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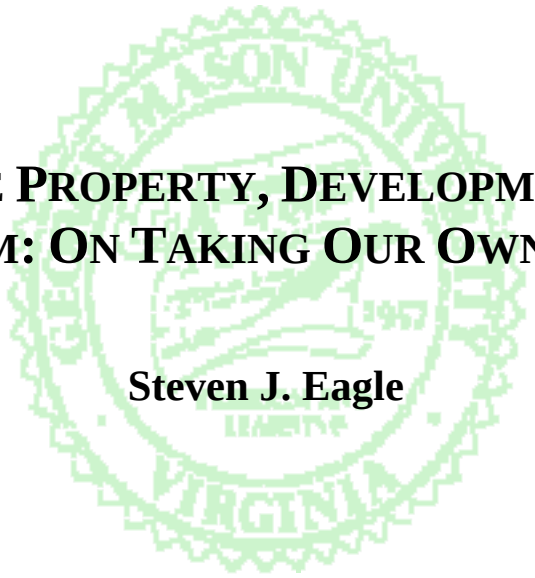

PRIVATE PROPERTY, DEVELOPMENT AND FREEDOM: ON TAKING OUR OWN ADVICE

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Private Property, Development and Freedom: On Taking Our Own Advice

By Steven J. Eagle*

Abstract

The author asserts that adherence to the rule of law, including property law, is a necessary condition to economic development and human freedom. United States governmental agencies and private institutes have attempted to convey this message to Russia, other states of the former Soviet Union, and former Soviet satellite states, with some success. Finally, and unfortunately, the United States has veered away from the very adherence to the rule of law respecting property which it espouses abroad.

During the past 15 years, the United States government and private American foundations have given considerable advice to the governments of Russia, other republics comprising the former Soviet Union, and Eastern European nations emerging from behind the former Iron Curtain. A good deal of this counsel reiterates the theme that a robust set of private property rights in land is indispensable to individual freedom and economic prosperity. This article explores such suggestions by American governmental and private organizations and contrasts them with contrary governmental practices here in the United States.

As economic and foreign policy makers have discovered, meaningful legal protection for private property cannot be imposed by sovereign fiat, or imparted whole through the generosity of eleemosynary foundations. Instead, secure property rights arise as citizens come to enjoy the benefits of private ownership and develop trust that their governments see such rights as legitimate and inviolate. This, in turn, requires supportive legal and social institutions.

In nations gaining a measure of political freedom, the immediate need is for nurturing an institutional structure upon which property rights are based. In the United States, on the other hand, the need is to build upon a long tradition of private property and freedom, and to resist the temptation to achieve short-run governmental objectives at the cost of weakening individual rights.

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I. THE RULE OF LAW, PRIVATE PROPERTY AND ECONOMIC DEVELOPMENT

In developing and developed nations alike, the predicates for individual liberty and national wealth are the rule of law and private property rights. The rule of law, in itself, is a necessary but insufficient condition for either liberty or prosperity.

A. The Rule of Law as a Framework for Rights

The most essential aspect of the rule of law is that government is bound in all its actions by rules determined and articulated in advance.[1] It thus is distinguished from regimes in which the leader's whim must be obeyed. While this type of rule sometimes is characterized as "charismatic," history teaches that the better characterization is "despotic."[2]

Among the more specific attributes generally associated with the rule of law are: (1) capacity (rules must be able to guide people in their affairs); (2) efficacy (rules actually do serve to guide people); (3) stability (the rule must be reasonably stable so that people can plan and coordinate their actions over time); (4) supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens); and (5) impartiality (courts should enforce the law and use fair procedures).[3]

While the rule of law thus provides for procedural fairness and, at least to some extent, shields individuals from abrupt changes in existing rules, it does not necessarily establish norms for the substantive rules themselves. Indeed, there is a long history of debate about whether "law" must be grounded in substantive norms at all. Those adhering to the positivist school of

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[1] *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72-73 (1944).

[2] The "leader principle," in German, *Führerprinzip*, was at the heart of Nazi rule. "Nazi legal theory officially was that the *Volk* [people] defined the *Führer* [leader], but the practical power hierarchies fully contemplated by legal theorists writing after Hitler's stranglehold on political power meant that the *Führer* was to define the *Volk*, and not vice versa." Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, 35 CORNELL INT'L L. J. 101, 174 (2002). Recall also Lord Acton's admonition, "[p]ower tends to corrupt; absolute power corrupts absolutely." Letter from Lord Acton, to Bishop Mandell Creighton (1887).

[3] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8-9 (1997).

law maintain that the existence of "law" is not premised on moral notions,[4] and is nothing more than the authoritative proscription of the sovereign, the person habitually obeyed.[5] This perspective is open to, among other criticisms, the inference that it lends legitimacy to tyrannical regimes.[6] Partly for this reason, those adhering to the natural law school maintain that "law" must embody some minimal substantive content of fairness.[7]

B. Positive Law Approaches

The rise of positivism can be traced to Thomas Hobbes's assertion that the sole source of law is the absolute power of the sovereign.[8] As he famously put it, the life of man in a state of nature was "solitary, poor, nasty, brutish, and short."[9] Hobbes argued that men formed a social contract to establish order and safety and to escape the misery of the "war of all against all."[10] Constrained by necessity, they entrusted their safety and property to the sovereign's will.[11]

Building upon Hobbes, Jeremy Bentham fashioned the theory of legal positivism that the noted legal philosopher Ronald Dworkin has described as the "ruling theory of law" in the United States and England.[12] Bentham adopted as his conceptual or structural component that

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[4] *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 155, 185, 201 (2d ed. 1994) (asserting that legal positivism stands for "the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality").

[5] *See, e.g.*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 193-94 (1954) (1832) (noting that the maker of "law" is the person who the bulk of the population habitually obey and who habitually obeys no one else).

[6] *See, e.g.*, Hans Kelsen's observation about the forced labor, concentration camps, and murder authorized under the Nazi regime: "Such measures may morally be violently condemned; but they cannot be considered as taking place outside the legal order . . . ." HANS KELSEN, PURE THEORY OF LAW 40 (Mat Knight trans., 1967).

[7] *See, e.g.*, John Finnis, *Natural Law: the Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1 (Jules Coleman & Scott Shapiro, eds., 2002).

[8] THOMAS HOBBES, LEVIATHAN 80 (Richard Tuck ed., 1991) (1651).

[9] Id.

[10] *Id*. at 97.

[11] *See generally, id*., Parts I and II.

[12] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY vii, ix (1977).

"law" comes from the sovereign,[13] and as his substantive or normative component the utilitarian principle of obtaining the "greatest good for the greatest number."[14] In more recent times, two of the most prominent legal positivists have been Hans Kelsen, who maintained that "a rule is a legal rule because it provides for a sanction,"[15] and H.L.A. Hart, who set forth a nuanced theory of rules that govern conduct and rules that govern the creation and application of rules.[16]

C. Natural Law Approaches and Locke

Unlike legal positivism, the natural law approach to liberty and property is based on the supposition of moral reasoning. In 1980, Justice Thurgood Marshall observed:

> The constitutional terms "life, liberty, and property" do not derive their meaning solely from the provisions of positive law. They have a normative dimension as well, establishing a sphere of private autonomy which government is bound to respect. Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way. Indeed, our cases demonstrate that there are limits on governmental authority to abolish "core" common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.[17]

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[13] JEREMY BENTHAM, THE THEORY OF LEGISLATION 112 (C. K. Ogden ed. & Richard Hildreth trans., Harcourt, Brace and Co. 1931). "I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is the law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to enclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest." *Id*.

[14] JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Methuen 1982) (1789).

[15] HANS KELSEN, GENERAL THEORY OF LAW AND STATE 29 (1961).

[16] *See generally*, H.L.A. HART, THE CONCEPT OF LAW 92(Oxford: Clarendon Press, 1962) (Hart describes "law" as the union of primary rules (i.e., rules relating to conduct) and secondary rules (i.e., rules which "specify the ways in which the primary rules [of conduct] may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined.").

[17] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

Similarly, Justice Anthony Kennedy, writing for the Supreme Court, applied a natural law theory of property when he invoked "an essential principle: Individual freedom finds tangible expression in property rights."[18]

As distinguished from Hobbes' view that people had to entrust their fate to the sovereign, John Locke liberalized the notion of social contract, arguing that men had common sense and therefore could cooperate for the common good without living under the yoke of absolutism.[19] Locke, an English political philosopher, was the individual most influential in the development of the American understanding of property rights. His labor theory of value often is called the "labor-desert" theory, since he asserts that individuals deserve to own, and can appropriate, natural resources mixed with their own labor.

Locke's theory of appropriation is an element of a framework for understanding social relations in an era of poverty, as well as for action in restructuring those relationships.[20] Using traditional natural law language, Locke asserted that everyone enjoys an "equal right" or "a right in common . . . [to] provide for their subsistence."[21] Thus the law of nature "gives every man a title to so much out of another's plenty, as will keep him from extreme want, where he has not the means to subsist otherwise."[22] Based on passages of the *Two Treatises* condemning nonproductive dominion over property as waste,[23] Richard Ashcraft concluded that "[p]roductive labor, and

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[18] United States v. James Daniel Good Real Property, 510 U.S. 43, 61 (1993) (holding that absent exigent circumstances, the Due Process Clause of the Fifth Amendment requires that the Government give notice and an opportunity to be heard prior to its seizure of real property subject to civil forfeiture).

[19] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 3 (J.W. Gough ed., 2d ed. 1956).

[20] *See* Richard Ashcraft, *Lockean Ideas, Poverty, and the Development of Liberal Political Theory*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 43, 45 (John Brewer & Susan Staves eds., 1995).

[21] JOHN LOCKE, FIRST TREATISE OF GOVERNMENT, pars 86-93; *Second Treatise*, par. 25.

[22] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, pars. 7, 16, 135, 171, 183; *First Treatise*, par. 42.

[23] Locke maintained that "God commended" man to labor, "to subdue the earth, i.e., improve it for the benefit of life," and that whoever "in obedience of this command of God, subdued, tilled and sowed any part of it" could claim the land as the product of his labor. *Second Treatise*, pars. 32, 35. But if an individual fenced off land without cultivating or otherwise improving it, the land, "notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other." *Id.*, pars. 38, 184.

not simply appropriation of property, is the key concept in Locke's understanding of economic development as well as an element in his theologically structured political theory."[24]

Locke saw the inherent liberties and rights of individuals as bound up in the concept of property, which, in turn, was derived from the nature of human personality itself. For Locke, the initial postulate was self-ownership: "Though the earth, and all inferior Creatures be common to all Men, yet every Man has a Property in his own person."[25] Locke admonished that "the preservation of Property" is the "end of Government."[26]

In a recent case involving land use regulation, *Palazzolo v. Rhode Island*,[27] the United States Supreme Court rejected a particularly stark assertion of legal positivism. A combination of Rhode Island statutes and environmental regulations precluded economically viable use of most of the land subsequently purchased by the petitioner. The state asserted that the *very existence* of these rules precluded the petitioner from raising a takings claim.[28] Writing for the Court, Justice Kennedy declared that "the State may not put so potent a Hobbesian stick into the Lockean bundle."[29]

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[24] Ashcraft, *supra* note 20, at 43, 45.

