the adverse possessor's expectations about ongoing use of the property harden. This is not exactly the same as the earning theory in the property literature, because it is not—or at least should not be seen as—a reward for the productive use of the property. Instead, the productive use of property is evidence of the adverse possessor's reliance on the property. In other words, the earning theory views the purpose of adverse possession as inducing the productive use of property.<sup>126</sup> In contrast, the account offered here views productive use as evidence of evolutionary reliance.

This is a better description of the doctrine. Courts and commentators have long wrestled with defining the productive uses that the law should reward.<sup>127</sup> That is a fraught endeavor and can lead to perverse results. In the famously wrongheaded case of *Van Valkenburgh v. Lutz*, for example, the New York Court of Appeals rejected an adverse possession claim based—it seems—on classist disapproval of the nature of the adverse possessor's use of the property.<sup>128</sup> Focusing on evolutionary reliance avoids these kinds of judgments and turns instead on the extent to which the adverse possessor's use indicates that he or she has come to rely on the property.

Simultaneously, the true owner's own reliance diminishes over time with disuse or neglect. Failing to protect property from ongoing adverse possession is some evidence of the erosion of the owner's reliance on the property. In general, property law will of course protect

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Holmes pointed out, a person loses attachment to property that he regards as no longer his own, and the restoration of the property would give him, therefore, only moderate pleasure.

125. One of the earliest common law writs, the assize of novel disseisin, reflects this same view, providing a relatively streamlined process for retaking possession of property from an intruder or someone claiming competing ownership, but only if the intrusion or claim were recent. See DONALD W. SUTHERLAND, *THE ASSIZE OF NOVEL DISSEISIN* 37 (1973) ("An action . . . could be justified and made acceptable . . . only for claims that were founded on the allegation that the defendant had disseised the plaintiff at some recent date."); G.O. SAYLES, *THE MEDIEVAL FOUNDATIONS OF ENGLAND* 339 (1948) ("The assize of novel disseisin . . . allowed any freeholder, who had been recently dispossessed of his land, to obtain a writ from the king which would put the matter before a sworn inquest of his neighbours.").

126. See ROSE, *supra* note 115, at 15.

127. *Id.* (discussing why payment of taxes is required for adverse possession).

128. 106 N.E.2d 28 (N.Y. 1952) (rejecting an adverse possession claim for use that resembled storing junk on the land).

a property owner's right to her property whether or not she actively uses it.<sup>129</sup> People can indeed rely on property with which they seldom interact.<sup>130</sup> But if enough time passes, the reliance becomes increasingly abstract. This subtly reframes the traditional "sleeping theory" of adverse possession, which views passive nonuse of property by the true owner as a kind of demerit—as if active ongoing use is superior, whether economically or morally.<sup>131</sup> That is normatively controversial, and commentators have indeed puzzled over the sleeping theory for this reason.<sup>132</sup> But reliance offers a different account. The point is not that the owner has behaved inappropriately or that active use is normatively superior to passive use.<sup>133</sup> It is, instead, that too little care or regard for land, reflected in a failure even to stop someone else's active use for a long period of time, is good evidence that the true owner no longer relies on the property.

Ultimately, then, the doctrine of adverse possession should be seen as resolving this conflict between competing reliance claims. The true owner's reliance diminishes over time through disuse, just as the adverse possessor's reliance increases.<sup>134</sup> Given long enough, the interests of the adverse possessor eventually will eclipse the true owner's reliance on the property.

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129. Oskar Liivak & Eduardo M. Peñalver, *The Right Not to Use in Property and Patent Law*, 98 CORNELL L. REV. 1437, 1455 (2013) ("It is, strictly speaking, true to say . . . that the law of tangible property permits owners to choose not to use their property.").

130. *See id.* ("The law does not hesitate to penalize owners for nonuse where that nonuse harms third parties and, in particular, where it harms the interest that those parties have in use and possession of their own property.").

131. *Cf. Merrill, supra* note 116, at 1130–31 (footnotes omitted):

The passive (and presumably absentee) owner will be harder to negotiate with, if only because he will be harder to locate. When the [true owner] is required to assert his right to exclude, therefore, he is in effect being asked to "flush out" offers to purchase his property, to make a market in the land. On this view, then, the sleeping-owner rationale is . . . a justification based on the desirability of encouraging market transactions in property rights.

132. *See* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 857 (1994):

[A]dverse possession law as applied to wild lands may be reconceptualized as a variant of the capture rule. Privately owned, undeveloped lands are analogous to a captured resource such as a caged deer. The owner who exploits her property protects her title. But the owner who retains his land in its natural condition has effectively allowed it to elude his grasp.

133. *But see* ROSE, *supra* note 115, at 15 (arguing that the "lazy" owner consistently loses).

134. Third parties' reliance interests might also deserve protection in this context. *See, e.g.,* *Yourik v. Mallonee*, 921 A.2d 869, 873 (Md. Ct. Spec. App. 2007) ("[T]here is a need to protect the reliance interests of either the adverse possessor or others dealing with the adverse possessor that are justifiably based on the *status quo*." (internal quotation marks omitted)).

### *B. Accretion and Avulsion*

An esoteric doctrine made momentarily famous by the Supreme Court's decision in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>135</sup> governs the shifting of littoral and riparian property boundaries. It also provides one of the clearest examples of the ways in which property law incorporates a dynamic vision of reliance that depends upon the pace of change.

While most people tend to think of land and its boundaries as fixed, that is not necessarily true where a boundary is defined by water.<sup>136</sup> Rivers and oceans can shift over time through the gradual processes of erosion and accretion. Erosion, of course, involves the slow eating away of land over time, and accretion the opposite.<sup>137</sup> When it comes to a river or stream separating two parcels, these shifts can be zero-sum, adding land to one side while reducing land on the other. And the rule, in general, is that these kinds of slow natural changes will in fact shift the boundary line.<sup>138</sup> In other words, the legal boundary remains with the river wherever it flows and is not fixed in some precise location.

The exception is avulsion. Where the change to the path of a river or a shoreline happens dramatically, it does not alter the property lines, and property owners are free to restore their property to the boundaries as they existed before the avulsive event.<sup>139</sup> If, for example, a dam breaks or there is significant flooding from a hurricane that alters the course of a river or a shoreline, the legal property lines do not change even if the location and path of the river does.<sup>140</sup>

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135. 560 U.S. 702 (2010).

136. *Id.* at 707–08.

137. See Nicholas Blomley, *Simplification Is Complicated: Property, Nature, and the Rivers of Law*, 40 ENV'T & PLAN. A 1825, 1829 (2008) (describing but problematizing the distinction between accretion and avulsion).

138. See Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 TUL. ENV'T L.J. 305, 306 (2009) (“The law provides that when the water’s edge shifts ‘gradually and imperceptibly’ (accretion), the property boundary moves with it.”); see also *Stop the Beach Renourishment, Inc.*, 560 U.S. at 709 (describing law regarding avulsion and accretion in Florida statutory and common law).

139. See Sax, *supra* note 138, at 306 (“[W]here the shift is ‘sudden or violent’ (avulsion), the boundary stays where it was.”); see also *Stop the Beach Renourishment, Inc.*, 560 U.S., at 709 (“In Florida, as at common law, the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed . . .”); Blomley, *supra* note 137, at 1829 (“What happens if you lose land through erosion? If the land erodes slowly and imperceptibly, there is no legal remedy. However, if such a change happens suddenly through a shift in the river channel, through ‘avulsion’, you retain ownership of the land.”).

140. See, e.g., Phillip Wm. Lear, *Accretion, Reliction, Erosion, and Avulsion: A Survey of Riparian and Littoral Title Problems*, 11 J. ENERGY NAT. RES. & ENV'T L. 265, 281 (1991) (footnotes omitted):

This distinction between erosion and accretion on the one hand, and avulsion on the other, means that slow gradual changes are incorporated into property rights without undermining owners' reliance on their resources.<sup>141</sup> But unexpected, dramatic changes are not.<sup>142</sup> This is true even if the ultimate effects of accretion and avulsion are the same. A river might change location by fifty feet either slowly over years, or suddenly after a flood. While the impact is the same, the pace of change determines whether the law will incorporate or resist the change.

In a thoroughgoing treatment of the topic, Joseph Sax explored the origins of the distinction between accretion and avulsion in the early common law and even back to Roman law.<sup>143</sup> He demonstrated that courts have long struggled to distinguish between the two. The long-standing principle is that accretive changes must be "imperceptible."<sup>144</sup> But how fast is too fast? Sax reports on an 1884 case, *Attorney-General v. Reeve*, in which an English court had to distinguish between accretion and avulsion. Faced with an argument that accretive change must be imperceptible to an observer, Lord Coleridge asked, "But how long is he to watch? As long as Demosthenes might have taken in reciting his oration *De Corona*? Would the accretion be perceptible if an addition could be perceived at the end of the oration, or how long?"<sup>145</sup> Current case law suggests that the difference between erosion and accretion might depend upon the nature of the river. The Mississippi and Missouri Rivers, for example, are "both noted for their tumultuous behavior[s]" and avulsion must be more dramatic than the changes that ordinarily occur.<sup>146</sup>

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"Avulsion" is defined as the process whereby the action of water causes a sudden, perceptible loss of or addition to land. Examples of avulsive action are: (1) A river breaking through the narrow neck of an ox bow, bypassing the former ox-bowed channel; and (2) sudden deposits due to floods or storms, or the creation of a natural lake when a mud slide dams a stream.

141. See *id.* (describing avulsion); Blomley, *supra* note 137, at 1829 (same).

142. See Lear, *supra* note 140, at 281 ("The common law rule is that avulsive changes do not affect the boundaries of riparian and littoral lands.").

143. See Sax, *supra* note 138, at 306.

144. See *id.* at 308 (citing Blackstone).

145. *Id.* at 338.

146. See *id.* at 343–44 (discussing related case law). In discussing the notion of adverse possession and the significance of the passage of time, Jeremy Bentham wrote:

But what length of time is necessary to produce this displacement of expectation? or [sic], in other words, what period is necessary to legitimate property in the hands of a possessor, and to extinguish every opposite title? To this inquiry, no exact answer can be given. It is necessary to draw at hazard the line of demarcation, according to the kind and value of the property in question.

BENTHAM, *supra* note 24, at 160.

For Sax, *Reeve* revealed the incoherence of the inquiry. As he framed the question, “Why should it matter whether the water’s edge shifts as the result of a storm and the sudden deposit of alluvion, rather than from gradual accretion?”<sup>147</sup> He identified several possible justifications for the rule but found them all wanting. For example, he explored the “lost boundary” rationale: “[T]hat when there is a sudden change, the former bounds are easy to determine, and the issue arises immediately, rather than after many years of very slowly changing water lines.”<sup>148</sup> But subsequent courts either repudiated or implicitly abandoned that reasoning.<sup>149</sup> Sax ultimately argued that courts should ignore the speed or extent of the change, and should focus instead on core values, like the importance of access to the water.<sup>150</sup>

Evolutionary reliance, however, suggests an alternative justification, and one that Sax even hinted at in passing. He analyzed a famous old common law treatise that noted, “of petty and unperceivable increasements from the sea the King gains no property, for *de minimis non curat Rex*.”<sup>151</sup> In other words, the King does not care about gradual, imperceptible changes that happen slowly over time. Or, as Sax pithily summarized the treatise’s claim, “The gradualness of the process also diminishes the sense of loss by the loser.”<sup>152</sup> That claim does not reappear in Sax’s argument, but it makes sense of the otherwise confused case law and provides its own normative justification for the difference between accretion and avulsion. Ultimately, littoral or riparian property owners should expect that their property boundaries will change over time; their expectations—like the common law King’s—include some measure of dynamism. But where a change marks a sharp break, they will seek to return to the status quo ante. Property mediates between these slow shifting interests over time.<sup>153</sup>

### C. Servitudes

The law of servitudes includes some of the more arcane and technical doctrines in the mainstream law of property. Concepts like “touch and concern” and “horizontal privity” are the perennial focus of

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147. Sax, *supra* note 138, at 307.

148. *Id.* at 316.

149. *Id.* at 334–43.

150. *See id.* at 347–53.

151. *Id.* at 324 (internal quotation marks omitted).

152. *Id.*

153. This is at least reminiscent of Singer’s observation that property rights are both stable and contingent. SINGER, *supra* note 21, at 86 (“Stability of a particular property right is achieved only through a conception of property rules that makes other property rights contingent on not interfering with the right we want to make stable.”).

this area of law and the frequent targets for law reform.<sup>154</sup> These issues can distract from a more general observation, however, that the law of servitudes often mediates between competing reliance interests that change over time, both in their creation and in their destruction.