[25] John Locke, *Second Treatise of Government* § 27, *in* TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed., 1988) (3d ed. 1698) (emphasis in original).

[26] JOHN LOCKE, TWO TREATISES OF GOVERNMENT, book II, ¶ 138 ("The Supreme Power cannot take from any Man any Part of his Property without his own consent. For the preservation of Property being the end of Government, and that for which Men enter into Society, it necessarily supposes and requires, that the People should have Property.").

[27] 533 U.S. 606 (2001).

[28] *Id*. at 626-27. For further explication, *see* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002).

[29] *Palazzolo*, 533 U.S. at 627.

D. Property Rights as a Framework for Liberty and Prosperity

The role of property rights in development efforts was noted by Federal Reserve chairman Alan Greenspan, who described "the rule of law, . . . property, . . . contract, . . . and judicial review and determination" as "the essential infrastructure of a market economy,"[30]

International officials have espoused similar sentiments. Addressing the U.S. Chamber of Commerce, United Nations Secretary General Kofi Annan declared that: "Without rules governing contracts and property rights; without confidence based on the rule of law; without trust and transparency-there could be no well-functioning markets."[31] The Managing Director of the International Monetary Fund, Michel Camdessus, similarly noted that "the rule of law and respect for property," along with "an independent judiciary and court system that can enforce property rights," are "principles that can act as lodestars for all countries. . . ."[32]

The antithesis of the society governed by the rule of law is the society where everything is up for grabs. Herman Melville eloquently described the difference in his epic novel *Moby Dick*,[33] where he generalized the distinction between "fast fish," specifically whales that had been harpooned so as to belong to a particular ship, even if subsequently adrift, and "loose fish," whales which were in their natural state or harpooned in a manner not perfecting a claim. The latter were available to be hunted by all. Melville analogized mortgaged land and serfs to "fast fish," and the rights of man and the America before the arrival of Columbus to "loose fish."[34] As has become only too clear from the Supreme Court's recent decision in *Kelo v. City of New Lon-*

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[30] Text of Greenspan Speech to Woodrow Wilson Center Award Dinner, Bloomberg News, June 6, 1997, LEXIS, Nexis Library, News File Group (as quoted in O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 Vand. J. Transnat'l. 673, 713 (March 2003)).

[31] Kofi Annan, Address Before the United States Chamber of Commerce (June 10, 1999), in M2 Presswire, June 10, 1999, at 1, available in LEXIS, News Group File. (as quoted in, O. Lee Reed, *Law, the Rule of Law, and Property: A Foundation for the Private Market and Business Study*, 38 Am. Bus. L.J. 441, 442 (2001).)

[32] Michel Camdessus, Remarks Before the Warsaw School of Economics (Dec. 13, 1999) in M2 Presswire, Dec. 14, 1999, at 4, *available in* LEXIS, News Group File. ((as quoted in *Id*. at 441-442)).

[33] HERMAN MELVILLE, MOBY DICK (1st ed. London 1851).

[34] *Id* at ch. 89 ("Fast-Fish and Loose-Fish").

don,[35] even in a society founded on the rule of law, judicial interpretations can put private property up for grabs.[36]

E. Private Property, Liberty and Wealth Creation

Douglass North defines social institutions as "the rules of the game in a society or, more formally, . . . the humanly devised constraints that shape human interaction.[37] The institution of private property is essential to individual liberty, the strengthening of civic institutions, and wealth formation both in developed and in developing nations.

The benefit to society inuring from widespread ownership of property has been asserted by such disparate groups as the Southern Agrarian movement in the United States[38] and modern experimental economists for a reconstituted civil society in Iraq.[39] For some, the primary benefit of both property[40] and contract[41] is not maximization of wealth, but the furtherance of liberty. F. A. Hayek has stated:

> What our generation has forgotten is that the system of private property is the most important guaranty of freedom, not only for those who own property, but scarcely less for

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[35] 125 S.Ct. 2655 (2005).

[36] *See infra* text accompanying notes 214-226.

[37] DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3 (1990).

[38] *See, e.g.*, M. E. BRADFORD, REMEMBERING WHO WE ARE: OBSERVATIONS OF A SOUTHERN CONSERVATIVE 86 (1985) (asserting that individual property ownership is vital to a culture of family self-reliance and liberty and that, for that reason, government should help individuals acquire property if necessary.

[39] Vernon L. Smith, *The Iraqi People's Fund*, WALL ST. J. (Dec. 22, 2004).

[40] *See, e.g.,* WALTER LIPPMANN, THE METHOD OF FREEDOM 100-102 (1934) "the only dependable foundation of personal liberty is the personal economic security of private property. . . . There is no surer way to give men the courage to be free than to insure them a competence upon which they can rely. Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it . . . [is] the very essence of the free man's way of life.) (quoted in Loveladies Harbor v. United States, 28 F.3d 1171, 1175 n. 8 (Fed. Cir. 1994)).

[41] *See* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Scholarship*, 82 CORNELL L. REV. 856, (1997). Bainbridge notes that, for mainstream contractarians, private ordering is presumptively legitimate because it is efficient. "For conservative contractarians, this is precisely backwards: we regard efficiency as a presumptively legitimate norm precisely because it best serves our preference for private ordering through contract." *Id*. at 859 n.199.

> those who do not. It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves.[42]

A strong property rights regime is an essential element for strong economic growth and wealth creation. Property rights help nurture in individual citizens a sense of personal responsibility, since the costs for failing to act as good stewards does not fall upon society as a whole, but rather redounds to the detriment of the individual owner.[43]

Beyond benefits to the individual, a strong property rights regime can even create incentives for individuals to create institutions of social protection.[44] Homeowners, for instance, have an enduring financial bond to their communities that tenants do not. They therefore tend to support local amenities that add to resale value, such as good schools, even when they make no personal use of them.[45] Likewise, the prevention of theft is of interest to all property owners. Therefore, not only do property owners take steps to protect their property, but they also assist in law enforcement since it is in their interest to do so. The rule of law as a whole is strengthened by this private interest.[46] Paradoxically, collectivism strips the individual of responsibility for adverse events and thus any reason to work for the collective benefit.[47]

To help create these incentives to work for individual gain and the collective good, governments must enforce a system of property rights that (1) are perceived to be permanent, (2) include the exclusive right of individuals to use their resources as they see fit, and (3) the exclusive

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[42] F.A. HAYEK, THE ROAD TO SERFDOM 103-104 (1944, 1956 ed.).

[43] See, e.g., Alan Rufus Waters, Economic Growth and the Property Rights Regime, 7 CATO J. 99, 104-105 (Spring/Summer 1987). See, also, Robert D. Cooter, *Organization as Property: Economic Analysis of Property Law Applied to Privatization*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE, (Christopher Clague & Gordon C. Rausser, eds., 1992) 77, 82.

[44] *See*, Waters, *supra* note 43, at 108-109. *See also*, MANCUR OLSON, POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS 103-104 (2000).

[45] *See generally*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES (2001).

[46] *See*, OLSON, *supra* note 44, at 103-104.

[47] Waters, *supra* note 43, at 108-109.

right to voluntarily transfer or partition their rights.[48] Permanency of the property rights gives individuals the confidence and security to use the land because the have assurance that they will reap the benefits of their labor. A government's effective recognition of property rights is essential for allowing individuals to rely on those rights.[49]

Beneficial property rights regimes begin with a strong and clear land code. The land code should encompass three fundamental objectives: (1) achieving land tenure security for private landholders; (2) developing a market in land rights; and (c) defining and protecting remaining legitimate public interests. Land tenure security, the primary goal of any land code, exists when an individual perceives that he or she has the right to a piece of land on a continuous basis, free from imposition or interference from outside sources, as well as the ability to reap the benefits of labor and capital invested in the land, whether in use or upon transfer to another holder.[50]

The establishment of a regime of land and other property rights is rarely performed on a clean slate. The existing set of property rights vested in private individuals and firms and communal and state organizations must be accounted for as part of any effort to build a strong economy based on private property. The heart of the reform must therefore be in the legal system. Individuals working to grow their assets must be supported by clear laws defining their property rights. These laws, in turn, must be enforced by a judiciary that is resolves disputes swiftly and fairly. Processes for establishing and recording property rights must be well thought out and streamlined so that the rights are established as quickly and as at the lowest cost possible.[51]

II. ADVISING EASTERN EUROPEAN NATIONS

A. General Advice from American Institutions and Agencies

The collapse of Soviet influence over Eastern Europe during the late 1980s and early 1990s provided a unique opportunity for privatization advocates to test their theories of eco-

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[48] *Id*. at 104-105; Gerald P. O'Driscoll, Jr. and Lee Hoskins, *Property Rights: The Key to Economic Development*, POL'Y ANALYSIS, No. 482, 8-9 (Aug. 7, 2003).

[49] Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737, 1741-1742 (June 2002).

[50] Dana Tumenova, *Evolution of Land Reform in Russia: The 2001 Land Code and its Impact on the Commercial Real Estate Market and Direct Foreign Investment*, 11 PAC. RIM L. & POL'Y J. 769, 789-790 (June 2002).

[51] Waters, *supra* note 43, at 112-113. Cross, *supra* note 49, at 1742.

nomic growth. Eager to facilitate market economies and democracy, private American organizations and the United States government offered advice and support to these countries. The goal was to build market-based, democratic societies grounded in the rule of law and private property.

1. Advice from Private American Institutions

There has been widespread agreement among economists and other scholars on the fundamental tasks necessary for a successful transition from a socialist to a free market economy. However, there has not been a similar consensus on the manner and timing in which some of these steps are to be implemented.

The agreed upon tasks can be grouped into four broad categories: (1) Institutional Reform; (2) Enterprise Reform and Structuring; (3) Price and Market Reform; and (4) Macroeconomic Stabilization.[52] Western governments can best assist in this process through financial and technical assistance and by providing access to their markets. This article discusses the first two tasks.[53]

Institutional reform can be understood as the redefinition of the role of the state from controlling the economy to a government of institutions that facilitate a strong free market economy. Necessary elements include legal and regulatory reform, the development of a basic social safety net, and the reform of government institutions involved in activities such as tax administration and monetary control. Institutions include a diverse collection of socially developed constraints, such as regulatory bodies or sets of rules within such organization, on individual action.[54] Such institutions, generally, should function in support of the market as opposed to controlling it. A society with well functioning supporting institutions allows individuals to enter into a multitude of complex agreements. Conversely, in a country without supporting institutions, in-

[52] Lawrence Summers, *The Next Decade in Central and Eastern Europe*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE *supra* note 5, at 23, 32.

[53] The third task, price and market reform, includes removing price controls, liberalizing trade, and creating competitive factor markets. The final task, macroeconomic stabilization, focuses on tightening fiscal and credit policies and addressing internal and external imbalances. *Id*. at 32.