Most servitudes are the product of voluntary transactions that are memorialized in writing and recorded.<sup>155</sup> But not all are. Prescriptive easements follow the same internal logic as adverse possession.<sup>156</sup> They arise out of consistent adverse use of another's land for enough time. They therefore protect the reasonable reliance of the adverse user as it solidifies over time.

Just as servitudes can arise through reliance by the benefitted party, servitudes can also terminate if the reliance ends.<sup>157</sup> Servitudes are powerful precisely because they run with the land and not only with the parties to the original agreement.<sup>158</sup> But property law provides two important mechanisms for avoiding servitudes that have become stale or pointless over time: waiver and the changed conditions doctrine.

Waiver operates exactly as it sounds. Conventionally, if owners of property in a subdivision (or property otherwise benefitted by a servitude) do not seek to enforce a restriction on burdened property within the subdivision—say a residential-only requirement—then they waive the right to enforce it on other property in the subdivision.<sup>159</sup> This is best explained in terms of evolutionary reliance. In general, courts enforce covenants to protect the reliance interests of benefitted

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154. See, e.g., Susan F. French, *Design Proposal for the New Restatement of the Law of Property Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1222 (1988) (“The murkiness of the law is compounded by obsolete terminology and by old doctrines whose functions now seem completely mysterious.”).

155. See JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 3:5, at 129 (2019) (“The most common method of creating an easement is by express grant.”).

156. See *id.* § 5:1, at 293 (“The process of obtaining an easement by prescription is closely analogous to that of securing title to land by adverse possession.”).

157. Courts vary in what counts as the end of reliance. Compare *W. Land Co. v. Truskolaski*, 495 P.2d 624, 625 (Nev. 1972) (holding that restrictive covenants will continue to be enforced so long as they “remain of substantial value to the” dominant tenements and enforcing them would not be “inequitable or oppressive”), with *Nahrstedt v. Lakeside Vill. Condo. Ass’n.*, 878 P.2d 1275, 1278 (Cal. 1994) (holding that restrictive covenants will continue to be enforced unless the “plaintiff owner can show that the burdens it imposes on affected properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner”).

158. See, e.g., Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 617–20 (1985) (surveying the landscape).

159. This is closely related to the doctrine of abandonment and, for present purposes, is functionally indistinguishable. For an articulation of the doctrinal difference, see RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. b (AM. L. INST. 2000): “The principal factual difference between waiver and abandonment is that waiver usually involves failure to object to a particular violation of a servitude under circumstances that lead to the conclusion that the beneficiary is precluded from objecting to different but similar violations.”



parties.<sup>160</sup> However, their failure to enforce the restrictions against defectors suggests that the owners of benefitted property are not, in fact, relying on the restrictions. As one court articulated it, waiver of a covenant occurs when one “does something which is inconsistent with the right *or his intention to rely upon it*.”<sup>161</sup> Failure to enforce a covenant demonstrates an absence of reliance. Simultaneously, owners of burdened property can begin to rely on shifting rules. If others are allowed to develop nonresidential uses, owners of other burdened parcels may begin to expect to be able to as well. Expectations regarding the use of the property are governed only preliminarily by the recorded servitudes and can then be altered and shaped by evolving practice on the ground.

The changed conditions doctrine is similar. Where conditions in the area have changed sufficiently since the servitude was created, the owner of property burdened by the servitude can sue for its termination as a matter of law.<sup>162</sup> Plaintiffs must clear a high bar. In the old case of *Reeves v. Comfort*,<sup>163</sup> Plaintiffs sought to invalidate a covenant restricting their property in a subdivision to single family residential use, arguing that the growth of Atlanta had made an apartment building there much more valuable. The court reasoned that the defendants had purchased their nearby property “in full reliance upon the restrictive covenants in the deeds to other purchasers of lots in the same subdivision.”<sup>164</sup> Protecting that reliance interest was more important than unlocking the value in Plaintiffs’ property.

Conventionally, courts hold that changed conditions requires a showing that the original purpose of the covenant can no longer be realized.<sup>165</sup> In other words, the owners of benefitted property are entitled to continue to rely on the restriction so long as its purpose has

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160. *See, e.g.*, *Simms v. Lakewood Vill. Prop. Owners Ass’n*, 895 S.W.2d 779, 786 (Tex. Ct. App. 1995) (upholding restrictive covenant because “[t]here is evidence that some lot owners purchased their property because of, and in reliance on, the fact that this was a restricted subdivision”).

161. *Cochran v. Bentley*, 251 S.W.3d 253, 262 (Ark. 2007) (emphasis added).

162. *See, e.g.*, *Robinson*, *supra* note 45, at 546 (“The changed conditions doctrine is simple and succinct: when conditions have so changed since the making of the covenant that it is no longer possible to secure in substantial measure the benefits originally contemplated, the covenant is unenforceable.”).

163. 157 S.E. 629 (Ga. 1931).

164. *Id.* at 631; *see also* *Exch. Nat’l Bank of Chi. v. City of Des Plaines*, 336 N.E.2d 8, 17 (Ill. App. Ct. 1975) (“[C]hang[es] outside the [subdivision], standing alone, should not be allowed to abrogate the restrictions to the detriment of lot owners within the subdivision who relied on the restrictions.”).

165. *Menne v. Keowee Key Prop. Owners’ Ass’n*, 629 S.E.2d 690, 694 (S.C. Ct. App. 2006) (“A party seeking to annul a restrictive covenant must show the change of conditions represented so radical a change that the original purpose of the restrictive covenant can no longer be realized.”).

not been thwarted.<sup>166</sup> But the point, again, is that reliance is dynamic, and change can occur through the passage of time.<sup>167</sup>

### *D. The Rule Against Perpetuities*

Even the arcane rule against perpetuities reflects the ways in which reliance in resources can shift over time. The rule, which any property student knows, states that any contingent future interest must either vest or fail within twenty-one years of the death of a life in being at the time of the conveyance.<sup>168</sup> In effect, it prohibits grantors from encumbering or directing the disposition of property beyond a certain amount of time, namely, a generation, plus twenty-one years. Grantees within this amount of time may have restrictions imposed on their property rights, but attempts to limit property for longer are void *ab initio*.<sup>169</sup>

As Gregory Alexander recognized in his leading history of dead-hand control, courts long invoked the principle of free alienability to prohibit grantors from encumbering property at all.<sup>170</sup> Courts reasoned that recipients of property should be free to use and dispose of the property as they want. Starting in the nineteenth century, however, courts in the United States began to realize that alienability is a zero-sum game.<sup>171</sup> Failing to enforce grantors' restrictions interferes with their free alienability as it simultaneously protects grantees. One way of thinking about the rule against perpetuities, then, is as a kind of temporal compromise between grantors and grantees.<sup>172</sup>

As between the grantor and the grantee, the rule against perpetuities allows the grantor to control the disposition of property for a long time, but not forever. The rule recognizes, implicitly, that grantors' reliance on the property—and, specifically, the ability to

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166. SPUR at Williams Brice Owners Ass'n v. Lalla, 781 S.E.2d 115, 125 (S.C. Ct. App. 2015) (“Notwithstanding the changed character, when one protected by a covenant seeks enforcement thereof, we cannot endorse the change while the purpose of the covenant may still be accomplished.”).

167. Some states have laws on the books that regulate this same tradeoff. So-called “stale use” statutes extinguish deed restrictions that are not periodically renewed. See, e.g., IOWA CODE § 614.24 (2021).

168. See JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* 191 (4th ed. 1942).

169. See, e.g., Frederick R. Schneider, *A Rule Against Perpetuities for the Twenty-First Century*, 41 REAL PROP. PROB. & TR. J. 743, 751 (2007) (describing the rule).

170. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1190–91 (1985).

171. See *id.*

172. Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 949 (2011) (describing rule as an “awkward compromise” between the interests of grantors and grantees).

restrict the property—declines over time. Simultaneously, grantees increasingly rely on outright ownership of the property as the source of any encumbrance fades further into the mists of time.

It may seem problematic to justify the rule in terms of grantors' and grantees' competing reliance interests. A grantor, after all, cannot rely on property after death, and even slow, accretive evolutionary reliance comes to a hard stop at the grave.<sup>173</sup> But a better analysis recognizes that it is the grantors' reliance *at the time of the grant* that the law appears to vindicate. There, the grantor is relying on the fact that the law will enforce any encumbrance within the perpetuities period. Indeed, grantors might not make certain gifts or dispositions of property if that were not the case. In essence, the rule against perpetuities represents a kind of crude, *ex ante* compromise between grantors' and grantees' interests far into the future. And at this high level of generality, it again reflects a vision of evolutionary reliance.

### *E. The Takings Clause*

These same issues also appear in the regulation of property, where courts have long acknowledged—if only in passing—the dynamic nature of expectations surrounding property rights. The Takings Clause represents the clearest point of intersection between private rights and public power. While it explicitly prohibits the government from taking property for public use without just compensation,<sup>174</sup> courts have struggled to define what kinds of government actions rise to the level of a taking.<sup>175</sup> It is a fraught and contested doctrine, requiring compensation if the regulation “goes too far,” according to the cryptic phrase from the Supreme Court.<sup>176</sup>

The overarching framework for identifying a taking comes from the eponymous *ad hoc* balancing test in *Penn Central v. New York*.<sup>177</sup> Its three factors include: the character of the regulation, the resulting

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173. See *id.* at 947 (“[F]ailing to enforce some dead-hand restriction over property has no meaningful effect on the welfare of the testator who is, after all, dead.”).

174. U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

175. See *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (“This area of the law has been characterized by *ad hoc*, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances.” (internal quotation marks omitted)); see also Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677, 741 (2005) (“Looking for consistency in takings cases is a little bit like finding shapes in the clouds: you can see them if you look hard enough, but they say more about the observer than the clouds themselves.”).

176. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (“[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).

177. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

diminution in value, and the extent of the regulation's interference with distinct investment-backed expectations.<sup>178</sup> It is that last prong that directly implicates reliance interests and implicitly recognizes their dynamic nature.

As interpreted by courts, the “investment-backed expectations” prong distinguishes between those relatively concrete plans for property and those more fanciful pie-in-sky aspirations.<sup>179</sup> Interfering with the former can violate the Takings Clause, while interfering with the latter is generally not constitutionally cognizable.<sup>180</sup> A developer cannot complain if the government prevents her from using property in a way that she never should have expected to use the property in the first place—a regulation prohibiting the development of factories in residential neighborhoods is no taking.

The perennial problem is deciding what counts as distinct or reasonable investment-backed expectations.<sup>181</sup> In *Penn Central* itself, the Court observed that a property owner's primary investment-backed expectation is the property's current, existing use.<sup>182</sup> Frank Michelman used the phrase “crystalized” expectations in his famous explication of the meaning of the Takings Clause.<sup>183</sup> Broadly speaking, courts require a property owner to show some specific plans—architectural renderings, permit applications, and the like—to demonstrate how he or she actually intended to develop the property.<sup>184</sup> In effect, the property owner must demonstrate actual reliance on using the property in a particular way, and not merely the invention of some higher-valued use *ex post*.<sup>185</sup> The point of the test, in other words, is to distinguish those expectations on which a property owner actually relied from those that are invented later. And importantly, those expectations can change over time. The same regulation might not be a taking as applied to a

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178. *Id.*

179. Serkin, *supra* note 35, at 1251; *see also* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533, 560 (2002) (characterizing transformation as a move from a subjective to an objective standard); J. David Breemer, *Playing the Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?*, 38 URB. L. 81, 85 (2006) (“Together, these decisions redirected the expectations inquiry away from the impact of regulation and toward the appropriateness of the landowners' land use expectations . . .”).

180. *See* Eagle, *supra* note 179, at 559–65.

181. For discussion of the evolution of the test from “distinct” to “reasonable,” *see* Breemer, *supra* note 179.

182. *Penn Central*, 438 U.S. at 136 (“[T]he New York City law does not interfere in any way with the present uses of the Terminal. . . . So the law does not interfere with what must be regarded as *Penn Central*'s primary expectation concerning the use of the parcel.”).

183. Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1233 (1967).

184. Breemer, *supra* note 179, at 84.

185. *Id.*

property owner with no bold plans, but a cognizable taking as applied to a developer who has made concrete steps to develop her property.<sup>186</sup>

There is additional doctrinal confusion about how reasonable expectations can develop in the context of the Takings Clause, and those are considered in more detail in Part III. But here it is enough to see that the heart of the *Penn Central* test implicates an evolving sense of expectations and, therefore, shifting reliance on uses of property.

### III. REEVALUATING PROPERTY

The argument so far has been primarily descriptive. Reasoning inductively from existing property doctrine, a new view of property emerges. In contrast to a neoliberal model of property as the stable raw material for voluntary transactions, it sees property as mediating between reliance interests that shift over time. This Part applies that insight to some of the thorniest property controversies in both private and public law contexts. Focusing on evolutionary reliance also has immediate doctrinal consequences for both common law property doctrines and for rights against the state.

#### *A. What Property Does*

It may seem trite if not banal to argue that property protects reliance. In fact, property and reliance may seem like synonyms to many people. But excavating the role of evolutionary reliance as a source of property rights comes with some important conceptual payoffs considered here (and doctrinal payoffs, considered below).

For one, recognizing how property rights can protect reliance interests that arise organically over time blurs the boundary between owners and nonowners. People rely on resources all the time, whether they own them or not.<sup>187</sup> If the role of property is to protect reliance, then people will sometimes have property claims to resources already owned by others. Of course, reliance does not automatically give rise to a protectable interest; a neighbor's reliance on an open view does not necessarily prevent development on a vacant parcel. But framing property as mediating between competing reliance interests invites a more nuanced and substantive inquiry than simply assigning all rights automatically to the owner. It recognizes that the category of "owner" is

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186. See John J. Delaney & Emily Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 29 (1996) ("[T]o successfully pursue a takings claim, one must possess development expectations recognized by state law which are reasonable enough to form a property interest.").

187. See *supra* text accompanying notes 45–47.

a kind of legal conclusion that one party's reliance interests trump another's in a particular context.<sup>188</sup> While this will often result in protecting the rights of owners as traditionally labeled, it elevates others' claims. Their reliance is not a peripheral constraint on ownership but is itself a source of property rights.

For another, this account puts change at the heart of property. Instead of seeing property as a legal tool that always promotes stability, it recasts property as promoting a kind of constrained dynamism, with rights that can shift naturally over time. Through the process of slow, accretive changes, property law's focus on reliance can allow rights to emerge and disappear.

Stability is admittedly a central feature of property. It is what allows people to rely on resources, to plan for future conduct, and to make investments that pay off over time.<sup>189</sup> But too much stability risks fossilizing entitlements. Property rights do not need to be perpetual to be stable, and the value of stability may decrease as the temporal horizon stretches further into the future.<sup>190</sup> The substantive question should always be whether *and to what extent* a particular reliance should be protected to secure property's benefits. For example, the difference in value today of an easement that lasts for, say, two hundred years versus one hundred years may be very slight indeed.<sup>191</sup>

188. This argument mirrors long-standing observations about possession as a source of property, where possession is itself a legal conclusion and not a justification for assigning rights. See, e.g., Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1224–25 (1979) (describing complex legal rules that determine who is in possession of a resource).

189. See Beitz, *supra* note 21, at 429 (“A rational agent who takes possession of a thing without a secure expectation of retaining exclusive access to it for as long as she wishes would tend to underinvest in the thing because she could not count on gaining the full benefit of her investment.”); see also Fennell, *supra* note 82, at 1963 (“Rights that run with assets respond to the fact that property interests in other people’s land, such as easements, exhibit a form of temporal lumpiness: they are often most valuable when consumed over long periods that are not interrupted by changes in ownership.”); Brunner, *supra* note 23, at 302 (“[According to Bentham,] the means of legislators to enable citizens to gain lasting and certain pleasures is by protecting their private property over time.”).

190. Cf. Beitz, *supra* note 21, at 428:

Certainly the interest in self-determination would not be well served if the term were too short . . . . On the other hand, it is not obvious that the term needs to stretch to the end of the life of an owner: conceivably there might be a term short of a lifetime such that one could still succeed in carrying out one’s plans . . . .;

Harding, *supra* note 47, at 292 (footnote omitted):

[J]ust as the notion of absolute ownership is a myth, so too the idea of perpetual ownership has never been accurate. . . . [W]hile an intent of “lasting control” might be important in establishing property rights, real control over too long a period of time can be used to quash those very same interests.

191. How much would you pay for rights to a house for two hundred years? Would you pay much less if the rights were for one hundred years? See Christopher Serkin & Michael P. Vandenberg, *Prospective Grandfathering: Anticipating the Energy Transition Problem*, 102

This is true of nonmonetary values as well. Property as personhood,<sup>192</sup> as instrumental in securing liberty,<sup>193</sup> or as committed to human flourishing<sup>194</sup> all can be obtained with less than permanent and immutable rights. Stability and predictability in ownership and property rights are crucial to some extent. However, all or most of the benefits of ownership under any theory can be secured with rights that are not rigid in perpetuity, especially if changes occur with enough advance notice, or over a long enough period of time for people to have a chance to adjust expectations.

Expectations, in this regard, are like a car's headlights on a dark night, shining ahead a fixed distance but always moving forward. If those headlights were to go out suddenly, the car would likely crash. But if the headlights gradually dim, the driver will naturally slow down to keep pace with her visibility. She also might eventually stop if the headlights go dark, but at that point will be going too slowly to crash.<sup>195</sup> How quickly the headlights can fade will depend on the speed of the car and the brightness of the lights to begin with. This is the same kind of analysis required of property.

How quickly property can allow changes to occur depends on the nature of the resource and the substantive interests at stake.<sup>196</sup> This analysis cannot be done in the abstract. But it is nevertheless possible to identify specific doctrines and areas of law that would benefit from a more explicit focus on evolutionary reliance and the pace of change. And it is sometimes possible to identify some places where a particular reliance interest is especially important to vindicate.<sup>197</sup> In the doctrines

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MINN. L. REV. 1019, 1059 (2018) (“A regulation that grandfathers an existing use for a hundred years, for example, will have very little impact on the value of the property today . . .”).

192. See Radin, *supra* note 21, at 741–42; see also Radin, *supra* note 105, at 968 (“If an object you now control is bound up in your future plans or in your anticipation of your future self . . . then your personhood depends in part on the realization of these expectations.”).

193. See ELY, *supra* note 25.

194. See, e.g., Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 757 (2009) (discussing social obligations tethered to property ownership); PROPERTY AND COMMUNITY 61, 65–66 (Gregory S. Alexander & Eduardo M. Peñalver eds., 2010).

195. Cf. *How Far Can You See When Driving at Night?*, DRIVESMARTBC (June 11, 2013, 8:54 PM), <https://www.drivesmartbc.ca/miscellaneous/how-far-can-you-see-when-driving-night> [<https://perma.cc/TPR6-FK8Z>] (offering an amusingly retro video that describes the importance of not “overdriving” your headlights).

196. For Bentham's view, see *supra* note 146 and accompanying text.

197. This methodology is deliberately reminiscent of Frank Michelman's towering work on the Takings Clause. See Michelman, *supra* note 183. In deciding whether to offer compensation for a burdensome regulation, he proposed asking courts to evaluate the extent of demoralization resulting from not compensating—that is, the foregone investments in property, and the genuine demoralization costs of uncompensated burdens on property. He did not propose a case-by-case inquiry, but instead identified broad categories in which demoralization costs were likely to be especially high, as, for example, when the government permanently invades property or dramatically reduces its value. Others have imported the idea of demoralization costs into other

that follow, reliance provides a helpful new way of framing perennial problems. At the least, it offers a framework for evaluating reliance in different specific property doctrines.

So, what does it mean to take seriously the nature of accretive change in the reliance interest in property? It has immediate doctrinal consequences for both common law property doctrines and for rights against the state.

### *B. Evolutionary Reliance in Private Law*

1. *Coming to the Nuisance.* The dynamic nature of evolutionary reliance in property suggests some new ways of thinking about even the most familiar doctrines. Consider, first, the “coming to the nuisance” defense.<sup>198</sup> The law of nuisance proscribes the use of property in a way that substantially and unreasonably interferes with another’s use of her property.<sup>199</sup> In the main, a nuisance is not per se unreasonable, but only a nuisance because of its proximity to some other use. A pig farm or feedlot, for example, may be entirely permissible in an agricultural area but inappropriate in a residential one.<sup>200</sup> But what if the pig farm was there first, and the residential area developed later around it? Nuisance law often involves a problem of timing.<sup>201</sup>

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areas of property theory. *See, e.g.*, ROSE, *supra* note 10, at 55–56 (comparing the advantages and disadvantages of class-based property transfers through the lens of demoralization costs).

198. *See, e.g.*, Donald Wittman, *First Come First Serve: An Economic Analysis of “Coming to the Nuisance,”* 9 J. LEGAL STUD. 557, 559 (1980) (discussing coming to the nuisance).

199. *See, e.g.*, O’Cain v. O’Cain, 473 S.E.2d 460, 466 (S.C. Ct. App. 1996) (“A nuisance is a substantial and unreasonable interference with the plaintiff’s use and enjoyment of his property.”).

200. *See, e.g.*, Pendoley v. Ferreira, 187 N.E.2d 142 (Mass. 1963) (pig farm); Spur Indus., Inc. v. Del E. Webb Dev. Co., 494 P.2d 700 (Ariz. 1972) (cattle feedlot); Martin A. Levitin, *Change of Neighborhood in Nuisance Cases*, 13 CLEV.-MARSHALL L. REV. 340, 341–43 (1964) (discussing agricultural nuisances). For consideration of the nuisance impacts of pig farms in particular, see Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 ENV’T. HEALTH PERSPS., June 2013, at A182, A183, noting that “On the coastal plain of eastern North Carolina, families in certain rural communities daily must deal with the piercing, acrid odor of hog manure—reminiscent of rotten eggs and ammonia—wafting from nearby industrial hog farms.”

201. *See, e.g.*, Cordato, *supra* note 85, at 273 (“This paper reexamines the efficiency arguments that are made regarding coming to the nuisance and argues that the entire discussion has been cast in an inappropriate analytical framework. A problem that by definition involves the passage of time has been forced-fit into a static equilibrium framework of analysis.”); *see also* Spur Indus., 494 P.2d at 707 (internal quotation marks omitted):

The case affords, perhaps, an example where a business established at a place remote from population is gradually surrounded and becomes part of a populous center, so that a business which formerly was not an interference with the rights of others has become so by the encroachment of the population.

Of course, where both uses are changing simultaneously, it is not always possible to say who got there first. *See Spur Indus.*, 494 P.2d at 704 (describing development of residential subdivision as happening alongside expansion of feedlot).



A preexisting use was, at one time, immune from nuisance liability.<sup>202</sup> This so-called “coming to the nuisance” defense gave de facto preference to whatever use was in place initially. However, almost every American jurisdiction has now abrogated the coming to the nuisance defense.<sup>203</sup> Courts have reasoned that the mere fact of first-in-time should not lock in a use that has become inappropriate.<sup>204</sup> The issue at any given moment should be whether a particular use is appropriate in a particular place. The fact that a use was in place first may be one of a number of relevant considerations, but it is no longer a complete defense.

Focusing on evolutionary reliance interests, however, suggests a different analysis. A relevant consideration—perhaps *the* relevant consideration—should be the pace of change in the area. Contrast, for example, a feedlot that finds itself suddenly surrounded by a new residential subdivision built over a short period of time with a feedlot that finds itself surrounded by residential uses that have developed slowly over years or decades. The end result is the same: a feedlot in the middle of a residential neighborhood. But the nature and the rate of change should matter.<sup>205</sup> In a suit by residential neighbors, a relevant consideration should be whether the feedlot owner’s reliance had the opportunity to evolve. Each new house over the years would have made the feedlot slowly but surely more out of place. The feedlot owner would have had an opportunity to adjust his or her expectations, to see the change afoot, and—willingly or not—to have recognized a shift in the character of the area.

The availability of the coming to the nuisance defense should therefore depend on the pace of change in the area, and not just the conflict between the incompatible uses when the nuisance litigation arises. This, in turn, depends on the nature of the competing uses. For example, a giant feedlot operation in place for years could receive more

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202. George P. Smith, II & Matthew Saunig, *Reconceptualizing the Law of Nuisance Through A Theory of Economic Captivity*, 75 ALB. L. REV. 57, 63 (2012) (“Early common law, dating back to the Nineteenth Century, recognized ‘coming to the nuisance’ as a valid defense to a nuisance claim.”).

203. See *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259, 1267 (N.D. W. Va. 1982) (“The majority view [of jurisdictions] rejects the doctrine of coming to the nuisance as an absolute defense . . .” (quoting *Lawrence v. E. Airlines, Inc.*, 81 So. 2d 632, 634 (Fla. 1955))).

204. See Smith & Saunig, *supra* note 202, at 64 (“Many courts found that the concept of ‘coming to the nuisance’ was contrary to public policy and the common good.”); see also Levitin, *supra* note 200, at 345 (summarizing the law in transition as of 1964).