[54] William E. Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 CHI.-KENT L. REV. 265, 271 (2001).

dividuals struggle to enforce their rights and shy away for interacting with other entities in mutually beneficial ways.[55]

Among the most important reforms of government institutions is the establishment of an independent and well-functioning judiciary to resolve property disputes and enforce property rights.[56] This most likely will result in decisions that promote economic efficiency and therefore lead to wealth enhancement,[57] as in the common law tradition.[58] Although private parties can rely on market enforcement mechanisms and other non-judicial dispute resolution methods to some extent, in the long run weak courts seriously will restrict growth.[59]

In addition to a strong judiciary, scholars largely agreed upon the necessity of regulatory bodies that interpret and administer the law, and possess appropriate market oversight responsibilities. For instance, an antitrust agency would help prevent collusion, predatory pricing, and other abusive practices. Antitrust regulation is particularly important to development of a strong competitive market in Eastern Europe, since prior regimes stressed centrally planned economies and regarded competition as wasteful.[60] Trade policy, securities, banking regulation, tax policy, and a social safety net should be administered through the government in a way that supports and is beneficial to the market.[61] Organized and run properly, these bodies will help develop a strong and secure market. However, such agencies should be fully aware of the possibility of and be

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[55] Christopher Clague, Philip Keefer, *et al*., *Institutions and Economic Performance: Property Rights and Contract Enforcement*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS-DEVELOPED AND POST-SOCIALIST COUNTRIES 67, 68-69 (Christopher Clague, ed. 1997).

[56] *Kovacic*, *supra* note 54, at 271.

[57] Cooter, *supra* note 43, at 77, 97.

[58] *See, e.g.*, Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980).

[59] *Kovacic*, *supra* note 54, at 271.

[60] Robert D. Willig, *Anti-Monopoly Policies and Institutions*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE, *supra* note 43, at 187, 188-189.

[61] Christopher Clague, *The Journey to a Market Economy*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE, *supra* note 43, at 1, 16-17.

careful to avoid overextending their regulatory reach and consequently retarding market growth.[62]

Rounding out a market-supportive infrastructure, such entities as universities and professional schools and organizations would assist in developing the expertise necessary for intelligent and uniform application of the law. In particular, judges need to be able to understand the complex deals that an open market produces and the consequences of their decisions in order to administer the law efficiently.[63] Similarly, regulators need to be able to understand the markets they are regulating in order to facilitate strong growth while avoid overregulation.[64]

A general land use framework, with administration delegated to local government, could support economic growth when tailored to local traditions and, in general, offers wide discretion to market forces while allowing for a system of dispute resolution.[65] The key, however, is clearly defined procedures for obtaining necessary permits and enforcing rights. Without clear procedural guide lines, the process will be extremely inefficient.[66] Conversely, clear procedural guidelines and limited involvement will allow the market to grow and allocate land resources efficiently.

Legislative action and administrative interpretation must support private property rights and market activities. Economists have suggested narrow, general and easily implemented legislation, permitting room for legal interpretations that will mould the law to efficiently work with the market.[67] However, the reason for this also lies in the nature of the political process. Legislative reform requires the support of the population which may be too fickle to support reforms over a long period of time. Scholars agree that the absolutely necessary legislation should be

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[62] Willig, *supra* note 60, at 195.

[63] Kovacic, *supra* note 54, at 272-273.

[64] *See*, *generally*, Clague, *supra* note 61, at 17.

[65] Cheryl W. Gray, Rebecca J. Hanson and Michael Heller, *Hungarian Legal Reform for the Private Sector*, 26 GEO. WASH. J. INT'L L. & ECON. 293, 315. (1992).

[66] *Id*.

[67] Cooter, *supra* note 43, at 96.

passed while the population is still energized by the prospect of market reforms.[68] This political consideration played a big role in the division among scholars over the timing of privatization.[69]

a. Enterprise Reform

"Enterprise reform" may be defined as the development of a private sector through the establishment of well defined property rights, the restructuring of enterprises and the facilitation of the entry and exit of firms. The timing of privatization efforts in a developing economy remains an issue:

> In retrospect, there is widespread agreement on the importance of institutional reform to successful transition. In an ideal world, there reforms should precede or at least accompany enterprise privatization. But in a less than ideal world, there is no consensus on how much institutional reform was feasible in Russia during the 1990s, nor on whether rapid enterprise privatization, despite weak institutions, was better than available alternatives. Gradualist authors, who include both economists and political scientists, believe that the Russian government could have done significantly better at institutional reform, if President Yeltsin had made this reform a political priority.[70]

There is general agreement that the process of reforming property rights should take into account each nation's traditions and the nature of its current law. The property rights regimes in Eastern Europe are not being established in a vacuum. For example, in Russia, property rights are being layered on top of Soviet collectivism and pre-Soviet civil law.[71] The Czech Republic has a history where land ownership was recognized, but was rendered largely meaningless because the state retained the right to use the land.[72] The right to own land was not a foreign concept and was accomplished without must difficulty, but rights of exclusion and use needed to be

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[68] *Id*. at 96. *See*, Clague, *supra* note 61, at 21.

[69] *See supra* text accompanying notes 70-74.

[70] Bernard S. Black & Anna S. Tarassova, *Institutional Reform in Transition: A Case Study of Russia*, 10 SUP. CT. ECON. REV. 211, 220 (2003).

[71] Gianmaria Ajani and Ugo Mattei, *Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics*, 19 HASTINGS INT'L & COMP. L. REV. 117, 118 (Fall 1995).

[72] Donovan W. Burke, *Argument for the Allocation of Resources to the Development of a Well-Defined System of Real Property Law in the Czech Republic*, 29 VAND. J. TRANSNAT'L L. 661, 682 (May, 1996).

developed largely from scratch.[73] A property rights system also must account for the agrarian, industrial, or mixed nature of the country as the system is introduced.[74]

A property rights system must also be able to facilitate change in land usage and industrial structure. Entry and exit of firms and individuals creates efficient land use and corporate structure. Property rights regimes that prescribed certain land uses and corporate forms should be discouraged. Instead, a private property rights regime is beneficial if it provided a frame work for competition among alternative uses.[75] The key is transferability. Property rights must easily be exchangeable to allow property to migrate to its most efficient use. Otherwise, property use will remain inefficient and the market will not be allowed to grow.[76]

Of course, antecedent to efficient transfer between private individuals, land, other natural resources, and enterprises must be transferred from the state to private ownership. Auctions and "spontaneous privatizations" appear to be the preferred methods for such transfers because both seem to be the most efficient option in most situations. "Spontaneous privatization" involves a "sweetheart" sale of an enterprise to the existing management.[77] This process, although not the most equitable, places the enterprise in the hands of managers who will either be able to adapt it for efficient use or realize its sale value. Also, it would tend to keep the vast majority of a country's enterprises out of the hands of cash rich foreigners, at least temporarily.[78]

A flexible system that facilitates the mobility of private industry must have a functioning private housing ownership and rental market. Industry cannot prosper with an immobile labor force resulting from insufficient housing.[79] However, privatizing housing is one of the more dif-

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[73] *Id*. at 683.

[74] *Id*. Ajani et al., *supra* note 71, at 126-127.

[75] Cooter, *supra* note 43, at 97.

[76] See, generally, Id.

[77] *See*, Stanley Fischer, *Privatization in East European Transformation*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE, *supra* note 43, at 227, 231-233.

[78] Cooter, *supra* note 43, at 93.

[79] Thomas Gale Moore, *Privatization in the Former Soviet Empire*, in ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA: REALITIES OF REFORM, (Edward P. Lazear, ed.) 180.

ficult aspects of an overall privatization program.[80] The sale of housing to non-residents would create conflict with the current residents. Furthermore, even if preferred access to housing is given to local residents, housing prices will probably rise.[81]

Hungary's solution to this problem was nationalizing the property and compensating to former owners in the form of lump sum coupons reflecting the value of the property.[82] These coupons could then be used as full or partial payment for property undergoing privatization.[83] The main success of this program was the avoidance of clouded titles.[84] Clear title was seen a main goal in the privatization of housing along with the facilitation of sales and construction.[85] Advice, therefore, focused the assessing the viability of and the providing of technical advice for the development of certain vital pieces of a housing market, such as a construction sector and mortgage lending facilities.[86] By establishing new housing, driven by demand and supported by appropriate government institutions, the housing market should gradually become privatized.[87]

Privatization is unquestionably the linchpin of reform recommendations for Eastern Europe. Private ownership of land and enterprises will give individuals incentives to use the land for its most efficient purpose or sell to someone who will do so. Either way, the property will gravitate towards its most efficient use in the society. The viability of the privatization process and whether it produces long term economic growth, however, appears to depend largely on the timing of the privatization.

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[80] *Id*. *See also*, Fischer, *supra* note 77, at 242.

[81] *Id*.

[82] Gray et al., *supra* note 65, at 309.

[83] *Id*.

[84] *Id*. at 310.

[85] Id. at 312-313. *See also*, Ted K. Smith, *The Foreign Investment Regime of the Russian Federation: Progress Toward a System of Free Entry*, 11 UCLA PAC. BASIN L.J. 310, 323-25 (1993).

[86] *Id*.

[87] *See*, Smith, *supra* note 85, at 323-25.

b. Reform Timing

The early dispute among scholars focused on the timing on the implementation of the reform steps. Initially, much of the private university and think tank advice focused on state organized mass privatization.[88] The so called "Big Bang" or "Shock Therapy" method, whereby privatization is carried out at once and on a mass scale under the direction of the national government. In other words, enterprise reform was to come first and fast.[89] Conversely, voluntary or "ad hoc" privatization carried out one enterprise at a time over a long period of time was advocated by other scholars who believed that institutional reform had to be in place before a predominantly private economy could thrive.[90]

Advocates of shock therapy supported it because the believed that privatization had to be carried out while the population still supported it. Slow privatization during a period of institution reform, conversely, was thought to allow managers to strip company assets and workers and managers to collude to raise wages. Such activity, it was feared, would give the public the impression that privatization does not work.[91] Rapid massive reforms would create property owners and demonstrate the benefits of privatization before any opponents could act to derail the reforms.

For example, Harvard University's Jeffery D. Sachs urged Russia to rapidly adopt reforms that comprehensively address and install a private ownership system. Sachs believed that Russian privatization would work best if the national Russian government enacted reforms that privatized thousands of the larger industrial enterprises simultaneously, transferring them into joint stock companies with share distribution reflecting the current balance of interest in the en-

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[88] *See* Jeffrey D. Sachs, *Privatization in Russia: Some Lessons from Eastern Europe*, 82 AM. ECON. REV. 43, 43-44 (May 1992). *See also* Armeane M. Choksi et al., *The Design of Successful Trade Liberalization Policies*, in FOREIGN ECONOMIC LIBERALIZATION 37 (Andres Koves & Paul Marer eds., 1991); Edward P. Lazear, *Economic Reform: Appropriate Steps and Actual Policies*, in ECONOMIC TRANSITION IN EASTERN EUROPE AND RUSSIA: REALITIES OF REFORM, *supra* note 79, at 15-16; ANDERS ASLUND, BUILDING CAPITALISM, 76 (2002).

[89] *Id*.

[90] *See*, Paul H. Brietzke, *Designing the Legal Frameworks for Markets in Eastern Europe*, 7 TRANSNAT'L LAW. 35, 42. *See also*, Charles Cadwell, *Legal Reform in Transition Economies*, in INSTITUTIONS AND ECONOMIC DEVELOPMENT, *supra* note 43, 251, 266-267; Aslund, *supra* note 88, at 100.