205. Cf. Cordato, *supra* note 85, at 281 (“The passage of time implies the addition of information that did not previously exist and the discarding of information that has become irrelevant.”). Cordato focuses on the inevitable effects of knowledge and preferences changing over time, and the effect of such changes on Coasean bargaining, but not the pace of change or any effect on reliance interests. See *id.*

protection from nuisance claims than a smaller scale operation that was accessory to—and not essential to—other agricultural uses. Any specific outcome will obviously require keen sensitivity to context. But focusing on the shifting nature of the competing reliance interests reframes the application of the coming to the nuisance defense. Among property law's most essential functions, then, is to ensure that change happens gradually. This is explicitly to embrace incrementalism and to defend slow steady changes over short abrupt ones.

2. *Bad-Faith Adverse Possession.* Another place where the focus on reliance affects existing doctrine is in the law of adverse possession. As Part II demonstrated, adverse possession already implicitly recognizes how reliance interests can shift dynamically over time. But making this explicit suggests a new inquiry into the requisite mental state of the adverse possessor.

A perennial question in adverse possession doctrine and theory is whether an adverse possession claim should be available only to good-faith adverse possessors, whether the claim should be available only to bad-faith adverse possessors, or whether the knowledge and mental state of the adverse possessor should matter at all.<sup>206</sup> There is both case law and theory supporting each position.<sup>207</sup> But to the extent adverse possession vindicates the competing reliance interests of the owner and the adverse possessor, the question should be whether and to what extent the adverse possessor's mental state affects that trade-off.

A moment's reflection reveals that the adverse possessor's mental state is irrelevant to the owner's reliance. The owner's reliance is a fact about her relationship to the property and is unaffected by an adverse possessor's subjective beliefs about ownership. But mental state may affect the adverse possessor's reliance.

If you use a thing—or land—that you know belongs to someone else, you are aware that your use is contingent on ongoing, if tacit, consent. There is always a chance that the resource will be taken away and so reliance develops more slowly than if you erroneously believe it to be yours.<sup>208</sup> It does still develop, however. For a trivial but familiar example, think of a nice jacket left in your home after a party. You know it belongs to someone else, and so you probably leave it in the closet for

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206. See, e.g., Stake, *supra* note 117, at 2430 (discussing the various mental state requirements employed in different jurisdictions).

207. See Lee Anne Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW U. L. REV. 1037, 1046–49 (2006) (describing existing doctrine).

208. Cf. Cox fame, *Whats a Squatter? \$330K Home for \$16.00!*, YOUTUBE (Nov. 23, 2012), <https://www.youtube.com/watch?v=TxVL1kut7qM> [<https://perma.cc/64GV-5BY9>] (KHOU newscast discussing squatting by adverse possessor in Texas, where adverse possessor asserts his rights but invests only minimally in the property because of the insecurity of his claim).

some time, waiting for the owner to return. But eventually, you might take it out and wear it, still knowing that it is held in a kind of bailment for the true owner, if he or she should come back for it. But with the passage of enough time, you may start to rely on the jacket. And with the passage of still more time, you might come to view your claim as even stronger than the true owner's. Psychologically, this is the equivalent of the bad-faith adverse possessor.<sup>209</sup> Reliance may still develop but more slowly than if you genuinely but wrongly believed that the jacket was yours.

Focusing on reliance therefore suggests that bad-faith adverse possession should still be able to ripen into ownership, but over a longer period of time. This is consistent with a proposal that Richard Epstein made several decades ago, arguing for a longer statute of limitations for bad-faith adverse possession.<sup>210</sup> But he was primarily concerned with evidentiary issues, arguing that the passage of time implicates a trade-off between "principle" and "proof." The *principle*, in his view, is that the stability of property rights should prevail. But matters of *proof* can cut the other way, and so at some point the law should vindicate the rights of the possessor even over the rights of the prior owner.<sup>211</sup>

While the doctrinal result is the same, the justification here is notably different. Focusing on reliance reveals that adverse possession is not an unfortunate concession to the limitations of evidence but is instead a vindication of the reliance interests of the possessor. And the justification for a two-tiered statute of limitations is not, as Epstein suggested, merely about making it more difficult for the bad-faith adverse possessor to prevail but is instead a reflection of the different rates at which reliance solidifies in the good-faith and bad-faith possessors. In other words, the proposal here is to conform the law of adverse possession to the phenomenology of reliance, instead of viewing it as a compromise between the "right" answer and the limits of human knowledge.

*3. Changed Conditions.* The changed conditions doctrine in the law of servitudes, described briefly above, also finds added justification by focusing on evolutionary reliance.<sup>212</sup> Changed conditions is well-settled as conventional property doctrine, but conceptually problematic. In early work, Richard Epstein criticized the existence of the doctrine

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209. See *supra* note 207 and accompanying text (discussing bad-faith adverse possession).

210. See Epstein, *supra* note 21, at 686–88.

211. See *id.* at 674 ("It does not take a profound knowledge of human cognition or motivation to conclude that all evidence decays with time.").

212. See *supra* Part II.A.4.

as violating freedom of contract.<sup>213</sup> He argued that courts should defer absolutely to the bargains that the parties struck when they created the servitude, and that, “given the pervasive ignorance over the trade-off between the virtues of flexibility and certainty, and between the vices of indefiniteness and rigidity, there is simply no persuasive reason to embrace one extreme to the exclusion of the other.”<sup>214</sup>

A decade later, Glen Robinson again criticized the changed conditions doctrine in a lengthy treatment. He looked first at justifications sounding in contract: frustration of purpose and efficient breach.<sup>215</sup> He found the former did not capture the doctrine in practice, because courts did not apply it as a default rule but instead forbade parties from bargaining around it, unlike in contracts.<sup>216</sup> Most relevant here, he also argued that it is not appropriate for property law to adapt to owners’ changed preferences over time.<sup>217</sup> His general point was that courts should not intervene to allow property rights to shift simply because conditions in the world have changed. For him, the gradual nature of change was a reason for rejecting the doctrine wholesale. As he put it, “Preference changes do not occur as discrete events, distinctively defining a succession of personalities. Rather . . . changes in basic preferences are scalar in character.”<sup>218</sup> He agreed it was “dotty” to think that the law could incorporate such gradual changes.<sup>219</sup>

It is not dotty, however. It is, in fact, another example of the law’s recognition of evolutionary reliance. In a leading treatment of the topic, Gregory Alexander viewed the problem of changed conditions as a particular example of the broader phenomenon of “legal obsolescence.”<sup>220</sup> As he succinctly framed the issue: “The obsolescence problem is not peculiar to servitudes; it is a function of duration, and it exists in all legal arrangements that have extended time horizons . . . .”<sup>221</sup> That is exactly right, and property law manages the

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213. See Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1364–66 (1981).

214. *Id.* at 1366.

215. See Robinson, *supra* note 45, at 551–80 (differentiating between frustration of purpose and changed conditions).

216. *Id.* at 546. He also argued that a contract lens could, at best, justify substituting injunctive relief with damage remedies, but not the full-throated revocation of servitudes through conventional application of the changed conditions doctrine. *Id.*

217. *Id.* at 566 (“[T]here is no necessary relationship between the legal rule that relates to changes in external contingencies and the altered preferences problem.”).

218. *Id.* at 566–67 (footnote omitted).

219. *Id.* at 567. In support of the characterization, Robinson quoted the Cheshire Cat in *Alice in Wonderland*, saying “It’s the most curious thing I ever saw in all my life.” *Id.*

220. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 898 (1988).

221. *Id.*

obsolescence problem in its own way, simply by moderating the pace of change.

It is perhaps telling that many of the examples scholars raise to motivate the problem of changed conditions involve avulsive changes. Glen Robinson, for example, imagined a new highway that unexpectedly opens encumbered land to valuable new commercial uses.<sup>222</sup> One of the leading cases reproduced in property casebooks is *Rick v. West*.<sup>223</sup> There, a developer subdivided property and sold a parcel to the defendant subject to covenants limiting that parcel, along with the rest of the parcels, to residential use. Nearly contemporaneously, the developer sold an additional forty-five acres to an “industrialist,” who in turn conveyed part of the property to a hospital. This resulted in a challenge to the validity of the covenant and a claim of changed conditions.<sup>224</sup> The shift from residential to commercial use happened over a short time span—five years from the original sale to the defendant. This was not a case where the area changed gradually, but instead involved an abrupt change in the developer’s plans for his property. Indeed, the court observed explicitly that “[t]here is no evidence of any substantial change in the general neighborhood.”<sup>225</sup>

Focusing on reliance suggests that the pace of change in the area should matter. If the change outpaces owners’ ability to adapt, then courts should enforce property rights to moderate that pace of change. In other words, courts should be more skeptical of changed conditions claims to address quick changes—like the surprise construction of a new road or the sudden development of a hospital in a residential neighborhood—as opposed to slower, more gradual changes in community character.

Some case law implicitly supports this approach. In contrast to *Rick v. West*, which rejected application of the changed conditions doctrine, the North Carolina Supreme Court in *Muilenburg v. Blevins* struck down restrictive covenants because of the extent of the change in the character of the community.<sup>226</sup> The court there focused on the age of the covenant: it dated back to 1911 and had been in place for forty-four years. The court also characterized the nature of the change in the neighborhood, noting “the great growth of the City of Charlotte in the

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222. See Robinson, *supra* note 45, at 561.

223. 228 N.Y.S.2d 195 (Sup. Ct. 1962); see also JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER & MICHAEL H. SCHILL, PROPERTY 887 (7th ed. 2010).

224. *Rick*, 228 N.Y.S.2d at 198 (setting out claims).

225. *Id.* at 199; see also *Martin v. City of Seattle*, 765 P.2d 257, 264 (Wash. 1988) (Callow, J., dissenting) (noting in passing that “[i]n this area of the city there has been little change over the decades”).

226. 87 S.E.2d 493, 496–97 (N.C. 1955) (affirming the nullification of restrictive covenants after a residential community developed into a business community).

past 15 or 20 years and the extension of the city limits.”<sup>227</sup> The *Blevins* court focused on all of the competing uses that had developed nearby: an “apartment house,” a “plumbing and heating establishment,” an “office building,” and a “filling station.”<sup>228</sup> And based on the extent of the changes over the nearly half century, the court applied the changed conditions doctrine to invalidate the covenant. That is exactly the right kind of inquiry.

The claim here is, in fact, counterintuitive. Changes that are unexpected and quick should be less likely to invalidate a covenant than changes that are slow and accretive. That seems backwards, at least from the perspective of contract law. If the changed conditions doctrine is seen as a species of frustration of purpose, then sudden and unforeseeable changes should be more likely to invalidate the original agreement.<sup>229</sup> But viewed as a species of property, the evolutionary nature of reliance suggests the opposite: where covenants become obsolete slowly over time, parties’ reliance is allowed to shift and adjust to changes in the character of the community.

Instead of viewing the changed conditions doctrine as an inapt application of contract doctrine, it is better seen as reflecting the dynamic nature of evolutionary reliance in property. Pointedly, Robinson is wrong to assume that the law is flummoxed by incremental—scalar—change.<sup>230</sup> Rather, that is precisely what legal rules like the changed conditions doctrine properly incorporate.

4. *Waste*. The law of waste prohibits a life-estate holder (or tenant) from acting, or failing to act, in a way that interferes with the interests of remainder beneficiaries or other future interest holders (including landlords).<sup>231</sup> This creates the potential for conflict that is addressed through the doctrine of waste, which allows remaindermen to sue to protect their rights to the property in the future.<sup>232</sup> This, too, mediates competing reliance interests, but the law could better acknowledge the way those reliance interests change over time.

The present possessor of a life estate, for example, is entitled to rely on the property for her lifetime, but she has no control over what

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227. *Id.* at 494.

228. *Id.* at 496–97.

229. *See* Robinson, *supra* note 45, at 552 (discussing frustration of purpose).

230. *See id.*

231. *See, e.g.*, Sally Brown Richardson, *Reframing Ameliorative Waste*, 65 AM. J. COMPAR. L. 335, 336 (2017) (“The doctrine of waste governs what actions—and inactions—the possessor may take.”).

232. *See id.* (highlighting the conflict between present and future possessors); Gus G. Tamborello, “A House Divided”: *The Rights and Duties of Homesteaders, Life Tenants & Remaindermen*, 9 EST. PLAN. & CMTY. PROP. L.J. 29, 48 (2016) (“A life tenant may be held liable for waste if the vested interests of a future holder is damaged.”).

happens to the property after death (in the absence of a prespecified testamentary power of appointment).<sup>233</sup> As a life-estate holder ages and confronts the limits of the life estate, there arises an incentive to overconsume the remaining value of the property. This can take the form of reaping too much of the economic value, like cutting too many trees, mining, or otherwise trying to strip resources from the land.<sup>234</sup> But it can also come in the form of neglect, which can deplete the value of property just as surely as can affirmative destruction.<sup>235</sup> The doctrine of waste can step in to protect the rights of remaindermen from such predictable overconsumption.

Waste often implicates complicated trade-offs between parties with competing interests in a resource.<sup>236</sup> But the most interesting questions arise in the context of ameliorative waste, where a life-estate holder seeks to change the property to *increase* its value, for example by tearing down a dilapidated barn,<sup>237</sup> demolishing a house in an industrial area,<sup>238</sup> or replacing a drafty mansion with an apartment building.<sup>239</sup> There is a dispute among courts and scholars whether

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233. See, e.g., 56 N.Y. JUR. 2D *Estates, Powers, & Restraints on Alienation* § 58 (footnotes omitted):

Upon the death of the life tenant, his or her title to the property forming the corpus of the life estate is extinguished. . . . However, . . . a life estate may be terminated sooner than the life tenant's death, by a contingency provided for in the instrument creating the life estate.

234. See *Jackson v. Don Johnson Forestry, Inc.*, 830 S.E.2d 659, 664 (N.C. Ct. App. 2019) (“Where there is an unauthorized cutting of trees during a life tenancy, the remaindermen may seek relief.”); Tamborello, *supra* note 232, at 48.

235. These alternative dynamics are addressed through the doctrines of affirmative and permissive waste, respectively. The former allows the remainder beneficiary to sue to stop the affirmative overuse of the property, and also to recover a share of the value extracted from the property (if any). In extreme cases, it may even result in premature termination of the life estate and so forfeiture of the property. The latter allows a remainderman to recover damages, or to require the life-estate holder to undertake repairs or other reasonable protection of the property.

236. See *Thomas W. Merrill, Melms v. Pabst Brewing Co. and the Doctrine of Waste in American Property Law*, 94 MARQ. L. REV. 1055 (2011) (balancing the autonomy of property owners with the potential social benefits of public ownership); Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095 (2011) (responding to Merrill); POSNER, *supra* note 70, § 3.11, at 90–94 (“[T]he common law doctrine of waste . . . mediates between the competing interests of life tenants and remaindermen.”).

237. See *Woodrick v. Wood*, No. 65207, 1994 WL 236287, at \*1 (Ohio Ct. App. May 26, 1994) (rejecting ameliorative waste claim).

238. See *Melms v. Pabst Brewing Co.*, 79 N.W. 738 (Wis. 1899) (rejecting a claim of waste when demolishing a mansion increased the property value); see also Merrill, *supra* note 236 (discussing the case with illuminating and entertaining photographs).

239. See *Brokaw v. Fairchild*, 237 N.Y.S. 6, 14 (Sup. Ct. 1929) (finding that destruction of the present residences to erect an apartment building would cause “such an injury to the inheritance” as to constitute waste); see also Richardson, *supra* note 231, at 337 (“Ameliorative waste occurs when the possessor materially alters the property without the consent of the future owner, and that alteration *increases* the market value of the property.”).

ameliorative waste should be actionable at all.<sup>240</sup> Merrill has argued for protecting the rights of remaindermen to take the property in the form it was granted.<sup>241</sup> Judge Posner, on the other hand, argued in response that increases in the value of the property should never constitute waste, and many states agree.<sup>242</sup> Others have sought middle grounds.<sup>243</sup> The problem, fundamentally, is navigating between the societal interest in encouraging the productive use of property and the remaindermen's interest in taking the property in the form they were expecting.<sup>244</sup>

Courts have generally treated waste as an atemporal, binary choice: give the rights to the present possessor or the future interest holder.<sup>245</sup> But their interests are not static. In fact, they change over time. The expected duration of the present interest, and the corollary proximity of the remaindermen's right of possession, affects their respective reliance on the resource.<sup>246</sup> A remainderman who does not expect to take possession of property for years or decades has a much more abstract interest in its condition. True, a present possessory interest like a life estate, in particular, can always be cut short unexpectedly. But a remainder beneficiary is likely to experience such an event as a windfall (if, perhaps, a tragic one), and not an event on which she could rely. The extent of her reliance depends entirely on her reasonable assumptions about when she is likely to take possession. Likewise, the present possessor's reliance is also influenced—if not

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240. See Richardson, *supra* note 231, at 337–38 (describing the disagreement).

241. Merrill, *supra* note 236, at 1057.

242. Posner, *supra* note 236, at 1100; Richardson, *supra* note 231, at 372 (“[T]he majority rule today is that when a material change increases the value of the underlying property, the future owner generally has no recourse against the possessor.”).

243. See, e.g., PETER M. GERHART, *PROPERTY LAW AND SOCIAL MORALITY* 236 (2014) (describing a “reasonableness” approach to waste); John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 588–89 (1996) (arguing that waste analysis should include social values like preservation).

244. See Merrill, *supra* note 236, at 1059 (distinguishing between an economic or “social” conception of property and property as an individual right).

245. Compare *Watson v. Wolff-Goldman Realty Co.*, 128 S.W. 581, 583 (Ark. 1910) (“[I]t is a rule of universal application that a contingent remainderman may obtain relief in equity by injunction to prevent waste . . .”), and *Kollock v. Webb*, 39 S.E. 339, 343 (Ga. 1901) (“[T]hreatened waste by any life tenant . . . would be promptly and efficiently restrained by a court of equity upon application by any remainder-man.”), with *Strickland v. Jackson*, 134 S.E.2d 661, 661–62 (N.C. 1964) (holding that contingent remaindermen have no grounds for relief when life tenant permits waste), and *Sermon v. Sullivan*, 640 S.W.2d 486, 487 (Mo. Ct. App. 1982) (holding that contingent remaindermen can obtain an injunction to prevent future waste, but are not entitled to damages for waste already caused by life tenant).

246. Cf. John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209, 1212 (2007) (“[W]aste doctrine becomes particularly important in moments of radical change when patterns of land use and development are under intense pressure because the physical, environmental, social and economic circumstances affecting the underlying property relationship are changing dramatically.”).



determined—by how long he expects his interest to last. A young life-estate holder, or a lessee at the beginning of a lengthy lease, will have a longer-term reliance on the property than someone nearing the end of a possessory estate and is likely to make more responsible decisions with regards to the property.

Courts should consider the competing reliance interests and how they change over time, giving remainder beneficiaries more rights the closer their interests are to becoming possessory. This might mean, for example, that an action for ameliorative waste would not be available where the life-estate holder is young but could perhaps become available as the end of the life estate comes closer into view. Or it might mean that the remedies for a waste action change depending on the anticipated duration remaining in the possessory estate. Damages may be appropriate early in the tenure, for example, while injunctions or even premature termination might be available later.<sup>247</sup> At the very least, time should be an explicit part of the analysis.

If this seems like an unrealistically granular inquiry, courts in some contexts already look at actuarial or mortality tables when dividing the value of property held in a life estate.<sup>248</sup> Specifically, courts will calculate the present value of a possessory interest, as well as remainder interests, by consulting the life expectancy of the present possessory-interest holder.<sup>249</sup> That valuation inquiry reflects how these competing reliance interests shift over time. That same approach should be imported into the substantive law of waste.

### *C. Evolutionary Reliance and the Problem of Legal Change*

While property is quintessentially a private right and the focus so far has been primarily on private law, its contours are often defined by public law, whether in statutory or regulatory limits, or in constitutional rules constraining the exercise of state power. And reliance can evolve here as well.

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247. RESTATEMENT (FIRST) OF PROP. § 189(1) (AM. L. INST. 1936) (listing injunction, damages, or “other equitable decree appropriate” as possible remedies for waste).

248. See Olin L. Browder, Jr., *The Condemnation of Future Interests*, 48 VA. L. REV. 461, 469–70 (1962) (discussing different approaches).

249. See, e.g., *Miss. State Highway Comm’n. v. Hemphill*, 176 So. 2d 282, 287 (Miss. 1965) (“On remand the trial court should determine the cash value of the damages to the future interest at the time of the taking. . . . Expert actuarial testimony . . . would be available.”); *Brennan v. Burke*, No. 15 MISC. 000010, 2019 WL 2498896, at \*4 (Mass. Land Ct. June 13, 2019) (approving valuation that “calculated the *probability* of each individual party being alive at any particular time (his ‘custom mortality tables’), which enabled him to calculate the value of each life estate in light of the probability that its particular constituent events would occur”), *judgment entered*, 15 MISC. 000010, 2019 WL 2494433 (Mass. Land Ct. June 13, 2019).

The Supreme Court made this explicit in its earliest zoning decision. Zoning in this country dates back to the 1920s, when the Department of Commerce promulgated the Standard Zoning Enabling Act as model legislation. Many states adopted it, and local governments quickly began to engage in comprehensive land use regulation.<sup>250</sup> Property owners initially challenged the very project of zoning, arguing that creating separate use districts violated substantive due process for being wholly unrelated to the public's health, safety, and welfare.

In the seminal case of *Euclid v. Ambler Realty*,<sup>251</sup> the Supreme Court upheld zoning, reasoning that it resembled a kind of ex ante nuisance prevention, keeping incompatible uses away from each other and thereby preventing harms before they arose.<sup>252</sup> The question was what harms zoning would prevent. In resolving this issue, Justice Sutherland, writing for the Court, identified the changing and dynamic nature of the relationship between private property and government power. His reasoning is worth quoting at length:

Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.<sup>253</sup>

Ultimately, he suggests that property rights must include the expectation of regulatory change.<sup>254</sup> Focusing on evolutionary reliance in public law therefore offers significant conceptual and doctrinal payoffs, and new insights into some of the most contested issues in property law.

1. *Background Principles of Property and Nuisance Law.* Consider, first, *Palazzolo v. Rhode Island*<sup>255</sup> and the problem of background principles of state law. A perennial issue in takings litigation involves the interaction between property owners' expectations and regulations predating the acquisition of property. The question is whether or not a property owner can have expectations that are inconsistent with existing regulations or, to put it differently, whether expectations are constituted by existing regulations. If so, then pre-acquisition regulations become immune from takings challenges

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250. See, e.g., John M. Quigley & Larry A. Rosenthal, *The Effects of Land Use Regulation on the Price of Housing: What Do We Know? What Can We Learn?*, 8 CITYSCAPE 69, 71 (2005).

251. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

252. *Id.* at 387–88.

253. *Id.* at 386–88.

254. *Id.* at 388–89.

255. 533 U.S. 606 (2001).

because an owner should not reasonably expect to be able to put property to a use that was prohibited at the time he acquired the property.

Doctrinally, the issue arises in the interaction between *Palazzolo* and *Lucas v. South Carolina Coastal Council*.<sup>256</sup> In *Lucas*, the U.S. Supreme Court held that a total wipeout of all economically beneficial uses of property is a per se taking.<sup>257</sup> However, the Court identified the important exception of regulations that are consistent with “background principles of nuisance and property law.”<sup>258</sup> As the Court reasoned, a regulation is not a taking if it is codifying a prohibition that existed anyway as a background principle of property. Where that is true, nothing would have been taken, because the property owner did not have a right to engage in the activity in the first place.

The *Lucas* Court did not explain what constitutes background principles of property and nuisance law, however. The Court appeared to have common law nuisance principles most squarely in mind, but the reasoning could extend more broadly. In *Palazzolo*, then, a property owner acquired property following the adoption of regulations prohibiting filling in wetlands.<sup>259</sup> Despite the presence of the regulations, the property owner filed permits seeking to fill the wetlands on his property to build a new campground and recreation area. Rhode Island denied the permits and Plaintiff sued for a taking. Rhode Island defended itself on grounds that the pre-acquisition regulations were background principles of property law and that the Plaintiff, therefore, could not reasonably expect to fill in the wetlands on his property.<sup>260</sup>

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256. 505 U.S. 1003 (1992).

257. *Id.* at 1019 (“[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”).

258. *Id.* at 1030.

259. The facts are unusual and more complicated than this brief description can capture. In *Palazzolo*, the Plaintiff only “acquired” the property following adoption of wetlands regulations because the property had been owned by a corporation that dissolved by operation of state law. When that happened, the Plaintiff acquired the property outright as the corporation’s only shareholder. While the regulations were in place before that transfer, it was a transfer in form only, and this may have affected the Court’s reasoning. See *Palazzolo*, 533 U.S. at 611–32.