[91] Sachs, *supra* note 88, at 43-44.

terprises.[92] The federal Russian government would maintain ownership of a minority of shares and then distribute them over the course of several years. For medium and small sized shops, Sachs recommended that Russia follow Eastern Europe's example and orchestrate worker-management buyouts. Finally, he advocated auctions for ownership of retail shops.[93] A few years later, Sachs was holding up Russia as an example that mass, rapid privatization was the right course for economic growth. Failing to privatize rapidly, Sachs believed, would result in the holding up or even sabotage of political reform by former bureaucrats. The government must take the opportunity to privatize and demonstrate the benefits of a free market system while they have the chance. By creating property owners as soon as possible, rapid privatization would install a middle class with a stake in the effective maintenance of property rights and the pursuit of governmental policies that further support the private sector.[94]

Some scholars criticized the shock therapy concept at the time and it has come under even more criticism since for placing the onus on rapid enterprise reform by the state instead of allowing property rights to form and develop at the local level with government institutional support. They believed that property rights in the context of a modern society are too complex and individualized to simply be installed for the development of a market economy.[95] Although basic legal protections, such as right to a home, are simple to identify and protect, many property rights are not as easy to identify prior to development. In these situations, law must work with industry rules of practice and customs.[96]

In Eastern Europe, the industrialization from the communist era necessitated the creation of property rights beyond simple rules.[97] In this context, property rights must be allowed to develop in response to market demand as opposed to being installed as a precondition to a market

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[92] *Id*. at 46.

[93] *Id*. at 47.

[94] Jeffrey D. Sachs, *The Transition at Mid Decade*, 86 AM. ECON. REV., 128, 132-133 (May, 1996).

[95] *See, e.g*., Andrzej Rapaczynski, *The Roles of the State and the Market in Establishing Property Rights*, 10 J. ECON. PERSPECTIVES, 87, 89 (Spring, 1996); Brietzke, *supra* note 90 at 42. See, also, Aslund, supra note 88, at 100.

[96] *Id*.

[97] *Id*.

economy. State imposed property rights might impede market development instead of reinforcing and working in connection with self-enforcing market mechanisms. Laws form an important part of the establishment of a strong property rights regime, but must function with market forces to be truly effective in supporting a vibrant economy.[98]

Many commentators assert that private enterprises work well only after a society has established the institutions that interact with the market to form an efficient private sector. This is the role meant for government involvement during the early stages. A set of new rules should be established to inspire confidence in would be private investors. Of primary importance is the establishment of a legal infrastructure for the private sector, including: commercial and contract law, anti-trust and labor law, rules regarding foreign owner companies, laws relating to the transfer of property, laws affecting landlord-tenant relations and creating systems for recording and transferring such rights. In addition, all these measures are of little practical value unless the laws are supported by courts and trained professionals who can settle disputes and enforce the laws.[99] These reforms must precede major privatization efforts to avoid mass disorder and lawlessness in the process.

More recent analysis of these early attempts demonstrates that the advocates of beginning the process with the development of government supporting institutions were correct and was largely overlooked as a vital factor for successful rapid privatization by advocates of the "big-bang" theory.[100] In Russia, for instance, mass privatization was conducted in a society with little history involving such government institutions.[101] This privatization was, therefore, largely conducted in a void. Prosperity did not follow because the institutions supporting the property rights

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[98] *Id*. at 102.

[99] *See* Christopher Clague, *The Journey to a Market Economy*, in THE EMERGENCE OF MARKET ECONOMIES IN EASTERN EUROPE, *supra* note 43, at 1, 5.

[100] *See* David Lipton and Jeffery Sachs, *Privatization in Eastern Europe: The Case of Poland*, 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 293, 328 (1990) (acknowledging the role of socialist reforms of the 1980s, but disregarding their importance in the relatively successful Polish privatization program).

[101] Douglas C. North, *Why Some Countries are Rich and Some are Poor*, 77 CHI.-KENT L. REV. 319, 327-328 (2001).

were virtually non-existent. The Russian mob stepped into this void, offering property owners "protection" at a price.[102]

Conversely, in both the Czech Republic and Poland, privatization has been relatively successful. In the Czech Republic, the new government was able to reinstitute much of the pre-communist revolution law with modifications reflecting the desired changes to the law and property rights structure. The privatization was able to rest on old traditions and legal framework that once helped that country's markets grow. [103] In Poland, the background reforms that were beginning as far back as 1981 allowed for a more rapid transition to a private economy in the early 1990s.[104] The pace of privatization can be rapid if the individual country's traditions and history so allow, but such privatization should not begin until the appropriate government institutions for protecting individual property rights are in place.

As reflected in a report issued by the World Bank, private and governmental development institutions have come to recognize that "if the transition economies are to join the ranks of the advanced market economies, they will need not just good economic policies but strong and accountable institutions to support . . . them."[105] The focus has shifted to "securing the economic and social fundamentals" and "reinvigorating institutional capability."[106] In the final analysis, it may be faster to just create private property in name, but the more difficult task of creating a property legal structure to enforce these rights in practice with regard to the equal exclusionary rights of other is the essential first step to successfully creating market growth in a society.[107] Private assets tend eventually to end up in the possession of those who most value them regardless of the method of privatization used. Nevertheless, the speed with which a country can de-

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[102] *Id*. *See also*, O. Lee Reed, *Nationbuilding 101: Reductionism in Property, Liberty, and Corporate Governance*, 36 VAND. J. TRANSNAT'L. L. 673, 712-713 (March 2003) (discussing the consequences of the Russian privatization measures on Russian industrial management).

[103] North, *supra* note 101, at 328.

[104] Lipton et al., *supra* note 100, at 303.

[105] World Bank, World Development Report 1996: From Plan to Market (1996) (as quoted in David Campbell, *Breach and Penalty as Contractual Norm and Contractual Anomie*, 2001 WIS. L. REV. 681, 686 (2001).

[106] *Id*.

[107] *See* Reed, *supra* note 102, at 711.

velop the necessary supporting institutions and progress towards privatization of its society on any sort of a mass scale is dependent upon a country's traditions and the institutions already in place.[108]

2. United States Government Advice and Assistance

Since the waning of the Soviet Union's influence, many Eastern European countries have invited the U.S. Agency for International Development (USAID) to assist in their efforts in making the transition from a centrally planned to a market economy. Upon these invitations, USAID established missions dedicated to the task of assisting in the development of each country. These missions do not fund and perform self-contained activities aimed at changing a country's economic system.[109] Instead, USAID assists the country's reformers in weighing options, refining technical solutions and helping to build analytic capacity to implement and manage reforms in accordance with the mission's strategic objectives.[110] Over the course of the early 1990's many countries turned to USAID for help in creating an economy based on private ownership.[111] USAID also contracts out and awards grants to private institutions based on their assessment of a country's need. With a few exceptions, USAID will solicit bids for projects and select from among the competitors.[112]

The first task in developing a USAID mission to a country is determining a set a strategic objectives that focus the issues for which the county requested help. Generally, USAID's strategic objectives for Eastern European countries included accelerated development and growth of private enterprises. The objectives also called for more effective, responsive and accountable lo-

[108] North, *supra* note 101, at 327.

[109] *See* USAID, *USAID/Russia Strategy Amendment 1999-2005*, H-1, (February 2002), *available at* http://www.usaid.ru/en/main/activity/index.shtml?activity_id=644.

[110] *Id*.

[111] For a list of the Eastern European countries currently working with USAID missions, *see* the USAID website, *at* http://www.usaid.gov/locations/europe_eurasia/countries/.

[112] *See*, *How to Get Involved With USAID?*, *at* http://www.usaid.ru/en/procurement/how_we_operate.shtml.

cal governments.[113] USAID support, accordingly, has focused on the creation of a property rights system that is supported by strong laws and allowed to develop via the market. Therefore, much of the work has been advice and technical support for the formation of property rights legislation and recordation systems.

Although officials recognized that advice needed to be tailored to the specific country's customs and traditions, there are several common themes that can be found in the advice given and supported by the United States government. For example, United States officials focused their efforts on providing what they called "demand-driven technical assistance."[114] This means that they wanted provide advice in response to requests from organizations within the country instead of attempting to impose a preconceived program. This policy reflects the acknowledgement that reforms are most effective in situations where the market is ready for them and where the reforms account for and reflect the market realities of the specific region.

Towards this end, another focus of USAID and its contractors was to train local officials in carrying out the necessary acts for implementation and the running of the private land reform policies in their region.[115] In addition, the systems created were drawn up to be clear and concise. The idea was to facilitate the transition to a private property regime in a manner as unobtrusive as possible with the lives of the local residents.[116] The simpler and cost effective the process of privatization and the local administration of the system, the easier it is to get local people and firms participating in it and relying upon it.

To support all of this work at the local level, the efforts at the level of national government focused on legal reform and assisting in drawing up and enacting legislation. This frame-

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[113] Kenneth J. Kopstein, *The Russian Housing Sector Reform Project Phases I and II*, Prepared for the Office of Program and Policy Development USAID Mission to Russia 15 (Nov. 1999).

[114] *See, e.g.*, Kenneth J. Kopstein, USAID Assistance Program to Poland in Local Government and Housing Sector Reform: A History and Assessment from 1990-2000, Management Systems International, 42-45 (June 2000).

[115] *Id*. at 26.

[116] *See, e.g.*, David Arsenashvili, *Land Privatization in Georgia*, Country Studies: Real Estate Privatization in Selected Eastern European and Eurasian Countries, 2 (March 2001).

work supported the local programs by providing a background that ensured the property rights would be upheld in the face of local corruption and gave local authorities the backbone upon which to build reforms.

All these actions reflect a belief that land reform is most effectively enacted when reforms are allowed to form in accordance with local markets based on a national legal framework. Conversely, reforms carried out directly on a national scale can incapacitate economic progress by contradicting the realities of local markets. Land reform at the national level should leave a flexibility that allows local officials and the market itself to flourish and work in conjunction with a strong property rights regime.

B. Nation-Specific Reform Efforts

Over the past 15 years, many of these general concepts have been tested in the Eastern European countries. USAID and private American institutions have been in these countries continually offering advice and helping implement their recommendations. This section explores these efforts in several of the numerous countries trying to privatize their economies.

1. Russia

In the early 1990's the Russian Federation began the process of reversing the sate ownership of land system that had been instituted after the Soviet Revolution of 1917. As with other countries, Russian history and traditions in land tenure were an important consideration in adapting general concepts of privatization to the Russian Federation.

a. Land Ownership

The state monopoly on land ownership in the Russian Federation was first broken by the passage of the Law on Land Reform (November 23, 1990) and the Law on Property (December 24, 1990). The Law on Property provided that parcels of land can be held privately by individuals and entities as well as by the state. These principles were later affirmed in the constitution of the Russian Federation.[117]

[117] *See* Alexey Overchuk, *Development of Private Landownership in Russia*, Country Studies: Real Estate Privatization in Selected Eastern European and Eurasian Countries, *supra* note 116, at 1.