260. *Id.* at 626 (citation omitted):

The theory underlying the argument that postenactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.

In a fractured decision, the Court rejected Rhode Island's defense and held that pre-acquisition regulations are not automatically background principles of property law.<sup>261</sup> According to the Court, a regulation either is or is not an unconstitutional burden on property. Whether property changes hands should not immunize an otherwise unconstitutional regulation from takings review. Or, as the Court colorfully concluded, "The State may not put so potent a Hobbesian stick into the Lockean bundle [of property]."<sup>262</sup>

The Court, however, did not manage to explain how or when a regulation becomes a background principle of property. In a concurring opinion, Justice Scalia reasoned that it was irrelevant to a takings claim that the property was acquired after the challenged regulation went into effect.<sup>263</sup> Justice Stevens, concurring in part, argued precisely the opposite: that it should, in fact, be dispositive; a property owner should not be able to challenge as a taking a regulation that predated acquisition of the property.<sup>264</sup> And, finally, Justice O'Connor reasoned that a pre-acquisition regulation should be relevant but not dispositive with regards to the content of property and nuisance law.<sup>265</sup> How this applies remains contested and unsettled.<sup>266</sup>

Evolutionary reliance offers an answer. It suggests that state laws and regulations do not automatically become background principles the moment they are enacted, but become so over time. This occurs whether or not property has changed hands in the meantime. Consider, for example, rules governing the destruction of wetlands like those at issue in *Palazzolo*. Wetlands received very little protection prior to the 1970s.<sup>267</sup> Owners of wetlands therefore had every expectation of being able to fill them in to develop property. When new

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261. *Id.* at 627 (citation omitted).

262. *Id.*

263. *Id.* at 637 (Scalia, J., concurring) ("[T]he fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." (citation omitted)).

264. *Id.* at 641 (Stevens, J., concurring in part and dissenting in part) ("To the extent that the adoption of the regulations constitute the challenged taking, petitioner is simply the wrong party to be bringing this action. If the regulations imposed a compensable injury on anyone, it was on the owner of the property at the moment the regulations were adopted.").

265. *Id.* at 633 (O'Connor, J., concurring) ("Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine. Further, the regulatory regime in place at the time the claimant acquires the property at issue helps to shape the reasonableness of those expectations.").

266. See, e.g., Nicole Stelle Garnett, *From a Muddle to a Mudslide*: Murr v. Wisconsin, 2016–2017 CATO SUP. CT. REV. 131, 148 (2017) ("Commentators have faulted Justice Scalia for misapprehending in *Lucas* the nature of 'background principles of property and nuisance'—by assuming that these principles are fixed and static when in fact they are fluid and evolving.").

267. See, e.g., Jeffrey K. Stine, *Regulating Wetlands in the 1970s: U.S. Army Corps of Engineers and the Environmental Organizations*, 27 J. FOREST HIST. 60, 60 (1983).

regulations began to protect wetlands, the burdens appeared to many commentators to create cognizable takings claims.<sup>268</sup> Those regulations effected a change in owners' expectations—indeed, often a sharp change. But fast forward ten, twenty, or thirty years, and those objections lose their bite. Today, property owners should not be able to object to new state laws protecting wetlands, or even to changes in the content of those laws, whether or not property has changed hands. At this point, our collective understanding of the ecological importance of wetlands, and our expectations regarding wetland protection, mean that state wetlands regulations have become background principles of property law.<sup>269</sup> To be clear, they were not background principles from the moment wetlands regulations were enacted, but have become so over time as property owners' reliance interests have evolved.

This is not, of course, to argue in retrospect that wetlands regulations automatically violated the Takings Clause when they were enacted in the 1970s. They still had to impose a substantial burden on the owner's property as a whole and rise to the level of a taking according to the high standards that courts impose. But it is to suggest that those takings claims were at least more plausible when they were closer in time to the enactment of the regulatory restrictions. Today, those regulations should be defensible under the *Lucas* exception for regulations consistent with background principles of property and nuisance law. The passage of time matters.

2. *Judicial Takings.* A similar move helps explain and even justify the otherwise befuddling notion of takings claims against courts. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,<sup>270</sup> a plurality of the Supreme Court opened the door to so-called judicial takings. Plaintiffs in that case had sued the Florida Coastal Commission for denying compensation for a beach renourishment program, arguing that the result of extending the beach was to create a new stretch of *public* land between the Plaintiffs' property and the ocean.<sup>271</sup> In essence, they claimed this was a taking of their right to own all the way to the water's edge. Plaintiffs litigated up to the state supreme court, which rejected the takings claim on grounds

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268. Alan S. Rafterman, Note, *It's Not Easy Being Green: The Judicial View of Government Takings of Private Wetlands*, 2 *FORDHAM ENV'T L. REP.* 155, 162 (1991) (anticipating takings challenges); Michael K. Braswell & Stephen L. Poe, *Private Property vs. Federal Wetlands Regulation: Should Private Landowners Bear the Cost of Wetlands Protection?*, 33 *AM. BUS. L.J.* 179, 224 (1995) ("It is very likely that the takings issue will continue to cause controversy for the federal wetlands regulatory program.").

269. See generally PAUL A. KEDDY, *WETLAND ECOLOGY: PRINCIPLES AND CONSERVATION* (2d ed. 2010) (providing background).

270. 560 U.S. 702 (2010).

271. *Id.* at 711–12.

that Plaintiffs' claimed property right—to own to the mean high-water line—was not actually a property right recognized in the state.<sup>272</sup> Plaintiffs petitioned for certiorari in the U.S. Supreme Court, but now argued that the Florida Supreme Court had taken their property with its opinion “redefining” their property rights.

The U.S. Supreme Court unanimously rejected the claim, finding that the Florida Supreme Court was in fact correct about the substantive content of state law.<sup>273</sup> But the fact that the Court even engaged in the analysis, with a plurality specifically finding that judicial takings would be cognizable on different facts, presents a challenge to the nature and source of property rights.<sup>274</sup> Post-*Erie*, there is no higher authority on the content of state property law than the state supreme court.<sup>275</sup> A state supreme court simply cannot be wrong about substantive property rights, in the same way the U.S. Supreme Court cannot be wrong about the meaning of the Constitution.<sup>276</sup> It is “not final because [it is] infallible, but [it is] infallible only because [it is] final.”<sup>277</sup> And so, if a state supreme court holds that littoral owners do not automatically own to the mean high-water mark, or otherwise makes a proclamation about property, it is difficult to see how any takings claim could possibly arise.

State courts can, however, interfere with people's reliance. This is not the same as saying that state courts are *wrong* in their interpretation of state law. Nor does it suggest that new interpretations or applications of property law are inappropriate. It simply recognizes that changes can interfere with reliance and can therefore violate the Takings Clause, at least if they happen too quickly. Nothing in this approach ossifies state law or prevents state courts from modernizing property doctrines. But as with legislation, it may constrain the rate of change, and it recognizes that compensation may be due as a kind of transition relief when changes occur too rapidly.<sup>278</sup> This approach, then, preserves state courts' plenary power over common law property doctrines without eviscerating all constitutional protections.

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272. *Walton Cnty. v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1120–21 (Fla. 2008).

273. *Stop the Beach Renourishment, Inc.*, 560 U.S. at 731–32.

274. See Frederic Bloom & Christopher Serkin, *Suing Courts*, 79 U. CHI. L. REV. 553, 572 (2012) (noting that property has no meaning independent of state law).

275. See *id.*

276. *Id.* (“Judicial takings thus cannot be seen as a means of error correction, since authoritative state courts cannot be wrong about the content of their own law.”).

277. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

278. See Bloom & Serkin, *supra* note 274, at 575 (construing judicial takings claims as form of transition relief from changes to judge-made law).

3. *Regulatory Property.* Regulatory property also takes on additional coherence when viewed through the lens of evolutionary reliance. Starting in earnest in the 1960s, commentators and then courts have recognized that people can obtain property rights in regulatory entitlements.<sup>279</sup> In the beginning, this resulted in extending important due process protections to government entitlements like welfare benefits. Today, regulatory property is more likely to involve commercial interests like grazing permits, radio spectrum, taxi medallions, and transferable development rights (“TDRs”), to name just a few.<sup>280</sup> But the tension between stability and regulatory flexibility is profound.

One of the principal purposes of regulatory property is, in fact, to induce reliance.<sup>281</sup> Creating grazing rights—instead of relying on wholly informal or ad hoc interactions between ranchers and government officials—allows ranchers to rely on their entitlements and to plan their herd size and other land needs accordingly.<sup>282</sup>

A problem frequently arises, however, when some new regulatory priority or even disruptive technology undermines the regulatory property. Obvious examples involve efforts to change the National Flood Insurance Program to try to address people building (and rebuilding) in flood zones, changes in mineral rights on public land, or the rise of ride-sharing apps and their threat to taxi medallions.<sup>283</sup> In those instances, what protection should rights holders receive when their rights are constituted by the government in the first place?<sup>284</sup> Can welfare benefits simply be cut off with changes in

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279. See, e.g., Christopher Serkin, *The New Politics of New Property and the Takings Clause*, 42 VT. L. REV. 1, 16 (2017) (“The definitive treatment comes from Charles Reich’s path-breaking work, *The New Property*, in which he argued that welfare benefits and other forms of public assistance should be treated as vested property rights.”).

280. See, e.g., Serkin, *supra* note 102 (discussing regulatory property).

281. See, e.g., Serkin, *supra* note 172, at 936 (“The principal benefit of government precommitments and their resulting entrenchment is the ability to induce reliance.”).

282. See, e.g., Thomas E. Sheridan, *Cows, Condos, and the Contested Commons: The Political Ecology of Ranching on the Arizona-Sonora Borderlands*, 60 HUM. ORG. 141, 144 (2001) (internal quotation marks omitted):

Although public-land grazing permits are considered by the agencies to be a granted privilege rather than private property, they are commonly bought and sold along with the rest of the ranch. If any of these allotments are lost or the number of animal-unit months on them significantly reduced, the economic viability of the entire ranch may be destroyed.

283. See, e.g., Serkin, *supra* note 102, at 916 (“[R]egulatory property has become increasingly important and valuable in our modern economy, and includes such assets as pollution credits, fishing quotas, taxi medallions, financial guarantees, and the telecommunications spectrum, among many others.”).

284. See, e.g., Wyman, *supra* note 102 (discussing property protection for regulatory property like taxi medallions); Serkin, *supra* note 6 (discussing regulatory property more generally).

eligibility criteria, or can mineral rights be eliminated by new regulations of public lands?

Regulatory property cannot be a one-way ratchet. The creation of transferable development rights cannot lock in existing zoning regulations in perpetuity (or at least until all the TDRs are used).<sup>285</sup> That could make the creation of regulatory entitlements impermissibly entrenching against regulatory or legal change.<sup>286</sup>

However, it is equally problematic if regulatory entitlements could simply be cancelled at any time. There is a reason that theorists in the 1960s adopted a property framework to defend welfare and other government benefits from the vicissitudes of regulatory preferences: property provides strong protection.<sup>287</sup> Moreover, since the purpose of creating regulatory entitlements is to induce reliance—to encourage people to invest, for example—it would be self-defeating if future governments could simply cancel them or undermine their value at any time.<sup>288</sup> No one would rely on entitlements that are so ephemeral.

Evolutionary reliance offers a new framework for evaluating changes to regulatory property. Once created, regulatory entitlements are not locked in forever, because people should expect them to change, just as they should expect more conventional property rights to change. But they can also expect that such change will happen gradually. Canceling all taxi medallions by legislative fiat would be impermissible on this view, but offering more medallions for sale, experimenting with ride-sharing platforms, or gradually deploying other options would represent the kinds of permissible changes that property owners should expect.<sup>289</sup> The question at all times should be how much stability the regulatory regime needs to create in order to induce the intended reliance.

Grazing permits, for example, need to create stable expectations that allow for appropriate herd management. They do not need to last forever, but ranchers should have enough advance notice of changes to be able to adjust their cattle operations without too much disruption. Mineral rights require different amounts of time depending on how long it typically takes to develop mines—or gas wells or other extractive

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285. Serkin, *supra* note 102, at 916–17 (extending property protection to regulatory property “can transform the regulatory regime that creates them into a kind of one-way ratchet that limits governmental power”).

286. *See id.* at 915.

287. *See, e.g.*, Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 742, 785–86 (1964).

288. *See* Serkin, *supra* note 172, at 934 (“The ability to entrench a policy can create significant public benefits, principally in the ability to induce reliance by private parties . . .”).