To support these principles of land ownership, the Civil Code of the Russian Federation defines private property rights. Article 209, The Content of Property Rights of the code provides that:

- The owner possesses the rights to hold, to use, and to dispose of his property.
- The owner at his own pleasure may take any actions with respect to the property in his possession as long as they do not conflict with laws and other legal acts and do not harm the rights and interests of other persons as they are protected by the law; he (the owner) may alienate his own property as property to other persons or transfer to them rights to hold and to use and to dispose of the property while remaining its owner, or to use the property as collateral or to exchange in any way or to dispose of it in any other way.
- Holding, use, and disposal of land and other natural resources is carried out freely by the owner to the extent their transfer is allowed by law (Article 129) and as long as it does not harm the environment and lawful interests of other persons.
- The owner may transfer his property into trust management to another person (trust administrator). The transfer of property into trust management does not consequently affect the transfer of ownership rights to the trust administrator who must manage the property in the interests of the owner or other persons as requested by the owner.[118]

The Code goes on to define the means of acquiring, inheriting, confiscating, transferring, and terminating ownership rights in immovable property (*i.e.*: land parcels and everything tightly attached to the land so that its movement is impossible without causing considerable damage). In general, the transfer of land is carried out on a contract basis.[119]

b. b. Housing

The Russian government also tried to privatize housing in the early days of the Russian Federation. Initially, the government tried to privatize housing by selling units at low cost. This effort met with little initial success, since only about 8.2% of Russian housing had been transferred to private ownership by the time USAID became involved in 1992.[120]

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[118] *Id*. at 2.

[119] *Id*. at 4-5.

[120] Ken Kopstein, *The Russian Housing Sector Reform Project Phases I and II*, Report prepared for the Office of Program and Policy Development, USAID Mission to Russia, 5 (Nov. 1999).

As USAID became involved, the Russian government began taking new measures to transfer housing to private ownership. USAID's involvement in the project was spearheaded by the Urban Institute and consisted of several elements. First, the project strategy called for the design and implementation of demonstration projects to prove that a particular housing reform could be developed in Russia. USAID then focused on assisting in the legal reforms necessary for the implementation of the housing reforms. USAID also promised technical assistance on the demand driven housing projects undertaken by individual Russian cities and agencies.[121]

Possibly the most critical aspect of housing reform was the development of appropriate policies and legislation that supported all the functional activities of housing reform. Over the eight years of the project, the project staff assisted in over 160 federal laws, executive orders, and regulations. The December 1992 Law of Fundamentals of Federal Housing Policy allowed the implementation of the housing reform activities advocated by USAID. Laws were later passed on such key aspects as Mortgages and the Recording of Real Estate Rights. These legal reforms have brought Russia along way towards the establishment of a fee market system of housing.[122]

The major legal reforms on housing during the 1992 to 1995 included the elaboration and adoption of the laws "On Fundamentals of Federal Housing Policy," "On Privatization of the Housing Stock in the Russian Federation," and the first part of the Civil Code of the Russian Federation. These acts provided the legal basis for the establishment of privately owned housing. This legislative foundation was then supplemented by numerous later acts, including acts that established a real estate rights registration system and establishing legal relations for mortgage lending.[123]

c. c. Results and Recent Measures

The success for these early efforts was limited at best. The initial focus on agrarian land and the later efforts on urban areas resulted in only about 7.6% of the land in the country being

[121] *Id*. at 12.

[122] *Id*. at 18-19.

[123] *See* Raymond J. Struyk, *Housing Sector Reform Project II: Final Report*, The Urban Institute, 24 (September, 1998).

owned by legal entities and private citizens by the year 2000.[124] Due to the vast open spaces of the Russian Federation, this figure is deceptively small, but is also hardly and indicator of an unqualified success. Much of the land is simply undesirable to potential investors.

One of the main problems, however, was that much of the land was unavailable for sale do to conflicting legislative constraints. For example, more that two-thirds of agricultural land is either protected by law or are unattractive to potential investors.[125] As significant piece of these lands cannot be transferred to the private sector because it used for transportation, broadcasting, defense, security, the space program, or protected wildlife areas. The situation for housing urban land is similarly constrained by these factors. [126]

The Land Code passed in 2001 provide important steps towards a framework for land ownership, but the limited reach of these laws also reflects a continued political opposition to strong property rights. The Land Code represents in part a response to the need for clearly defined and enforceable property rights in Russia. Up to this point commercial real estate development had been hampered by a process by which land regulation had been left up to presidential decree or regional governors. The 2001 Code recognizes that strong predictable land rights spur investment (both foreign and domestic) and consequently progress by providing investors with a dependable assurance of their rights.[127] For example, prior Russian laws providing for only incomplete ownership of land by foreign companies limited foreign investment.[128] Until Russia establishes dependable property rights, foreign investment might be minimal.[129]

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[124] Overchuk, *supra* note 13, at 12.

[125] *Id*. at 14.

[126] *Id*. at 15.

[127] Tumenova, *supra* note 5 at 792-793.

[128] Smith, *supra* note 87, at 323-25.

[129] *See*, *e.g*., C. J. Chivers, *What About Democracy? Leaders Mute Differences, Latching On to the Affirmative*, N.Y. TIMES, Feb. 25, 2005 at A1 (noting American disquiet at President Vladimir Putin's apparent retreat from democracy and concerns about property rights in light of the Yukos take over).

2. Poland

The principal goal of the USAID housing strategy for Poland was "the emergence of a competitive, modern, market-based housing finance and production system." Early efforts focused on assessing the viability and providing technical advice for the development of certain vital pieces of a housing market, such as a construction sector and mortgage lending facilities.[130] Assistance in building and mortgage lending were accompanied by policy assistance. Among other legislative assistance, USAID had major input in the 1997 Mortgage Banking Law, the Condominium Law and Mortgage Bank and contract savings legislation. USAID also assisted in the initiation of an effective bank regulatory and supervisory system.[131]

USAID also focused its early efforts on assisting new, inexperienced, local political leadership with the transition to transparent and accountable governance through the strengthening of fiscal and managerial capabilities of local governments and local non-government institutions.[132]

3. Georgia

The USAID strategic plan for Georgia for 1996-2000 mentioned land reform as a high priority for the Georgian government. In the introduction USAID states that "here is a unique opportunity to build a market-based and democratic society grounded in the rule of law and private property if Georgia decentralizes economic and political power and privatizes its agricultural resources, industrial capacity, and infrastructure."[133]

For Georgia to move towards a market-based society, many steps needed to be taken in regard to private property rights. The Government needed to work to create an integrated economic, legal and regulatory framework to stimulate private sector investment and growth, comprehensive private financial markets, and establish private land, both agricultural and urban, that could be freely bought and sold.[134]

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[130] Kopstein, *supra* note 39, at 23-24.

[131] *Id*. at 33.

[132] *Id*. at 26

[133] United States Development Strategic Plan For Georgia, USAID, 11 (April, 1996).

[134] *Id*.

a. Land Ownership

One of USAID's primary activities in Georgia during this period focused on the rapid creation of a land market. USAID advocated and assisted Georgian officials in working to implement a clear, simple and legally sound land registration system as a way of creating this market. This system developed around two main categories of land: Agricultural Land and Non-Agricultural (Urban and Industrial) Land.

Agricultural land privatization began in Georgia almost immediately after it gained independence in 1992. As of 2000, approximately 1 million Georgians had privatized 3 million agricultural parcels. Despite a successful privatization plan, there was no movement on land registration rights and the old system did not meet the requirements of the new privatization laws. After analysis, the government initiated a USAID supported agricultural land registration program in 1999 by presidential order. Some key points included:

- An initial land registration that is free of charge for farmers, increasing interest in registering rights to land;
- Local private companies and private entities conducted initial registration, simplifying the registration process;
- An initial registration process that is comprehensible for farmers and free of useless bureaucratic steps;
- An initial registration of land parcels permitting the recording of land transactions subsequent to privatization at the time of registration;
- An initial registration process that is transparent and all interested persons have access to the information they seek.

The initial registration system was inexpensive and effective. Since 1999, almost one million parcels of agricultural land have been registered and subsequent transactions have been held on tens of thousands of these parcels. [135] Thus, one of the problems in the privatization process in Georgia was solved at minimal cost by creating a simple process enacted in large part by local authorities as opposed to setting up a large central bureaucracy.

In the Georgian civil code, non-agricultural land includes urban and industrial land. Although land reform started with agricultural land, the privatization of urban and industrial land began in 1997 and has been largely successful. The success in part had been attributed to the fact

[135] Arsenashvili, *supra* note 116, at 2.

that, like the agricultural land registration process, the privatization of non-agricultural land was designed to be as simple and cost effective as possible. First, the privatization process effectively utilized existing documentation and was molded into the existing government structure in order to avoid creating useless bureaucratic steps. The process established with these concerns in mind was transparent, accurate in the recording of rights, affordable and responsive to the market as opposed to the being limited to the land boundaries and usage that was established under the communist state.[136]

4. Kosovo

Unlike the many of the other countries that arose out of the fall of the Soviet Union's influence in Eastern Europe, Kosovo experienced several years of civil war and ethnic discrimination following the end to socialist rule in Yugoslavia. Land reform, therefore, did not begin until after the 1999 conflict. At that point, the land ownership and registration system was in a state of confusion due to the rapidly changing political system. In the preceding years, the legal framework concerning property rights questioned, canceled and revised several times. In addition, the conflicts have damaged much of the land records and the property itself. USAID has proposed way in which it can provide assistance to correct the lack of clear and recorded property rights that has been limiting economic development.[137]

a. Legal Framework

USAID's recommendations revolve around improving the legal framework supporting property rights. The current legal framework is rife with gaps and uncertainty. The government needs to fill these gaps and bolster the current laws supporting private ownership and the land market. New legislation should amend current laws and establish new regulations that allow the land market to develop and work efficiently. For example, a current provision gives municipali-

[136] *Id*. at 3.

[137] David Stanfield, et al., *An Assessment of Property Rights in Kosovo: Final Report*, USAID Contract No. LAG-00-98-00031-00, Task Order No. 4, 4 (2004).

ties and agricultural socially owned enterprises the "right of first refusal" that requires their approval for the sale of land.[138]

To implement and uphold these laws, USAID looking to develop guidance for legal professionals, judges and institutions involved in upholding property rights. Such support will help to ensure even, consistent, and fair application of the property rights. This will help restore the public's knowledge and confidence that their rights will be protected and they can, therefore, rely on them in their actions.[139]

b. Land Administration

USAID is also working to support municipalities' administration of land and harmonize this with land administration programs of other countries in the region. This will allow local municipalities to inventory property ownership and provide a basis for the assignment of socially owned property. Staff must also be established and trained in the operation of a new immovable property rights registration system.[140]

III. THE WEAKENING STRANDS OF PROPERTY RIGHTS IN THE UNITED STATES

A. *American Rights, Property and Lockean Values*

In the United States, the generation of the Framers did not have to create a theory of property rights anew, but were able to draw upon a great source of intellectual and political capital. They regarded liberty and property as part and parcel of the historic "rights of Englishmen."[141]

The Glorious Revolution of 1688 had affirmed that even the king was subject to the rule of law. The writers of the English and Scottish Enlightenment realized that government was a compact among individuals for the preservation of their liberties—an idea important to the success of the Glorious Revolution. John Locke was the best known of these authors to eighteenth

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[138] *Id*. at 113.

[139] *Id*.

[140] *Id*. at 117.

[141] FORREST MCDONALD, *NOVUS ORDO SECLORUM*: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985).

century Americans. It was Locke's *Second Treatise of Government* that declared: "Lives, Liberties, and Estates, which I call by the general Name, *Property*."[142] James Madison rephrased this as: "As a man is said to have a right to his property, he may be equally said to have a property in his rights."[143] According to a leading historian of the Revolutionary period, "By the late eighteenth century, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."[144] As John Adams, who as president had appointed Chief Justice Marshall, declared, "Property must be secured or liberty cannot exist."[145]

During recent years, the U.S. Supreme Court has, from time to time, recognized the centrality of property rights to individual liberty. In *Dolan v. City of Tigard*,[146] the Court declared that "[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."[147] In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[148] the Court referred for first time to the "*Armstrong* principle" of fairness.[149] In *Armstrong v. United States*, it noted that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[150]

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[142] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690).

[143] James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 27, 1792, at 174, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 478 (1867).

[144] Pauline Maier, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE, 87 (1997).

[145] 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed. 1850).

[146] 512 U.S. 374 (1994).

[147] *Id*. at 392.

[148] 535 U.S. 302 (2002).

[149] *Id*. at 321.

[150] 364 U.S. 40, 49 (1960).

Nevertheless, the tenuous status private property rights in the United States contrasts sharply with the clear articulation of the importance of such rights so cogently articulated to Eastern Europe nations.[151]

B. The Temptation to Subsume Property in Regulation

1. The Growth of the Regulatory State

In the broadest sense, the weakening of the fabric of American property rights is concomitant with the rise of the regulatory state. During the early decades of the twentieth century, the Progressive movement developed the theme that the application of expertise to human affairs could alleviate all manner of economic and social ills. Progressivism, as manifested in the New Deal, spawned massive administrative bureaucracies and numerous regulations in fields such as commerce, housing, labor, and permissible land uses.[152] This new regulatory landscape profoundly changed many aspects of the legal system. Particularly affected were the great branches of the common law, which provided a framework for private ordering. Tort law, previously emphasizing the rectification of wrong done against one person by another, became infused with notions of strict liability regardless of fault.[153] The traditional content of contract law, previously content with providing a framework for consensual dealing among individuals, became partially supplanted by such vague regulatory doctrines as unconscionability and fair dealing.[154] Property law was perhaps most vulnerable to change. Unlike contract rights, which are negotiated among

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[151] *See infra*, Part II.

[152] For expositions of the increased scope of government since the New Deal, *see, e.g.*, Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 447-48 (1987) (noting that the New Deal "altered the constitutional system in ways so fundamental as to suggest that something akin to a constitutional amendment had taken place"); 1 BRUCE ACKERMAN, WE THE PEOPLE, 44 (1991); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS, *passim* (1938).

[153] *See, e.g.*, Martin A. Kotler, *Reconceptualizing Strict Liability in Tort: An Overview*, 50 VAND. L. REV. 555, 560 (1997) ("today the adoption of an approach that imposes liability regardless of conduct normally represents an instrumentalist view of tort. Liability is imposed to further some policy unrelated to the parties' behavior. As such, strict liability may be viewed as a cost allocation system intended to achieve various goals, such as wealth redistribution, efficiency, autonomy, and so on") (footnote omitted).

[154] *See*, e.g., Hilder v. St. Peter, 478 A.2d 202 (Vt. 1984) (articulating the "implied warranty of habitability," a requirement for landlords to keep premises habitable, in fact based on the police power but elaborately based on ostensible (but nonwaivable) implications of contract).

individuals and generally binding upon only them and those with whom they are in privity, property rights are applicable against the world. In order to be apparent to strangers, property rights must possess clear-cut definitions and bright-line boundaries.[155]

2. Attenuation of Property Rights in Land Use

Perhaps nowhere has property rights in the United States been so eroded as in the area of land use. The basis rights of landowners—to use, to exclude others, and to convey their rights to others—all have been under assault.[156] In many respects, American real property has become governed by a land use regime that, as in contemporary England, recognizes ownership rights only in uses to which land is currently put and vests all other development rights in the State.[157]

The right of alienation was directly attacked by the federal government in such cases as *Hodel v. Irving*[158] and *Babbitt v. Youpee*,[159] in which the Supreme Court struck down repeated prohibitions on the transfer at death of fractional interests in land. In a more subtle way, concepts such as "reasonable investment backed expectations"[160] may diminish the transfer of property rights to successors.[161] Misplaced equitable doctrines, such as the rule in place in some states disqualifying the purchaser of land from seeking a variance on the grounds of "self-imposed

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[155] *See* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001) (elaborating the nature and consequences of contract rights being in personam in nature and property rights being in rem).

[156] A general example is the revolution in landlord-tenant law, in which the lease, at common law primarily to convey an estate in land, has become regarded as a heavily-regulated contract. *See generally*, Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 516 (1984).

[157] *See infra* notes 241, 242, and associated text.

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

[159] 519 U.S. 234 (1997).

[160] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)

[161] In Palazzolo v. Rhode Island, 533 U.S. 606 (2001), the Court held that the promulgation of a regulation prior to acquisition did not deprive the purchaser of the right to raise a takings claim. *Id*. at 626-630. However, Justice O'Connor, who supplied the fifth vote, added that the Court's holding "does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial." *Id*. at 633 (O'Connor, J., concurring).

hardship" even though the seller would have qualified,[162] thus departing from the traditional rule that a buyer acquires all of the rights that the seller possessed.[163]

The right to exclude others, although described by the Supreme Court as "so universally held to be a fundamental element of the property right,"[164] nevertheless has been abrogated in many regulatory contexts, such as prohibitions on discrimination,[165] solicitude for low-income workers,[166] and "expressive" rights for those wanting to mount their soapboxes in private shopping centers.[167] These, and similar ways in which the right to exclude others, the classic manifestation[168] of the "negative liberty" to be left undisturbed, has been breached to enhance the "positive liberty" actualizing the goals of some at the expense of others.[169]

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[162] *See, e.g.*, Clark v. Board of Zoning Appeals, 92 N.E.2d 903, 903 (N.Y. 1950) (declaring "one who thus knowingly acquires land for a prohibited use, cannot thereafter have a variance on the ground of 'special hardship.").The facts were otherwise egregious, and the court did not explain why plaintiff's status as a purchaser was germane. For elaboration, *see* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 363 (1998).

[163] *See, e.g.*, Blackman v. Striker, 37 N.E. 484, 485 (N.Y. 1894) ("The deed must be held to convey all the interest in the lands which the grantor had, unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant.").

[164] Kaiser Aetna. v. United States, 444 U.S. 164, 179-180 (1979) ("we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation").

[165] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (prohibiting racial discrimination in public accommodations).

[166] *See, e.g.*, State v. Shack, 277 A.2d 369 (N.J. 1971) (holding farmer's trespass claims subordinate to right of legal services attorneys to make unsolicited visits to farm laborers).

[167] The Supreme Court has held that there is no First Amendment right to expressive activity in private shopping centers. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972). However, it subsequently ruled that states may impose private expressive conduct on shopping center owners without violating the owners' property rights under the Fifth and Fourteenth Amendments or free speech rights under the First Amendment. PruneYard Shopping Center v. Robbins, 447 U.S. 74 (1980).

[168] One famous definition reads: "That is property to which the following label can be attached. To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state." Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

[169] *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118 (1969) (discussing positive and negative liberty).

Of all types of regulation of property in land, probably the most damaging to the rule of law has been the rise of comprehensive regulation of land use. The earliest comprehensive zoning regulation, in New York City in 1916, was instituted at the behest of Fifth Avenue merchants desirous of protecting their carriage trade clientele from contact with teeming southern and eastern European immigrants working in new high-rise loft factories.[170] The articulation of the need for zoning, however, was framed in terms of Progressive era expertise.

> The early enthusiasts for zoning . . . were fighting a holy war against the libertarian sins of nineteenth-century development . . . . Control over land use would be removed from the amoral hand of the market and entrusted to expert elites removed from politics and business . . . .
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> In part, advocates have sought to downplay the social and political significance of planning by arguing that planning controls land and other natural resources, not people. But the value of resources lies in their social utility, so man and land cannot be so neatly separated.[171]

In 1926, comprehensive zoning received the Supreme Court's imprimatur in *Village of Euclid v. Ambler Realty Company*.[172] Justice George Sutherland, writing for the Court, framed the issue as the validity of zoning restrictions "excluding from residential districts apartment houses, business houses, retail stores and shops, and other like establishments."[173] Any nonresidential uses in residential areas, including apartment houses, might result in fire, contagion, or disorder.[174] Sutherland's particular *bête noire* was apartment houses, which he pronounced to "come very near to being nuisances."[175] Their presence in single-family house neighborhoods, he added, "has sometimes resulted in destroying the entire section for private house purposes

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[170] *See generally*, SEYMOUR I. TOLL, ZONED AMERICA (1969).

[171] DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION 21 (1993).

[172] 272 U.S. 365, 379-84 (1926).

[173] *Id*. at 390.

[174] *Id*. at 392.

[175] *Id*. at 394-95. This was dicta on a grand scale. Ambler Realty Co. wanted to use its land for heavy industry, and its facial attack on zoning in no way implicated single family homes or apartment buildings.

[and] very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district."[176]

While some recent decisions decry "exclusionary zoning,"[177] American land use regulation was at the outset a "less than holy alliance between zoning . . . and anti-immigration sentiment."[178] It always has had a substantial class-based component. Indeed, as the trial court's opinion in *Euclid* declared, the ultimate purpose of zoning was "to classify the population and segregate them according to their income or situation in life."[179]

3. Expansion of the Power of Eminent Domain

Government entities increasingly have used condemnation for purposes far removed from alleviation of blight or the more traditional construction of government buildings and facilities used by the public. Eminent domain "has become a marketing tool for governments seeking to lure bigger business."[180]

In its two seminal cases on what constituted "public use" under the Takings Clause of the Fifth Amendment,[181] the Supreme Court accorded great latitude to localities seeking to condemn land for retransfer to private owners. In *Berman v. Parker*,[182] the Court adjudicated the condemnation of a sound parcel located within a blighted neighborhood that was undergoing comprehensive redevelopment. The Court held that the redevelopment of slums was within the "broad

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[176] *Id*. at 394.

[177] *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) (imposing obligation to provide fair-share of regional low- and moderate-income housing needs on developing municipalities).

[178] Michael Allan Wolf, *The Prescience and Centrality of* Euclid v. Ambler, *in* ZONING AND THE AMERICAN DREAM 252, 257 (Charles M. Harr & Jerold S. Kayden eds., 1989).

[179] Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 272 U.S. 365 (1926).

[180] Dean Starkman, *Condemnation Is Used to Hand One Business Property of Another*, WALL ST. J., Dec. 2, 1998, at A1.

[181] U.S. CONST. amend. V. ("nor shall private property be taken for public use, without just compensation").