289. *See* Wyman, *supra* note 102.



technologies—as well as the business model of such extraction. Of course, holders of such rights should not expect their rights to be immutable nor protected absolutely. They are not necessarily entitled to extract the full value of their regulatory entitlements before changes occur. But nor should they expect the full value to be wiped out without warning or recourse. The requirement, again, is to protect evolutionary reliance by ensuring that changes happen incrementally over time.

4. *Vesting Rules.* Focusing on reliance also provides a new path forward for evaluating vested rights. The vested rights doctrine is implicated when a developer faces a regulatory change during the course of development.<sup>290</sup> For example, someone may buy property and seek to develop some new intensive use. Either coincidentally or often in response to a development plan, the local government may change existing regulations to prohibit or otherwise restrict the use. The question then arises whether the property and development plans are subject to the old or the new regulatory regime. The answer depends on whether or not the development rights have vested.<sup>291</sup>

Vesting rules vary by state and are often technical.<sup>292</sup> They usually involve defining some specific act in the development process that locks in the existing regulatory regime.<sup>293</sup> Vesting rules often seem arbitrary, and all invite strategic decisions by the developer, local officials, or both. In states where development rights vest with site preparation, for example, developers often race to get a stake in the ground, simply to lock in existing regulations, even—or especially—if they know that the government is contemplating a new regulation.<sup>294</sup> The effect can be a kind of race to build in ways that undermine the

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290. See Serkin, *supra* note 35, at 1238 (“The doctrine is usually implicated when a property owner has begun but not yet completed some project before the government changes the applicable regulations.”).

291. See *id.* (“The vested rights doctrine assumes that if a right has vested—that is, if a project is sufficiently far along—then it is entitled to protection from subsequently enacted land use regulations . . .”).

292. See, e.g., Delaney & Vaias, *supra* note 186, at 32 (“[F]ew, if any, bright-line tests have emerged concerning vested rights, and the caselaw is often inconsistent and confusing.”).

293. See John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL’Y 603, 607 (2000) (“At least 30 state courts have used the issuance of a building permit as the principal benchmark for [vested rights], but virtually all of these courts also require that other actions be taken in reliance upon the permit, such as construction or expenditure of funds to implement the permit.”); Grayson P. Hanes & J. Randall Minchew, *On Vested Rights to Land Use and Development*, 46 WASH. & LEE L. REV. 373, 389–402 (1989) (surveying approaches).

294. See, e.g., David A. Dana, *Natural Preservation and the Race to Develop*, 143 U. PA. L. REV. 655, 694 (1995) (“We do know that observers of and participants in the development process believe that development is accelerated in response to regulatory risk.”).

efficacy of new regulations.<sup>295</sup> On the other hand, local officials can sometimes undermine significant investments that developers have made and frustrate reasonable expectations in the process.

Whatever their doctrinal contours, vesting rules exist at the intersection of dynamic changes: the property owner's planned changes to the use of the property and the government's changes to the applicable regulatory regime. And they do so, expressly, by asking whether the property owner has made sufficient investments in reliance on being able to develop the property.<sup>296</sup> As one court put it succinctly, " 'Reliance' is an essential element of the [vested rights] doctrine."<sup>297</sup> Courts have reasoned that at some point in the development process, owners need a measure of certainty and should be able to rely on their right to develop.<sup>298</sup> Vested rights therefore implicitly acknowledge that rights and expectations are dynamic, and stability in expectations is weighed against the expectation that property regulation will change.

Vested rights doctrine could do better than focusing on some arbitrary moment in the development process and should instead embrace the contours of evolutionary reliance. This approach would examine the nature and extent of the developer's reliance as well as the reasonable expectations of change. For example, a developer who had acquired property specifically for a particular development and worked methodically through the development process only to be sandbagged by a last-minute regulatory change should see her rights protected. But a developer who had notice of some anticipated regulatory change, or who had sat on land for a long time and rushed to develop only in the face of some regulatory change, should not be able to claim a vested right, even if he managed to get a proverbial or literal stake in the ground. There is undoubtedly a cost to the uncertainty inherent in this approach, but this focus on evolutionary reliance provides a more satisfying account of the goals of the vested rights doctrine.

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295. See Serkin, *supra* note 35, at 1284 ("[P]rotecting existing uses can induce people to alter at least the timing of their investment decisions, if not their substance, specifically in order to receive favorable regulatory treatment.").

296. Delaney & Vaias, *supra* note 186, at 30 ("Once the landowner spends large sums of money in reliance upon development approvals, by installing roads, utilities, and other infrastructure improvements, or dedicating amenities such as parkland or school sites to public use, the expectations of the developer become 'investment backed.'").

297. Exeter Bldg. Corp. v. Town of Newburgh, 980 N.Y.S.2d 154, 159 (App. Div. 2014), *aff'd*, 47 N.E.3d 71 (N.Y. 2016).

298. Md. Reclamation Assocs., Inc. v. Harford Cnty., 994 A.2d 842, 886 (Md. 2010) (Harrell, J., dissenting); see also Noble Manor Co. v. Pierce Cnty., 913 P.2d 417, 419 (Wash. Ct. App. 1996) ("Washington's doctrine of vested rights embraces a vesting principle which places great emphasis on certainty and predictability in land use regulations." (internal quotation marks omitted)), *aff'd*, 133 943 P.2d 1378 (Wash. 1997).

5. *Reconciling Penn Coal and Keystone Bituminous*. A famously perplexing duo of cases is also resolved by focusing on evolutionary reliance. In *Penn Coal*, the seminal takings case, the Supreme Court held that the Kohler Act violated the Takings Clause.<sup>299</sup> The Kohler Act was a state law prohibiting coal companies from mining in a way that caused certain buildings—like homes, schools, and churches—to collapse.<sup>300</sup> The Court held that this was a taking of the plaintiff coal company’s “support estate” because it effectively required coal to be left in the ground.<sup>301</sup>

Fast forward more than half a century to *Keystone Bituminous Coal Ass’n v. DeBenedictis*.<sup>302</sup> The case involved a nearly identical state law, also from Pennsylvania, that required coal companies to leave unmined at least fifty percent of bituminous coal under certain specified structures—like homes, schools, and churches.<sup>303</sup> In rejecting Plaintiff’s takings claim, the Court went to great but unpersuasive lengths to distinguish *Penn Coal* without overruling it.<sup>304</sup> The Court focused on the extent of the legislature’s findings of public need in this latter case and also refused to define the relevant property as only the coal left in place, instead of all the coal owned by Plaintiff.<sup>305</sup> While this is superficially plausible, it is difficult to escape the conclusion that the Kohler Act and the later Bituminous Mine Subsidence and Land Conservation Act are indistinguishable on any principled grounds. While the procedural posture of the two cases may have been different, it is hard to see why *Penn Coal* was not entirely controlling and dispositive. Indeed, a number of commentators have made precisely this point.<sup>306</sup>

299. Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). *But see* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 865–74 (2006) (arguing that the case is a due process case and not a takings case at all).

300. *Mahon*, 260 U.S. at 416–17, 421 (Brandeis, J., dissenting) (describing statute).

301. *Id.* at 414.

302. 480 U.S. 470 (1987).

303. *Id.* at 476 n.6 (describing statute).

304. *Id.* at 484–85 (distinguishing *Penn Coal*).

305. *See id.* at 485 (“The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas.”); *id.* at 499:

When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners’ coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.

306. *See, e.g.,* Richard A. Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4–5 (arguing that *Keystone* “shatters any easy illusion about the unity of the law, for it marks yet another step in the apparently remorseless expansion of state power, gutting, although not explicitly overruling, the celebrated decision of *Pennsylvania Coal Co. v. Mahon*.”); John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1541

Evolutionary reliance offers an explanation, and it is, quite simply, the passage of time.<sup>307</sup> The Kohler Act was a taking because it arose during a period of profound transition. Technological change was reshaping the mining industry, allowing mining in ways that subjected surface structures to a greater risk of collapse.<sup>308</sup> Simultaneously, legislatures were adopting waves of new industrial and workplace laws, many of which were invalidated by skeptical courts during the *Lochner* era.<sup>309</sup> As one historical article framed the outcome in *Penn Coal*, “[T]he legislature took a ‘populist’ stand [in protecting surface owners]; and the Supreme Court looked toward stability, the long-run, and sanctity of contract.”<sup>310</sup> These were avulsive changes to the regulatory environment, reconfiguring the relationships between coal companies and their workers, and between mines and the land.<sup>311</sup> The problem of surface cave-ins resulting from subsurface mining had only arisen recently. A commission studied the problem starting in 1911, and the Kohler Act was enacted within a decade.<sup>312</sup> The decision, then, came at a “critical point,” when public attitudes towards regulation had only just “passed an invisible boundary line.”<sup>313</sup>

Sixty-five years later, expectations around industrial regulation had shifted. Coal companies could no longer claim that they had relied on their ability to mine all available coal without regulatory oversight in lots of different ways. Instead, their reliance had become tempered over time by increasingly restrictive regulations governing mine safety, the conditions of mining operations, and the ways in which mining

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(1994) (“Despite Justice Stevens’s efforts to distinguish *Pennsylvania Coal*, however, many consider the two decisions to be plainly inconsistent.”); Ron vonLembke, Comment, *Keystone Bituminous Coal Association v. DeBenedictis and the Status of Coal in Pennsylvania*, 11 HARV. J.L. & PUB. POL’Y 227, 236 (1988) (“In order to retain Justice Holmes’s ‘too far’ rule while nevertheless relying on the *Mugler-Hadacheck* approach, Justice Stevens had to draw fine distinctions between the facts in *Pennsylvania Coal* and the facts in *Keystone*.”).

307. Cf. Marla E. Mansfield, *A Reexamination of the Temporal Dimension in Property and Takings*, 44 TULSA L. REV. 765, 770 (2009) (“The passage of time with [a] regulation in place, however, begins to alter perceptions about the physical nature of the property involved.”).

308. See, e.g., WILLIAM A. FISCHER, *REGULATORY TAKINGS* 26–27 (1995) (describing changes in mining practices).

309. See Lawrence M. Friedman, *A Search for Seizure: Pennsylvania Coal Co. v. Mahon in Context*, 4 LAW & HIST. REV. 1, 21 (1986).

310. *Id.*

311. For a different focus on the role of time in defining the relevant denominator, see Danaya C. Wright, *A New Time for Denominators: Toward a Dynamic Theory of Property in the Regulatory Takings Relevant Parcel Analysis*, 34 ENV’T L. 175 (2004) (arguing that owners’ actions prior to a regulation should factor into takings analysis).

312. See Friedman, *supra* note 309, at 3.

313. *Id.* at 22.

could occur.<sup>314</sup> Against these accretive shifts, the act in *Keystone Bituminous* looked like much less of an interference with coal companies' reasonable reliance. Even though the substance of the laws was effectively indistinguishable, and the burdens on coal companies largely the same, the latter was not a taking because the reliance interest had changed. Thus, *Keystone Bituminous* did not need to overrule *Penn Coal* to reach a different result. While this does not appear on the face of the *Keystone Bituminous* opinion, the Court's focus on the strong public justification for the Act reflects an awareness of the shifting expectations around coal mining. The implicit reversal may not have been a reversal after all.

6. *Grandfathering and Amortization of Prior Nonconforming Uses.* Many property regulations—and especially zoning and land use controls—grandfather existing uses of property to insulate them from regulatory change.<sup>315</sup> This is often not strictly required, but is nevertheless used precisely to protect an in-place property owner's reliance on the existing use of the property.<sup>316</sup> But at least in the zoning context, grandfathering and amortization rules are designed to encourage the slow demise of existing uses.<sup>317</sup> Prohibitions on improvements and repairs can make an existing use increasingly out-of-date, putting economic pressure on the owner to replace it with something that conforms to the new regulations.<sup>318</sup> Implicitly, encouraging a slow demise is permissible in a way that enforcing a quick regulatory change may not be. While grandfathering protects the property owner to some extent, these additional restrictions appear to be designed to shift the extent of the owner's reliance on the

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314. See, e.g., Michael S. Lewis-Beck & John R. Alford, *Can Government Regulate Safety? The Coal Mine Example*, 74 AM. POL. SCI. REV. 745, 746–47 (1980) (briefly describing history of federal mining laws and regulations).

315. Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 853 (1924), argues that regulations not only do apply purely prospectively but may be constitutionally required to in some instances. A failure to protect existing uses could lead to constitutional liability, though it is unclear which constitutional provision a retroactive regulation would offend. Another article, *Retroactive Zoning Ordinances*, 39 YALE L.J. 735, 741 (1930), suggests that retroactive zoning may offend the Takings Clause.