[182] 348 U.S. 26 (1954).

and inclusive" concept of public welfare.[183] "Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."[184] Furthermore, "community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis—lot by lot, building by building."[185] In *Hawaii Housing Authority v. Midkiff*,[186] the Court similarly upheld the condemnation of freehold interests for transfer to the respective ground lessees for the purpose of "reduc[ing] the perceived social and economic evils of a land oligopoly traceable to their monarchs."[187]

Both cases effusively deferred to legislative determinations. *Berman* declared that "[s]ubject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."[188] *Midkiff* added, rather confusingly, that the Public Use Clause is "coterminous" with the police power.[189] More generally, the Court, in both cases, distinguished the incidental private gain that would result from condemnation and

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[183] *Id*. at 33.

[184] *Id*. at 34.

[185] *Id*. at 35. "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets, and shopping centers. In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented." *Id*. at 34-35.

[186] 467 U.S. 229, 240 (1984).

[187] *Id*. at 241-42. The Court noted findings that the State and Federal Governments owned almost 49% of the State's land and that another 47% was in the hands of only 72 private landowners. *Id*. at 232.

[188] *Berman*, 348 U.S. at 32.

[189] *Midkiff*, 467 U.S. at 240. "This pronouncement has dismayed commentators because the outer limit of the police power has traditionally marked the line between noncompensable regulation and compensable takings of property, not the line between compensable takings and the area where the constitution bars government from engaging in any sort of exchange whatever. Legitimately exercised, the police power requires no compensation. Thus, if public use is truly coterminous with the police power, a state could freely choose between compensation and noncompensation any time its actions served a 'public use.' This approach would seemingly overrule the entire takings doctrine in a single stroke." Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61 (1986)

retransfer to achieve a valid public purpose from the "purely private taking [that] would serve no legitimate purpose of government and would thus be void.[190]

Even in areas where the permissibility of condemnation for retransfer clearly is established, the inherent vagueness of definitions gives rise to the possibility of abuse. In *Concerned Citizens of Princeton, Inc. v. Mayor and Council of Borough of Princeton,*[191] for instance, a New Jersey appellate court recently determined that the designation of an "area in need of redevelopment" (i.e., a blighted area) could be premised on functional obsolescence. The "faulty design" in question was that of a municipal parking lot in an affluent community that was condemned by the borough in which it was located. The borough sought to ease parking problems in downtown Princeton and deemed the lot ill-configured. Likewise, in *City of Norwood v. Horney,*[192] a municipality had designated a formerly all-residential neighborhood that more recently had some commercial development as "deteriorating," so that homes could be condemnation for an additional commercial project.[193] The city code defined a "deteriorating" area as

> An area, whether predominantly built up or open, which is not a slum, blighted or deteriorated area, but which because of incompatible land uses, nonconforming uses, lack of adequate facilities, faulty street arrangement, obsolete platting, inadequate community and public utilities, diversity of ownership, tax delinquency, increased density of population without commensurate increases in new residential buildings and community facilities, high turnover in residential or commercial occupancy, lack of maintenance and repair of buildings, or any combination thereof, is detrimental to the public health, safety, morals and general welfare, and which will deteriorate or is in danger of deteriorating, into a blighted area.[194]

Under this definition, a slippery slope is created by which neighborhoods deemed ripe for conversion by developers are determined to be less-than-ideal by local officials, hence in danger of becoming blighted, and thus treated as if they were blighted. Under these elastic standards, the

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[190] *Midkiff*, 467 U.S. at 245. *See also*, *Berman*, 348 U.S. at 33-34 ("[t]he public end may be as well or better served through an agency of private enterprise than through a department of government").

[191] 851 A.2d 685 (N.J. Super. Ct. App. Div. 2004).

[192] 830 N.E.2d 381. (Ohio. App. 2005).

[193] *Id*. at 384-85.

[194] *Id*. at 388.

appellate court in *Horney* found that the city had not abused its discretion.[195] The Supreme Court of Ohio recently granted review.[196]

A glaring example of the pretextual invocation of "blight" was *99 Cents Only Stores v. Lancaster Redevelopment Agency*,[197] where a "big-box" retailer important to local redevelopment efforts leaned on the city to condemn a competitor's store for retransfer to it. Also, in *Aaron v. Target Corp*.,[198] in which a large retailer, desirous of expanding a successful store, circumvented negotiating with its landlord by paying for a blight study that found minor problems which, in fact, were the retailer's responsibility under the lease. Furthermore, the retailer had process served upon itself as agent for the landlord, which learned of the condemnation too late.[199] The U.S. district court declared *Aaron* to be "one of the rare cases in which possible 'bad faith, harassment, or some extraordinary circumstance' makes abstention inappropriate."[200] On this point it was reversed, with the U.S. Court of Appeals for the Eighth Circuit holding that the trial court should have exercised *Younger* abstention.[201]

In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*,[202] the Supreme Court of Illinois found that the redeveloping agency condemning the landowner's parcel did not undertake an independent study or formulate a comprehensive plan, but instead "advertised that, for a fee, it would condemn land at the request of 'private develop-

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[195] *Id*. at 387.

[196] 828 N.E.2d 115 (May 25, 2005) (table).

[197] 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *dismissed*, 60 Fed. Appx. 123, 2003 WL 932421 (9th Cir. 2003).

[198] 269 F. Supp. 2d 1162 (E.D. Mo. 2003).

[199] *Id*.

[200] *Id*. at 1172 (quoting Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 437 (1982)).

[201] Aaron v. Target Corp., 357 F.3d 768 (8th Cir. 2004) (noting that, although condemnation proceedings were not commenced in state court until almost two weeks after federal injunctive relief was sought, steps proceeding formal condemnation had been well underway.) *See* Younger v. Harris, 401 U.S. 37 (1971) (holding that federal courts should abstain from exercising jurisdiction in cases where equitable relief would interfere with pending state proceedings in a way that offends principles of comity and federalism).

[202] 768 N.E.2d 1 (Ill. 2002).

ers' for the 'private use' of developers."[203] The court concluded that the agency's "true intentions were to act as a default broker of land."[204]

A case raising the generic economic condemnation issue perhaps most starkly is *Cottonwood Christian Center v. Cypress Redevelopment Agency*.[205] There, the locality desired to obtain sales tax revenues that would flow from a "big-box" store to be located on the church's large, commercially-zoned lot fronting a main road, instead of the large auditorium and ministry buildings that the plaintiff had planned for. The city denied the church's development application and its redevelopment agency instituted condemnation proceedings on the grounds of ostensibly blight. Given the nature of the landowner's intended use, the court applied heightened scrutiny to the denial under the Religious Land Use and Institutionalized Persons Act of 2000,[206] as opposed to rational basis review. The court quoted *99 Cents Only Stores*' observation that the "condemnation efforts rest on nothing more than the desire to achieve the naked transfer of property from one private party to another," and added "[t]hat appears to be the case here."[207] "The court's skepticism of the city's explanations provides support that courts are becoming increasingly critical of public use justifications."[208]

A very significant response to condemnation abuse was the Michigan Supreme Court's 2004 decision in *County of Wayne v. Hathcock*.[209] The court abrogated its seminal, well known, and very deferential *Poletown* doctrine,[210] under which an entire ethnic neighborhood had been leveled for construction of a new General Motors assembly plant. *Hathcock* reviewed the history of the term "public use" under the Michigan constitutions, and concluded that "the transfer of

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[203] *Id*. at 10.

[204] *Id*. at 10.

[205] 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

[206] 42 U.S.C. § 2000cc-2.

[207] 218 F. Supp. 2d at 1229 (quoting *99 Cents*, 237 F. Supp. 2d at 1129).

[208] Jennifer J. Kruckeberg, Note, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use' Requirement*," 87 MINN. L. REV. 543, 554 (2002).

[209] 684 N.W.2d 765 (Mich. 2004).

[210] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

condemned property is a 'pubic use' when it possesses one of the three characteristics in our pre-1963 case law identified by Justice Ryan" in his *Poletown* dissent:

> First, condemnations in which private land was constitutionally transferred by the condemning authority to a private entity involved "public necessity of the extreme sort otherwise impracticable."[211]
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> * * *
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> Second, this Court has found that the transfer of condemned property to a private entity is consistent with the constitution's "public use" requirement when the private entity remains accountable to the public in its use of that property.[212]
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> Finally, condemned land may be transferred to a private entity when the selection of the land to be condemned is itself based on public concern. In Justice Ryan's words, the property must be selected on the basis of "facts of independent public significance," meaning that the underlying purposes for resorting to condemnation, rather than the subsequent use of condemned land, must satisfy the Constitution's public use requirement.[213]

The first of these tests would seem to cover railways, pipelines, and other uses where holdouts could stymie acquisition of an unbroken right of way. The third test would cover elimination of blight, which would occur prior to the land's redevelopment. The troublesome aspect of the second test, remaining accountability, is that it will have a tendency to involve the State more closely with private enterprise. While real covenants designating broadly appropriate uses of land would prevent some abuse, the need of ongoing business for flexibility in their operations would make public bodies more their business partners than their regulators.

4. The Supreme Court Endorses Condemnation for Private Redevelopment in *Kelo*.

In *Kelo v. City of New London*,[214] the Supreme Court recently explicated the Fifth Amendment's Public Use Clause.[215] In a 5-4 decision, it upheld the condemnation of private homes in a non-blighted neighborhood for the purpose of private economic redevelopment of a distressed community. Justice John Paul Stevens, writing for the Court, asserted that "public pur-

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[211] *Id*. at 781 (quoting *Poletown*, 304 N.W.2d at 478 (Ryan, J. dissenting)).

[212] *Id*. at 782 (quoting *Poletown*, 304 N.W.2d at 479 (Ryan, J. dissenting)).

[213] *Id*. at 782-783 (quoting *Poletown*, 304 N.W.2d at 480 (Ryan, J. dissenting)).

[214] 125 S.Ct. 2655 (2005).

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

pose" has morphed to subsume "public use,"[216] and that the revitalization project, which would create offices, shops, and high-end housing adjacent to the Pfizer Corporation's new world research center, served a public purpose.[217] Justice O'Connor's principal dissent complained that, in both *Berman* and *Midkiff*, "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society."[218] In contrast, *Kelo* "holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even aesthetic pleasure."[219] Furthermore, "[t]he specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[220]

A concurring opinion by Justice Kennedy, whose vote was necessary to Justice Stevens' majority, stressed that heightened scrutiny would be required in judging condemnations for retransfer to other private parties under some unspecified circumstances.[221] In any event, however, the presence or absence of a comprehensive redevelopment plan or explicit quid pro quo involving the redeveloper is essentially irrelevant. The success of attempts to lure desirable new commercial activity to a city largely is a function of its reputation in pleasing firms that previously relocated there.[222] As Justice O'Connor noted, in economic development takings, "private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case,

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[216] *Id*. at 2662 (asserting that "while many state courts in the mid-19th century endorsed 'use by the public' as the proper definition of public use, that narrow view steadily eroded over time.").

[217] *Id*. at 2665.

[218] *Id*. at 2662 (O'Connor, J., dissenting) (noting that *Berman* involved urban blight and *Midkiff* oligopoly).

[219] *Id*. at 2675 (O'Connor, J., dissenting).

[220] *Id*. at 2676 (O'Connor, J., dissenting).

[221] *Id*. at 2669 (Kennedy, J., concurring) (citing, inter alia, *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447, 450 (1985)).