316. Serkin, *supra* note 35.

317. See, e.g., *id.* at 1236 (describing the doctrines); Osborne M. Reynolds, Jr., *The Reasonableness of Amortization Periods for Nonconforming Uses—Balancing the Private Interest and the Public Welfare*, 34 WASH. U. J. URB. & CONTEMP. L. 99, 100 (1988) (“Although some commentators forecasted a rapid demise in nonconforming uses, their prediction has proven incorrect. One critic called this development ‘one of the greatest disappointments of the zoning movement.’”).

318. Serkin & Vandenberg, *supra* note 191, at 1057; see also, e.g., *Cnty. Council v. E. L. Gardner, Inc.*, 443 A.2d 114, 119 (Md. 1982) (“[T]he purpose of such restrictions is to achieve the ultimate elimination of nonconforming uses through economic attrition and physical obsolescence.”).

nonconforming use and to encourage some alternative use. The goal is to produce eventual compliance with new land use regulations without interfering too much with property owners' reliance on existing uses of property.<sup>319</sup>

This trade-off is even more explicit in the related doctrine of amortization. Sometimes, local governments seeking to eliminate prior nonconforming uses of land will not simply wait for them to die from slow obsolescence.<sup>320</sup> Instead, they take a more aggressive approach and adopt an amortization period, which amounts to a kind of time-limited grandfathering.<sup>321</sup> By allowing the use to remain in place for a pre-specified period, the local government can thereafter require compliance with new regulations, without otherwise compensating the property owner.<sup>322</sup>

The practice is controversial. Some courts have held that a taking in the future is still a taking and so have invalidated the practice.<sup>323</sup> But most have upheld the use of amortization generally and have focused their inquiry instead on the adequacy of the length of the amortization period.<sup>324</sup> For these latter courts, amortization reflects the intuition that deferring enforcement of a regulation is an appropriate mechanism for realigning owners' reliance interests over time—i.e., for vindicating evolutionary reliance. What would be impermissible to implement immediately can become permissible with enough advance warning.

For one particularly insightful examination of amortization, consider *Village of Valatie v. Smith*.<sup>325</sup> There, a municipality had prohibited mobile homes everywhere except in pre-designated mobile home parks.<sup>326</sup> However, the municipality grandfathered in preexisting

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319. As discussed in *Retroactive Zoning Ordinances*, *supra* note 315, at 741, much of the hesitancy toward interference with existing uses was out of fear of takings liability. For the goals of the closely related amortization period, see also *Vill. of Valatie v. Smith*, 632 N.E.2d 1264 (N.Y. 1994), noting “the setting of the amortization period involves balancing the interests of the individual and those of the public.”

320. Serkin, *supra* note 35, at 1235.

321. *Id.* at 1235–36 (noting that amortization was a response to the failure of grandfathering to remove nonconforming uses which proactively eliminates nonconforming uses after the passage of some specified time).

322. See Serkin & Vandenberg, *supra* note 191, at 1061.

323. See, e.g., *De Mull v. City of Lowell*, 118 N.W.2d 232, 237–38 (Mich. 1962) (holding that Michigan municipalities had no authority to terminate nonconforming uses after a set period of time).

324. See, e.g., *Town of Islip v. Caviglia*, 540 N.E.2d 215, 224 (N.Y. 1989) (“Presumptively, amortization provisions are valid unless the owner can demonstrate that the loss suffered is so substantial that it outweighs the public benefit gained by the exercise of the police power.”).

325. 632 N.E.2d at 1264 (N.Y. 1994).

326. *Id.* at 1265.

mobile homes until they changed hands.<sup>327</sup> Twenty years after the ordinance was adopted, the owner of one of the grandfathered mobile homes died, and the municipality sought to enforce the mobile home prohibition against his daughter who inherited the property.<sup>328</sup> She sued, arguing that it was inappropriate to measure the amortization period by the tenure of the property owner.<sup>329</sup> It meant that some mobile homes would be grandfathered for longer than others, making application of the zoning ordinance depend on the identity of the owners and not on specific characteristics of the property.<sup>330</sup> New York's highest court upheld the municipality's regulation, reasoning that it reflected an appropriate focus on "staying in a neighborhood or remaining on a particular piece of land."<sup>331</sup> In other words, the court viewed the ordinance as appropriately protecting existing owners' reliance on the ongoing use of the property, but effectively prohibited that individual's subjective reliance from being transferred to anyone else. Current owners could continue to use their mobile homes throughout their lifetimes, but their interests were nontransferable.

Whatever form amortization takes—whether measured by the existing owner or a prespecified duration—it reflects the view that reliance can be shaped with advance notice. The amortization period, then, allows owners to readjust their expectations slowly over time.

This has broader consequences for transition relief more generally. Legal change can create specific and disproportionate burdens on some property owners. One conventional account of the Takings Clause views it as providing relief from legal transitions.<sup>332</sup> Compensation, in this view, eases the cost of those transactions by spreading the specific burdens to society as a whole.

Incorporating evolutionary reliance in property, however, suggests that time can be an alternative to compensation. Time is its own form of transition relief. As Jeremy Bentham anticipated, discussing legal changes that interfered with expectations, "If it is possible, you should so arrange matters that this law will not begin to take effect except at a remote period."<sup>333</sup> Sufficient advance notice can minimize the burden. Amortization, then, is not a form of implicit compensation; it does not function like monetary compensation at all.

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327. *Id.*

328. *Id.*

329. *Id.* at 1265–66.

330. *Id.* at 1266.

331. *Id.* at 1267–68 (later citing *Modjeska Sign Studios v. Berle*, 373 N.E.2d 255 (N.Y. 1977)).

332. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 526–27 (1986).

333. BENTHAM, *supra* note 24, at 149.

Instead, it merely slows the implementation of the zoning change. Delaying the effect of the new regulation can be enough to avoid a takings violation because it allows for owners' expectations to adjust over time to the new zoning limits.

This same reasoning also justifies a new regulatory device dubbed "prospective grandfathering."<sup>334</sup> With traditional amortization, a regulatory ban is followed by a time-limited grandfathering of existing uses. Prospective grandfathering flips the temporal ordering, where the ban follows the period of amortization. It is useful when governments want to encourage an activity in the short term but then regulate it in the future, as, for example, with natural gas and its role in climate change.<sup>335</sup> Natural gas is an improvement over coal and so should be deployed as quickly as possible, but will need to be regulated away in the next thirty years to reduce carbon emissions even further.<sup>336</sup> Putting the natural gas industry on notice today that it will be highly regulated in the future should avoid the risk of takings liability when new regulations are ultimately adopted.

The point can be generalized, though, and highlights the role of notice. Providing property owners with advance notice of some regulatory change can serve as a kind of prospective amortization.<sup>337</sup> It works in precisely the same way as traditional amortization, giving owners a chance to modify their expectations over time. That kind of advance notice allows the regulatory change to shape those expectations gradually, so that by the time the regulation actually goes into effect, it no longer interferes too much with reliance interests.

7. *Legal Positivism and the Takings Clause.* Stepping back from these specific doctrines, evolutionary reliance solves a seemingly intractable problem at the intersection of private property and public power.<sup>338</sup> There is a long-standing fight over the nature of property between positivists on the one hand, and natural rights theorists on the other. Positivists argue that property rights originate with the state, and so state law constitutes the substantive content of property rights. Positivism in one form or another represents a mainstream view of

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334. See Serkin & Vandenberg, *supra* note 191, at 1061.

335. *Id.* at 1061–62.

336. See *id.* at 1021–22 (describing both the benefits and problems of natural gas).

337. See *id.* at 1074 (“[O]ur proposal to sunrise new regulation promises some important benefits that go beyond just natural gas.”).

338. See Laura S. Underkuffler, *Property, Sovereignty, and the Public Trust*, 18 THEORETICAL INQUIRIES L. 329, 330 (2017) (“Attempting to determine when and how change to previously existing property rights should be accomplished by sovereign power is one of the most critical functions of law.”).



property.<sup>339</sup> For where else should one look for the content of property than to the state laws that define one's rights?

But positivism comes with a serious conceptual challenge. If the state defines property rights, how can the state ever violate the Takings Clause or otherwise interfere with property rights? That is, if property is defined by state law, then state law cannot take property. A zoning ordinance or environmental regulation, for example, cannot take property because they are simply defining the contours of property rights. This has been dubbed the "positivist trap" for property rights.<sup>340</sup>

The alternative natural rights theory (or theories) fares no better, however. A response to the positivist trap is to identify some inherent content to property rights, independent of the positive content of state law. But what is that inherent content, and where does it come from? Here, natural law theorists struggle to find a widely accepted answer, though many have tried. John Locke's pre-political focus on labor is perhaps the most well known.<sup>341</sup> He argued that property arises when people intermingle their labor with resources in the world. The state's role is then to protect those rights. Modern proponents like Eric Claeys continue to champion Locke's core insights about the sources of property rights outside the state.<sup>342</sup> Others like Thomas Merrill and Henry Smith have sought to identify some pre-political core of property, in their case: the right to exclude others.<sup>343</sup>

The fact that so much work continues to be done on these topics reveals just how disputed they remain. And this is a challenge to natural rights theories that counterbalance the positivist trap. Yes, natural rights could provide a principled basis for defining the rights that state law is not allowed to invade, but only if there is some consensus about the source and content of those rights. Without that, they provide no persuasive anchor for the content of property rights against the state.

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339. See, e.g., Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1646 (2008) ("Bentham's particular species of property positivism prefigured aspects of modern economic approaches to property and more critical Legal Realist perspectives.").

340. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 892 (2000) ("This approach to identifying property, which concentrates on the source of property and imposes little or no limit on its content, gave rise to what may be called the positivist trap."); Bloom & Serkin, *supra* note 274, at 572 (discussing positivist trap). Bradley Karkkainen argued for this reason that the Takings Clause should not apply to the states, and that the Clause is only coherent when it applies exclusively to the federal government. See Karkkainen, *supra* note 299.

341. See Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. REV. 413, 417 (2017) ("Legal historians acknowledge that it 'is difficult to overstate the impact of the Lockean concept of property' on American property law."). See generally LOCKE, *supra* note 39.

342. See Claeys *supra* note 341, at 417.

343. See, e.g., Smith, *supra* note 87; Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

The conundrum is this: If property rights arise from and are defined by the state, then a state should be able to define its way out of any constitutional protection of property. But if property rights are pre-political and arise outside of law, what precisely is their content?

Focusing on evolutionary reliance provides a different kind of answer. Property is what it has been, but subject to a process of incremental change. This is positivism in its strongest form; the content of property is defined by the state. But it does not fall into the positivist trap because property rights cannot be rewritten too radically without triggering constitutional protection. This also does not require any kind of a priori mooring of property to some inherent source or content like labor theory or the right to exclude.<sup>344</sup> Reliance on existing rules anchors the content of property, but reliance in property is dynamic, and not ossified in the way people have traditionally assumed.

Adherence to historical practice for its own sake is often a blinkered view that represents a failure of imagination.<sup>345</sup> But protecting reliance interests provides a new basis to ground the content of property in past practices and becomes a reason to resist radical change. Reliance is not simply historical anachronism but a reason to constrain the pace of change over time.

## CONCLUSION

Property is a messy and complex body of law. But it has its own internal logic based on protecting people's reliance on resources in the world. Most people today think of property rights arising through private transactions, and they defend property as an important tool for facilitating further transactions. Reliance, however, can also arise or subside through use and disuse. This evolutionary reliance means that property rights are more dynamic than people typically think, even though the dynamism is reflected across a wide swath of familiar property doctrines. Looking closely at these doctrines reveals a more nuanced conception of property. Instead of focusing myopically on rigid and enduring rights of exclusion, property is better seen as the locus of competing reliance interests. And in this vision, property law serves specifically to constrain how quickly reliance can change. This is

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344. See, e.g., Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 646 (1994) ("Rather than universal principles, Burke believed that political philosophy must begin with the reality of a particular society.").

345. See Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1047 (1990) ("Burke is the outstanding defender of . . . the ancient but now largely discredited idea that the past has an authority of its own which, however circumscribed, is inherent and direct rather than derivative."); cf. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1055 (1992) (Blackmun, J., dissenting) ("There is nothing magical in the reasoning of judges long dead.").

property's central function, and it offers a new way of understanding doctrines as diverse as the coming to the nuisance defense, the changed conditions doctrine in servitudes, and a number of core takings rules. This conception also serves to reassure people who are committed to strong property rights that the institution of property is important and enduring. But it also reassures people more mistrustful of property that rights can and do change over time. By focusing on the pace of change, property can protect reliance to an important extent, without rigidly locking in the status quo. This is an altogether less familiar understanding of the institution of property, but a more satisfying one.