[222] *See* Steven J. Eagle, "Kelo v. City of New London*: A Tale of Pragmatism Betrayed*," in EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT (Dwight Merriam & Mary Massaron Ross, eds. forthcoming, 2005).

for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs."[223]

While Justice Stevens acknowledged such "aberrations" as *99 Cents Only Stores*, it was in the context of noting that the Court would confront potential abuses "if and when they arise."[224] Given that the Supreme Court did not hear a public use case during the 20 years preceding *Kelo*, and that it might hear perhaps one takings case per year of any type, it is unlikely that the Court will exercise direct supervision. Furthermore, its holdings make review of state or local regulatory takings cases by lower federal courts most improbable, as well.[225]

Even if a private enterprise is designated as the recipient of a post-condemnation retransfer, it has no assurance of retaining its new estate. In what might seem to the original landowner an act of poetic justice, the locality might condemn the interest a second time and transfer it to a different private developer. In that case, the cry of the first developer that its interest is inviolate because the transfer to it had been determined to be in the public interest is of no avail.[226] The upshot is that private redevelopers, as much as cities, must engage in eternal market-based courtship of those with the power to affect their destinies.

5. Smart Growth

Although many urbanites find it *de rigueur* to condemn suburban living and "sprawl," "Americans have a strong preference for detached single-family homes on relatively large lots, whether a log cabin in the woods, a garden cottage in the suburbs, or a four thousand square foot

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[223] 125 S.Ct. at 2675-76.

[224] 2667 & n.17.

[225] *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (positing need for property owner to litigate for compensation through state courts before claim "ripe" for federal judicial review); San Remo Hotel, L.P. v. City and Cty. of San Francisco, 125 S.Ct. 2491 (2005) (holding that full faith and credit act precludes federal court review of issues determined in state ripening litigation). In *San Remo*, four justices noted that the *Williamson County* "state litigation" requirement should be reconsidered. 125 S.Ct. at 2508 (Rehnquist, C.J., concurring in judgment).

[226] *See* Kaufmann's Carousel, Inc. v. City of Syracuse, 750 N.Y.S.2d 212, 221 (App. Div. 2002) (finding "no merit" to the contention that "the power to condemn does not extend to property that is already devoted to a public purpose").

"McMansion' on an acre of land . . . ."[227] Furthermore, given the cost of land and building materials, "[f]ar more Americans than Europeans can afford this form of low-density housing."[228]

> "Sprawl" is the ogre of land use and urban policy at the turn of the new century. While fostering suburbia was once a guiding principle, suburban "sprawl" is now blamed for a spectrum of harms, from environmental disasters such as the depletion of wilderness and the pollution of water, to urban maladies such as the creation of the ethnic underclass and the prostration of city governments. Without too much exaggeration, there would seem to be no greater issue of social policy . . . .[229]

As a "solution" to the sprawl problem, experts have proposed "smart growth," the tools of which include "use restrictions, environmental requirements, economic incentives, conditional demands, and regulatory mechanisms to secure participation by landowners and developers in combating urban sprawl."[230] The American Planning Association's "Policy Guide on Smart Growth" recently stated as a "core principle" that "[e]very level of government - federal, state, regional, county, and local – should identify policies and practices that are inconsistent with Smart Growth and develop new policies and practices that support Smart Growth. [231] The APA also calls for statewide planning,[232] and the number of "smart growth" statutes in place has increased dramatically. Hawaii, Vermont, Florida, and Oregon were the first states to implement

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[227] Edward H. Ziegler, *Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape,* 11 VA. J. SOC. POL'Y & L. 26, 32 (2003).

[228] *Id*.

[229] Paul J. Boudreaux, *Looking the Ogre in the Eye: Ten Tough Questions for the Antisprawl Movement*, 14 TUL. ENVTL. L.J. 171 (2000).

[230] James E. Holloway & Donald C. Guy, *Smart Growth and Limits on Government Powers: Effecting Nature, Markets, and the Quality of Life Under the Takings Clause and Other Provisions*, 9 DICK. J. ENVTL. L. & POL'Y 421, 455-456 (2001).

[231] AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON SMART GROWTH 2 (April 15, 2004) (hereinafter "APA POLICY GUIDE") (last visited on March 8, 2005) <http://www.planning.org/policyguides/smartgrowth.htm>.

[232] *Id*. (Policy 5).

planning on a statewide basis during the 1960s and '70s.[233]Other states adopting statewide planning initiatives since include New Jersey, Washington, Maryland, California and Florida.[234]

It is too early to tell the ultimate impact of the "smart growth" movement. However, it is very likely that such measures as the urban growth boundary system in Portland, Oregon, do result in higher prices.[235] Voters in Oregon attempted to amend the state constitution to protect private property rights,[236] and subsequently did so by statutory initiative.[237] The State's stringent land use controls played a critical role in their actions.[238]

A recent study of the housing markets in more than 300 American cities since 1950 notes that, since 1970, the primary cause of increase in housing prices appears to be "a significant increase in the ability of local residents to block new projects and a change of cities from urban

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[233] See DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 610 (3rd ed. 1999).

[234] For brief summaries of these and other statutes, see ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 209-252 (1999).

[235] *See* William A. Fischel, *Comment on Anthony Downs's 'Have Housing Prices Risen Faster in Portland Than Elsewhere?'*, 13 HOUSING POL'Y DEBATE 43, 44 (2002), available at http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1301_fischel.pdf (last visited March 8, 2005).

[236] In November 2000, the voters of Oregon passed "Initiative Measure 7," provided that the state or a political subdivision must pay just compensation equal to the full reduction in value caused by the enforcement of a regulation that adopted after the owner has purchased the private real property in question. The Amendment was invalidated under the state's "one subject" rule. League of Oregon Cities v. State, 56 P.3d 892 (Or. 2002).

[237] *See* Oregon Secretary of State, Measure 37, *at* http://www.sos.state.or.us/elections/nov22004/guide/meas/

m37_text.html (last visited Aug. 9, 2005).

[238] *See* Sara C. Galvan, Comment, *Gone Too Far: Oregon's Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL'Y REV. 587 (2005). *Compare*, Edward J. Sullivan, Commentary, *Oregon's Measure 37: Crisis and Opportunity for Planning*, 57 PLANNING & ENVTL. L. No. 3 at 3, 3 (Mar. 2005) (attributing passage to "clever political stroke").

growth machines to homeowners' cooperatives."[239] A related study of housing prices in Manhattan also indicates that supply restrictions lead to high prices.[240]

More important, "smart growth" inevitably would pull the United States closer to the present English system, where the right to develop land was "severely impacted" by the Town and Country Planning Act of 1947.[241] The law vested all rights, other than those to which the land was currently being put, in the State. It "did not nationalise the land; what it did do was to nationalise the development value in land."[242]

C. Creative Recognition of Private Property Rights

Even where the amount of a resource available for use has to be capped, there is no reason why fractional shares could not be distributed to the affected landowners. In nations with a rough transition to the rule of law and a market economy mistrust of government might make this not work too well.[243] In the United States, such an approach was adopted by the U.S. Court of Appeals for the Ninth Circuit in *Barancik v. County of Marin*.[244] That case concerned the sparsely developed Nicasio Valley, a rugged and beautiful area in Northern California. Rather than zoning individual parcels for development at commercially infeasible levels or limiting development to landowners elsewhere who were awarded "transfer development rights" in mitigation of stringent restrictions on land use on their own parcels that might otherwise constitute tak-

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[239] Edward L. Glaeser, *et al*., *Why Have Housing Prices Gone Up?*, Harvard Institute of Economic Research Discussion Paper 2061 (2005), available at <http://post.economics.harvard.edu/hier/2005papers/2005list.html> (forthcoming in the AMER. ECON. REV.).

[240] Edward L. Glaeser, *et al*., *Why is Manhattan So Expensive? Regulation and the Rise in House Prices*, Natl. Bur. Econ. Res. Working Paper No. W10124 (2003), available at <http://ssrn.com/abstract=471474> (last visited March 8, 2005).

[241] Shelley Ross Saxer, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales, and the United States*, 32 URB. LAW. 21, 37 (2000).

[242] *Id*. at 37 n.98 (quoting SIR DESMOND HEAP, AN OUTLINE OF PLANNING LAW 14 (11th ed. 1996)).

[243] *See, e.g*., Yuliya Mitrofanskaya, *Privatization as an International Phenomenon: Kazakhstan*, 14 AM. U. INT'L L. REV. 1933, 1415 (1999) (noting that Russian citizens often sold their tradable share certificates in newly denationalized industries for a pittance, partly because of mistrust of subsequent government policies).

[244] 872 F.2d 834 (9th Cir. 1989).

ings,[245] to award individual landowners There the county provided for "Transfer of Development Rights" in the that still was sparsely developed. The plan treated what the court later termed the "homogeneous community of Nicasio Valley," as "one complete land forum, one large property to be sensitively planned." Ranchers in the valley were permitted to sell to other property owners in the valley the right to develop within the regulations of the community. A purchaser could accumulate more than one development right.[246]

One impetus for recognition of such rights in the future is the disquiet that some Supreme Court justices have expressed in *Kelo v. City of New London*[247] regarding the failure of landowners whose land has been taken for private revitalization to receive any of the great additional value that inures when small parcels are assembled into one larger parcel.[248]

IV. CONCLUSION

Both United States Government agencies and private organizations have been working to acquaint Eastern European nations with the flexibility and other advantages of private property rights, creative preservation of those rights at home in America would offer similar advantages. However, court decisions in the United States have undermined the private property rights of American citizens at home.

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[245] *See* Fred F. French Investing Co., Inc. v. City of New York, 350 N.E.2d 381, 383 (N.Y. 1976) (approving TDRs in theory, although striking down the statute at bar as requiring landowners to accept TDRs with market values too uncertain and contingent to comport with due process). *Compare*, R. S. Radford, *Takings and Transferable Development Rights in the Supreme Court: The Constitutional Status of TDRs in the Aftermath of* Suitum, 28 STETSON L. REV. 685 (1999) (expressing concern that TDRs may be used as device to circumvent liability for regulatory takings).

[246] *Id*. at 835.

[247] 125 S.Ct. 2655 (2005).

[248] *See id*. at 2668 n.21 (recognizing the issue as "important," but not raised in this litigation). *See also, Kelo*, transcript of oral argument, 2005 WL 529436 (Feb. 22, 2005). Justice Kennedy asked petitioner's counsel whether there was legal scholarship pertaining to whether the Court ought "to adjust the measure of compensation, so that the owner—the condemnee—can receive some sort of a premium for the development? . . . [M]aybe that compensation measure ought to be adjusted when *A* is losing property for the economic benefit of *B*." *Id*. at *15-16.

As Justice O'Connor ended her *Kelo* dissent: "As for the victims, the government now has license to transfer property from those with fewer resources to those with more. The Founders cannot have intended this perverse result. '[T]hat alone is a *just* government," wrote James Madison, "which *impartially* secures to every man, whatever is his *own.*"[249]

[249] Kelo v. City of New London, 125 S.Ct. 2655, 2677 (2005) (O'Connor, J., dissenting) (quoting James Madison, *Property*, NAT'L GAZETTE, (Mar. 29, 1792), *reprinted in* 14 PAPERS OF JAMES MADISON 266 (R. Rutland et al. eds.1983).